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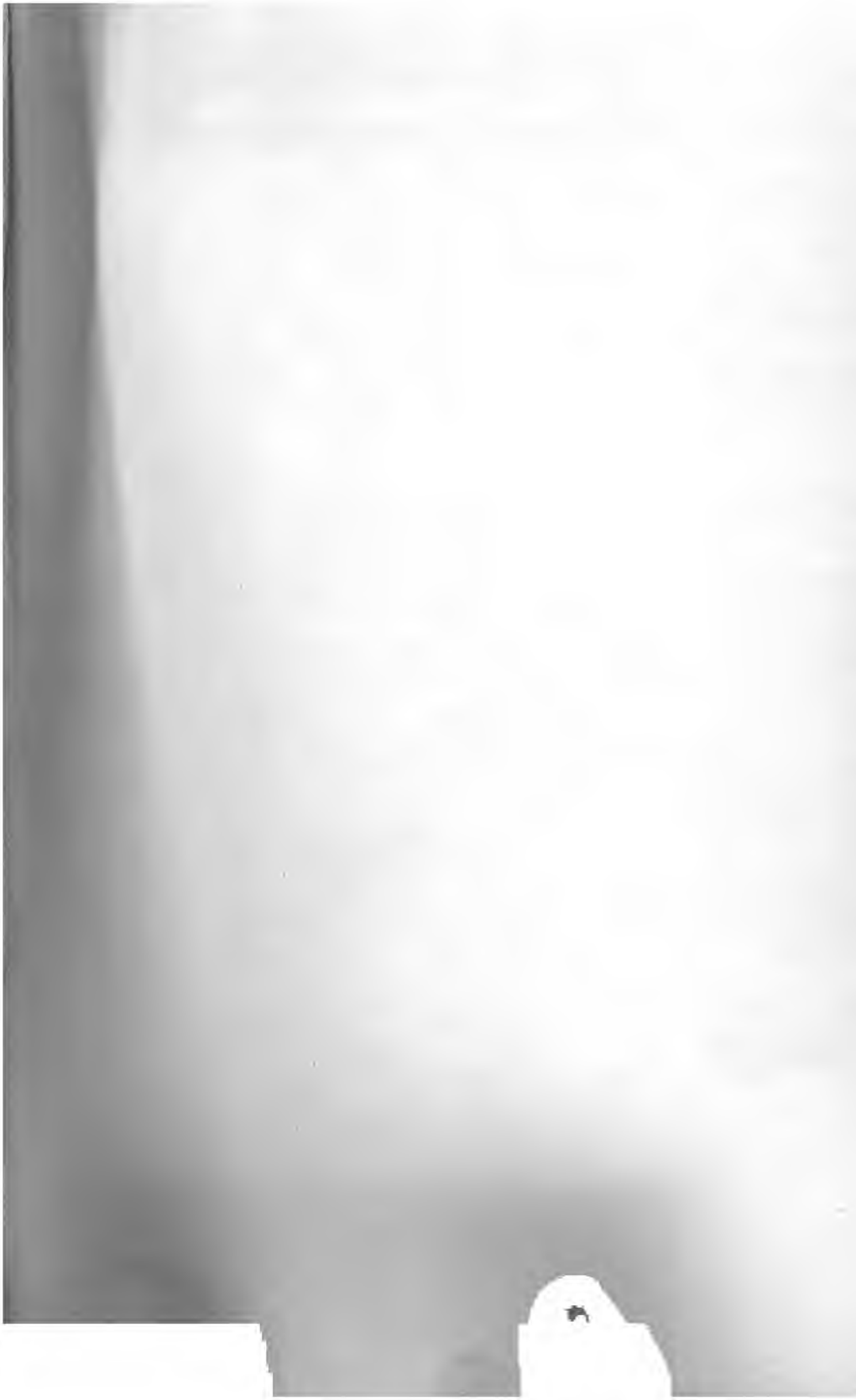

LIMITATIONS ON THE TREATY-MAKING POWER

LIMITATIONS ON THE TREATY-MAKING POWER

UNDER THE CONSTITUTION OF THE UNITED STATES

BY

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To

MY WIFE

MARTHA SHARPE TUCKER

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L. ed. = Lawyers' Edition United States Supreme Court Reports.
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LIMITATIONS ON THE TREATY-MAKING POWER

INTRODUCTION

§ 1. The object of these pages is to discuss the treaty-making power under the Constitution of the United States, and define its limitations. The broader question of the scope of treaties, their construction and binding effect, is a question of international law into which the author does not propose to intrude; this field has been so amply and ably filled that it would be useless to add to it, even did it come within the limits of a treatise of this character.

My object is to present in a simple and concrete form, in the discussion in these pages, not the general power of making treaties as applied to nations, nor what *ought to be* the full scope of such power in the United States, but what, under the Constitution of the United States, *is* the power of the United States to make and ratify binding treaties.

The past fifty years has witnessed a phenomenal growth of these United States, that is alike the surprise and wonder of the world, in material development, in the arts and sciences, in statecraft, and all sociological problems. The position of the United States to-day is second to no nation in the world. The elements of power, as seen in every field of development,

have stimulated in the minds of many the ambition of placing the United States in the primacy of the great World Powers, and of giving them a seat at the diplomatic table of the assembled nations of the world, where the game of politics is played successfully, when proper alliances are made, and where with equal disaster, the game is played if mis-alliances are formed.

The warning of George Washington to the people of these United States against "entangling alliances" with foreign nations must not be forgotten, if we would fulfil our manifest destiny. America can have no higher or more exalted mission among the nations of the world than to work out successfully and to their fullest fruition the principles of civil and religious liberty first brought by our fathers to these shores in 1607 and planted on the banks of the River James by the Colony at Jamestown. When this shall have been successfully accomplished, the armaments of America that will exert the greatest influence in the control of the world will not be the dreadnoughts of her navy, nor the artillery of her battlements, but they will consist of those sturdy moral forces abiding with the people that uphold justice, maintain the cause of Freedom, defy tyranny and tyrants, exalt the sanctity of the law, national and international, proclaim the equality of opportunity to all, and in all things hasten the advancement of Righteousness and Peace throughout the length and breadth of this "Land of the Free and Home of the Brave."

Every patriotic American rejoices in the wonderful development of his country; in the accumulation of its wealth and its proper diffusion; in the equality of right accorded every citizen of the land; in the power to defend ourselves against the aggressions of power — domestic and foreign; and in the unlimited power for good to the whole world in the development of the principles of freedom as proclaimed in the Constitution of this Federal Republic.

Whatever of good shall come to the world from the development upon this Continent of republican ideas must come with

the recognition of the fact that this Government differs from those of the old world, and that we are here charged with the duty under our system of government of developing the maximum of freedom in thought, in speech, and in action in every citizen consistent with the same right in every other American citizen under a written constitution. Nor must we be led into error by assuming that what can be done by Great Britain or Germany or any of the great powers of the world can and should be done by us. Our Government has no parallel among the nations of the world. Our constitutional form of government, dual in character, recognizing the States and the Federal government as joint instruments in the development of all governmental powers, some of which are committed to the one and some to the other, each supreme in its sphere, each powerless in that of the other, is difficult of interpretation and unique among the nations of the earth.

By a critical examination of the provisions of the Constitution of the United States; in the interpretation thereof by the early and modern statesmen of the country; in the opinions of judges, State and Federal; and in the adjudicated cases in their bearing upon this question, we shall hope to eliminate the prevalent error of the "unlimited" and boundless scope of this power and establish what are the reasonable and constitutional "limitations on the treaty-making power" under the Constitution of the United States.

CHAPTER I

Views and Opinions of Authors and Statesmen on the Treaty Power of the Constitution from our Early History to the Present Time

§ 2. As preliminary to our discussion, it will be proper and profitable to present the views of statesmen and public men on different phases of this question, as expressed by them in public speeches, on the floor of Congress, or in works devoted to the discussion of constitutional questions. The true view of any question must exist independently of the convictions of any one man or set of men, but where many, who from their public experience, ability, and study, concur in one judgment as touching a subject, it must be admitted as a strong presumption in favor of the correctness of that view. With this end in view, it is proposed to cite the opinions of statesmen from the foundation of the Government down to the present time, in order to see whether there is a common ground in their expressed views which may be accepted if not as conclusive, at least as strongly persuasive of its correctness.

§ 3. Mr. Calhoun stands *primus inter pares* among those who have been called upon to construe the Constitution of the United States. His power of analysis, his intense earnestness, and his high personal character, point to him as one of the greatest of American statesmen.

In one place he says:[1]

"Although the treaty-making power is exclusively vested and without enumeration or specification, in the Government

[1] "Discourse on the Constitution and Government of the United States," Vol. I, p. 203.

of the United States, it is, nevertheless, subject to several important limitations. It is, in the first place, strictly limited to questions *inter alios;* that is, to questions between us and foreign powers which require negotiation to adjust them. All such clearly appertain to it. But to extend it beyond these, be the pretext what it may, would be to extend it beyond the allotted sphere, and thus a palpable violation of the Constitution. It is, in the next place, limited by all the provisions of the Constitution which inhibit certain acts from being done by the Government, or any of its departments; of which description there are many. It is also limited by such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibit the contrary, of which a striking example is to be found in that which declares that 'no money shall be drawn from the Treasury but in consequence of appropriations to be made by law.' This not only imposes an important restriction on the power, but gives to Congress as the law making power, and to the House of Representatives as a portion of Congress, the right to withhold appropriations; and, thereby, an important control over the treaty-making power, whenever money is required to carry a treaty into effect; which is usually the case, especially in reference to those of much importance.

"There still remains another and more important limitation, but of a more general and indefinite character. It can enter into no stipulation calculated to change the character of the Government; or to do that which can only be done by the Constitution-making power; or which is inconsistent with the nature and structure of the Government or the objects for which it was formed. Among which, it seems to be settled that it cannot change or alter the boundary of a State or cede any portion of its territory without its consent. Within these limits all questions which may arise between us and other powers, be the subject matter what it may, fall within the limits of the treaty-making power and may be adjusted by it."

§ 4. Judge St. George Tucker presents his views of the treaty-making power as follows:[1]

"In our constitution, there is no restriction as to the subjects of treaties, unless perhaps the guarantee of a republican form of government, and of protection from invasion, contained

[1] Tucker's Blackstone, Vol. I, Appendix, 333.

in the fourth article, may be construed to impose such a restriction, in behalf of the several states, against the dismemberment of the federal republic.[1] But whether this restriction may extend to prevent the alienation by cession, of the western territory, not being a part of any state, may be somewhat more doubtful. The act of cession from Virginia militates, expressly, against such an alienation of that part of the western territory which was ceded by this state.[2] Nevertheless, it is said to have been in contemplation soon after the establishment of the federal government, to cede the right of pre-emption to the lands in that territory to the Indians, who were then supposed to be in treaty for the same with the crown of Great Britain. The president, who had not authorised any such article, and who is said to have disapproved of it, in submitting the treaty to the consideration of the senate, called their attention particularly to that part of it; in consequence of which it was rejected, though warmly supported in the senate, as has been said. If the power of making such a dismemberment be questionable at any rate, it is much more so, when it is recollected, that the constitution seems to have vested congress collectively, and not any one or two branches of it only, with the power to dispose of that territory.[3] The effect of this extraordinary treaty, if it had been ratified by the senate and the president, may easily be conceived. Great Britain, at that time not a little disposed to enmity towards the United States, would no doubt have insisted upon such an acquisition of territory, made under the faith of a treaty between the United States and the Indians; and thus the United States might either have been deprived of their territory by an unconstitutional treaty, or involved in a war for its preservation, by the proceedings of a body, whose authority does not extend to a final decision upon a question, whether war be necessary and expedient. This shews the collision which may possibly arise between the several branches of the congress, in consequence of this modification of the treaty-making power. For, being entrusted to a branch of the congress only, without the possibility of control or check by the other branch, so far as respects the conclusion and ratification of any treaty whatsoever, it may well happen, at some time or other, that the president and senate may overstep the limits of their just authority,

[1] C. U. S. Art. 4, § 4. [2] L. V. Edi. 1794. C. 40.
[3] C. U. S. Art. 4, § 3.

and the house of representatives be so tenacious of their own constitutional rights, as not to yield to the obligations imposed upon them by a treaty, the terms of which they do not approve."

He further says:[1]

"But, to return to the treaty-making-power; it appears to be somewhat extraordinary, that that branch of the federal government, who are by the constitution required to concur, in a declaration of war, before any such declaration can be made, should be wholly precluded from voting at all, upon a question of peace. . . . They are judges of the causes of war; of the existence of those causes; of the resources, and ability of the states to prosecute and support a war; of the expediency of applying those resources to the obtaining redress, or satisfaction for the injury received; in short, of every possible circumstance that can induce the nation to incur the hazard, or expence of a war: and yet, if through timidity, venality, or corruption, the president, and two thirds of a majority of the senate can be prevailed upon to relinquish the prosecution of the war, and conclude a treaty, the house of representatives have not power to prevent, or retard the measure; although it should appear to them, that the object for which the war hath been undertaken, hath not been attained, and that it was neither relinquished from necessity, or inability to prosecute it, with effect.

"These objections are not intended to extend to the agency which the president and senate may have in the formation of a treaty; nor to the principle that treaties with foreign nations should be regarded as a part of the supreme law of the land. . . . The honour and peace of the nation certainly require that its compacts should be duly observed, and carried into effect with perfect good faith. And though it may be the result of sound discretion to confide the formation of a treaty, in the first instance, to the president and senate, only; yet the safety of the nation seems to require that the final ratification of any compact, which is to form a part of the supreme law of the land, should, as well as other laws of the federal government, depend upon the concurrent approbation of every branch of the congress, before they acquire such a sanction as to become irrevocable, without the consent of a foreign nation; or without hazarding an imputation against the honour and faith of the nation, in the performance of its contracts.

[1] Tucker's Blackstone, Vol. I, Appendix, 338.

"It may not be improper here to add something on the subject of that part of the constitution, which declares that treaties made by the president and senate shall be a part of the supreme law of the land: acts of congress made pursuant to the powers delegated by the constitution are to be regarded in the same light. What then is the effect of a treaty made by the president and senate, some of the articles of which may contain stipulations on legislative objects, or such as are expressly vested in congress by the constitution, until congress shall make a law carrying them into effect? Is congress bound to carry such stipulations into effect, whether they approve or disapprove of them? Have they no negative, no discretion upon the subject? The answer seems to be, that it is in some respects, an inchoate act. It is the law of the land, and binding upon the nation in all its parts, except so far as relates to those stipulations. Its final fate, in case of refusal on the part of congress, to carry those stipulations into effect, would depend on the will of the other nation. If they were satisfied that the treaty should subsist, although some of the original conditions should not be fulfilled on our part, the whole, except those stipulations embracing legislative objects, might remain a treaty. But if the other nation chose not to be bound, they would be at liberty to say so, and the treaty would be defeated.[1] And this construction seems to be consonant with that resolution, of the house of representatives,[2] wherein they declare, 'That when a treaty stipulates regulations on any of the subjects submitted by the constitution to the power of congress, it must depend for its execution, as to such stipulations, on a law or laws to be passed by congress; and it is the constitutional right and duty of the house of representatives, in all such cases, to deliberate on the expediency, or inexpediency, of carrying such treaty into effect, and to determine and act thereon, as in their judgment, may be most conducive to the public good.' A contrary construction would render the power of the president and senate paramount to that of the whole congress, even upon those subjects upon which every branch of congress is, by the constitution, required to deliberate.[3] Let it be sup-

[1] Debates on the treaty-making power, p. 346.

[2] Resolution of the house of representatives, April 6, 1796.

[3] Such a doctrine appears to have been strenuously advocated in congress, some years ago. See debates on the treaty-making power: March and April, 1796. Philadelphia, printed. 1796.

posed, for example, that the president and senate should stipulate by treaty with any foreign nation, that in case of war between that nation and any other, the United States should immediately declare war against that nation: Can it be supposed that such a treaty would be so far the law of the land, as to take from the house of representatives their constitutional right to deliberate on the expediency or inexpediency of such a declaration of war, and to determine and act thereon, according to their own judgment?"

§ 5. Mr. Calhoun's views as to the supremacy of treaties are expressed as follows:[1]

"Where two or more States form a common constitution and government, the authority of these, within the limits of the delegated powers, must, of necessity, be supreme, in reference to their respective separate constitutions and governments. Without this, there would be neither a common constitution and government, nor even a confederacy. The whole would be, in fact, a mere nullity. But this supremacy is not an absolute supremacy. It is limited in extent and degree. It does not extend beyond the delegated powers; — all others being reserved to the States and the people of the States. Beyond these the constitution is as destitute of authority and as powerless as a blank piece of paper; and the measures of the government mere acts of assumption. And, hence, the supremacy of laws and treaties is expressly restricted to such as are made in pursuance of the constitution, or under the authority of the United States; which can, in no case, extend beyond the delegated powers. There is, indeed, no power of the government without restriction, not even that, which is called the discretionary power of Congress. I refer to the grant which authorizes it to pass laws to carry into effect the powers expressly vested in it — or in the government of the United States, — or in any of its departments, or officers. This power, comprehensive as it is, is nevertheless, subject to two important restrictions; one, that the law must be necessary, — and the other, that it must be proper."

§ 6. Among the older commentators upon the Constitution, whose book was used as a text-book at West Point, for the in-

[1] "Works of John C. Calhoun," Edited by Richard K. Cralle (1888), Vol. I, page 252.

struction of the young men of the country, is William Rawle of Philadelphia. In his work on the Constitution, page 66, he uses the following language:

"The most general terms are used in the Constitution. The powers of Congress in respect to making laws, we shall find, are laid under several restrictions. There are none in respect to treaties. . . . To define them in the Constitution would have been impossible, and therefore a general term could alone be made use of, which is, however, to be scrupulously confined to its legitimate interpretation. Whatever is wanting in an authority expressed must be sought for in principle, and to ascertain whether the execution of the treaty-making power can be supported we must carefully apply to it the principles of the Constitution, from which alone the power proceeds. . . .

"There is a variance in the words descriptive of laws and those of treaties. In the former it is said those which shall be made in pursuance of the Constitution, but treaties are described as having been made, or which shall be made, under the authority of the United States. The explanation is that at the time of adopting the Constitution, certain treaties existed, which had been made by Congress under the Confederation, the continuing obligations of which it was proper to declare. The words 'under the authority of the United States' were considered as extending equally to those previously made and to those which should subsequently be effected. But although the former could not be considered as made pursuant to a Constitution which was not then in existence, the latter would not be 'under the authority of the United States' unless they are conformable to its Constitution."

§ 7. Judge Story in his Commentaries on the Constitution, Section 1508, uses the following language,

"The power 'to make treaties' is by the Constitution general; and of course it embraces all sorts of treaties, for peace or war; for commerce or territory; for alliances or succors; for indemnity for injuries or payment of debts; for the recognition and enforcement of principles of public law; and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other. But though the power is thus general and unrestricted, it is not to be so

construed as to destroy the fundamental laws of the state. A power given by the Constitution can not be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and can not supersede or interfere with any other of its fundamental provisions. Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other. A treaty to change the organization of the Government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers, would be void; because it would destroy, what it was designed merely to fulfil, the will of the people. Whether there are any other restrictions necessarily growing out of the structure of the Government, will remain to be considered whenever the exigency shall arise."

§ 8. Mr. Webster, on the 27th of June, 1850, in a speech in the Senate on "California Public Lands and Boundaries,"[1] says:

"The Government of the United States holds no powers which it does not hold as powers as enumerated in the Constitution or as powers necessarily implied; and the same may be said of every State in the Union. The Constitution of each State prescribes definitely the powers that shall belong to the government of the State. But if these were a true source of argument in this case, the honorable member would find that this implication arising from sovereignty would just as naturally adhere to the Government of the United States as to that of the States. Certainly, many higher branches of sovereignty are in the Government of the United States. The United States Government makes war, raises armies, maintains navies, enters into alliances, makes treaties and coins money; none of which acts of sovereignty are performed by a State Government. Nevertheless, there are sovereign powers which the States do perform. They punish crimes, impose penalties, *regulate tenure of land*[2] and exercise a municipal sovereignty over it."

§ 9. Judge William A. Duer in his work entitled "Lectures on the Constitutional Jurisprudence of the United States[3]" uses the following language:

[1] Webster's Works, Vol. V, 389. [2] Author's italics.
[3] Second Edition, p. 228.

"More general and extensive terms, also, are used in vesting the power with respect to treaties than in conferring that relative to laws; and while the latter is laid under several restrictions, there are none imposed on the exercise of the former, notwithstanding it is committed to the President and Senate, in exclusion of the House of Representatives, and is executed through the instrumentality of agents delegated for that purpose. And although the President and Senate are thus invested with this high and exclusive control over all those subjects of negotiation with foreign powers which in their consequence may affect important domestic interests, yet it would have been impossible to have defined a power of this nature, and therefore, general terms only were used. These general expressions, however, ought strictly to be confined to their legitimate signification; and in order to ascertain whether the execution of the treaty-making powers can be supported in any given case, those principles of the Constitution from which the power proceeds should carefully be applied to it. The power must, indeed, be construed in subordination to the Constitution; and, however in its operation it may qualify, it cannot supersede or interfere with any other of its fundamental provisions, nor can it ever be so interpreted as to destroy other powers granted by that instrument. A treaty to change the organization of the Government, or annihilate its sovereignty, or overturn its republican form, or to deprive it of any of its constitutional powers, would be void; because it would defeat the will of the people, which it was designed to fulfill."

§ 10. Judge Cooley in his "Principles of Constitutional Law," page 117, says,

"The Constitution imposes no restriction upon this power (treaty-making power), but it is subject to the implied restriction that nothing can be done under it which changes the Constitution of the country, or robs a department of the government or any of the States of its constitutional authority."

§ 11. Among the ablest modern commentators upon the Constitution, a devoted follower of Judge Story, an adopted American, is von Holst. In his "Constitutional Law of the United States,"[1] he uses the following language;

[1] p. 202 (Callaghan & Co.).

"As to the extent of the treaty-power the constitution says nothing, but it evidently cannot be unlimited. The power exists *only under the Constitution*,[1] and every treaty-stipulation inconsistent with a provision of the constitution is therefore inadmissible and according to *constitutional law ipso facto null and void*.[1] Simple and self-evident as this principle is in theory, yet it may be very difficult under certain circumstances to decide whether or not it has been transgressed in fact. Indeed, the chief difficulty arises from the question of the relation the treaty-power of the president with the concurrence-power of the senate bears to the legislative power of congress. This question is answered by saying that these powers must be coördinate, for treaties like laws are 'sovereign acts,' which differ from laws only in form and in the organs by which the sovereign will expresses itself. It follows from this principle that a law can be repealed by a treaty (Foster *v.* Neilson, 2 Peters, 253) as well as a treaty by a law (The Cherokee Tobacco, 11 Wallace, 616). If a treaty and a law are in opposition, their respective dates must decide whether the one or the other is to be regarded as repealed (Foster *v.* Neilson, 2 Peters, 253, 314; Doe *v.* Braden, 16 Howard, 635 . . .). Neither the principle nor the correctness of these conclusions from it can well be disputed, and they are at any rate valid constitutional law. But in spite of this it must be admitted that the doctrine has its doubtful side, both in theory and practice. It must be called at least an anomaly, that by the *ex parte* action of the president and two-thirds of the senators present (who may be only a minority of the whole senate), a law can be repealed, the passage of which required the concurrence of the house of representatives with the senate and president or a two-thirds majority of each house of congress. The repeal of a treaty by the enactment of a law may, moreoever, lead the more easily to serious consequences, because the incompatibility of the law and of the treaty may not be so clearly manifest that the foreign power concerned will immediately take notice of the law. It is in no wise inconceivable that congress itself might know nothing of what it had done, so that only after a long time would the fact be established by judicial decision, that in this indirect manner a treaty was overthrown, the repeal of which had not been contemplated by either of the two contracting parties.

[1] Author's italics.

"On still another side this question of the direct relation between the treaty-power and the legislative-power makes it difficult to fix the limits of the treaty-power. It is certain that no authority granted by the constitution to any of the factors of government can be withdrawn from it by treaty. For that would be a change of the constitution and, as such, unconstitutional. But congress may be bound by a treaty not to exercise in a certain way a power belonging to it, although it might exercise it in that way if not bound by the treaty. The freedom of action of the house of representatives can thus easily be restricted by a treaty to such a degree that the restriction must be admitted to be a violation of the constitution, even if not strictly of its letter, yet still of its spirit. Thus, for instance, the framers of the constitution certainly did not wish that duties should be fixed in a way repugnant to the views of the house of representatives, and yet this might be brought about at any moment by a commercial treaty. Of course it must not be inferred that in general there should be no commercial treaties. But Daniel Webster was certainly right in advising his countrymen to consider carefully before beginning to handle questions of duties in connection with treaties."

§ 12. John Randolph Tucker in his work on the Constitution,[1] uses the following language:

"It is from the fundamental laws of each State that we must learn where resides the authority that is capable of contracting with validity in the name of a State"

and concludes as follows:

"A treaty, therefore, cannot take away essential liberties secured by the Constitution to the people. A treaty cannot bind the United States to do what their Constitution forbids them to do. We suggest a further limitation: A treaty cannot compel any department of the Government to do what the Constitution submits to its exclusive and absolute will. On these questions the true canon of construction, that the treaty-making power in its seeming absoluteness and unconditional extent, is confronted with equally absolute and unconditioned authority vested in the judiciary."

§ 13. Mr. Wharton, in his "International Law Digest," Vol. II, paragraph 131a, quoting Dr. Ernest Meier, Professor

[1] Vol. II, p. 725.

der Rechte an der Universität Halle, Leipsig, 1874, "Ueber den Abschluss von Staatsverträgen," says:

"That a treaty cannot invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition which it has received from no writer in our own tongue.

"Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the 'treaty-making power' be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives. The Constitution gives Congress the control of the Army. Participation in this control would be snatched from the House of Representatives by a treaty with a foreign power by which the United States would bind itself to keep in the field an army of a particular size. The Constitution gives Congress the right of declaring war; this right would be illusory if the President and Senate could by a treaty launch the country into a foreign war. The power of borrowing money on the credit of the United States resides in Congress; this power would cease to exist if the President and Senate could by treaty bind the country to the borrowing of foreign funds. By the Constitution 'no money shall be drawn from the Treasury, but in consequence of appropriations made by law'; but this limitation would cease to exist if by a treaty the United States could be bound to pay money to a foreign power. . . . Congress would cease to be the law-making-power as is prescribed by the Constitution; the law-making-power would be the President and the Senate. Such a condition would become the more dangerous from the fact that treaties so adopted being on this particular hypothesis superior to legislation, would continue in force until superseded by other treaties. Not only, therefore, would a Congress consisting of two Houses be made to give way to an oligarchy of President and Senate, but the decrees of this oligarchy when once made, could only be changed by concurrence of President and of Senatorial majority of two-thirds."

§ 14. John Randolph Tucker, in a speech delivered in the House of Representatives, March 22, 1882, on Chinese Immigration used the following language, discussing the treaty-making power;

"This treaty with China has not so provided; and it has been very much discussed, from the year 1796 down to the present time, whether the treaty-making power can divest Congress of the authority which it has to determine any question which is expressly delegated to it by the Constitution. It is a question of great consequence in preserving the balances of power created by the Constitution; and I will be pardoned for giving it a preliminary consideration. . . .

"The question is not whether Congress can annul a valid treaty, but is a treaty valid and binding on the United States which divests Congress of its Constitutional functions without its sanction and consent? Congress may not by its dissent annul a valid treaty, but is not its assent essential to the validity of a treaty divesting it of its constitutional power?

"The operation which a treaty can have may be from its inherent force, or such as may be necessary in aid of its provisions. All that is necessary in aid of its provisions is dependent on the action of Congress and cannot operate *proprio vigore*, but must depend for its operative force upon the concurrent action of Congress.

"But as to its provisions, which may operate without the aid of Congressional action, it is argued the power of Congress is excluded absolutely and entirely.

"Is this argument sound? Suppose a treaty with Great Britain should provide that the Government of the United States should never lay any duty on articles imported from that country, or that Congress should never borrow money, or should never naturalize an alien, or should not coin money, or raise armies, or provide a navy, or establish post-offices, &c. Can it be held that the President and Senate may by treaty thus divest Congress of its constitutional authority or relieve it of its constitutional duty to do any of these things? If so, then the treaty-making power may amend, alter, and destroy the Constitution and hold us bound in good faith to submit to this claim of a foreign power conferred and sanctioned by a treaty. This cannot be true. It is absurd. These express powers to Congress are limitations on the general power to make treaties.

"The general power to make treaties vested in the President and Senate is met by a specific grant of power to do certain things above referred to. Shall the general authority be limited by the specific grant of power to Congress, or the latter yield to and be submerged by the former? How can both stand in harmony? Clearly thus: The general power to make treaties, to establish the relation of contract between the United States and a foreign country, is for the executive branch. Negotiation of terms of a treaty is for the President and Senate. But before these terms can deprive Congress of its constitutional functions its consent must be obtained; and while Congress is not a part of the treaty-making department, neither are its legislative functions any part of the treaty-making department; and both must therefore concur in the stipulations of the treaty before it can be 'a treaty made under the authority of the United States,' which are the terms used to make any treaty the supreme law of the land (Constitution, Article 6, clause 2). It must pass a law as 'necessary and proper for carrying into effect this power' to make treaties, 'vested in another department of the Government of the United States.'

"This construction of the Constitution makes it harmonious. The contrary construction would give to the President and Senate the power by treaty to emasculate Congress, to strip it of its power to perform its duties to the people, and would give authority to the treaty-making department by compact with a foreign foe to destroy the Constitution.

"The same reasoning applies to a treaty which regulates commerce, in which, as I shall hereafter show, is included the power to regulate, limit, and forbid the migration of aliens to this country. Take another class of necessary limitations on the treaty-making power. Could a treaty alienate a part of the territory of the Union, when Congress has the express power to dispose of it? Or could a treaty give one of the States to a foreign power? Or could one of the States by treaty be surrendered to Great Britain as a Botany Bay for its convicts, an asylum for its paupers, or a hospital for its diseased and insane population?

"And the reason of the construction for which I contend will readily appear from a consideration of the balances of the Constitution.

"A law to be operative must have the concurrence of a ma-

jority of the people of the States represented in this House, of a majority of the Legislatures of the States represented in the Senate, and the approval of the President, representing all the States and the people of the States. The requisition of these concurrent voices of the States and people is a protection to them against injurious action by the Government. Each is a check upon inconsiderate action by the others.

"But how as to the treaty power? The President secretly negotiates, secretly proposes a treaty to the Senate for ratification, and the Senate deliberates with closed doors upon its ratification. Did the Constitution intend to give such power, as is claimed over the Constitutional functions of Congress, to the President and Senate acting in secret, and properly so in many cases?

. . . From this review, I feel justified in holding that if any treaty seeks to bind the United States to a foreign country in respect to the functional powers of Congress we are not open to a charge of bad faith if Congress refuses to sanction a divesture of its constitutional authority to deal with any subject intrusted to it by specifically granted powers in the Constitution of the United States."

§ 15. Judge Cooley in his "Constitutional Limitations,"[1] speaking of the treaty-making power says:

"It is subject to the implied restriction that nothing can be done under it which changes the Constitution of the country or robs a department of the government or of any of the States of their constitutional authority."

And in the Forum, June 1893, page 397, the same distinguished author says:

"But though no limitations are laid upon the power in the National Constitution, some exist in the very nature of things which the treaty-making power must be expected under all circumstances to respect and observe. We say this, having in mind only what we suppose to be a general rule applicable whenever the extent of the treaty-making authority of any country comes in question; all the conditions under which it has come into existence are to be considered; the racial and other peculiarities of the people; what the country is and its situation; the nature of established institutions, and so on,

[1] p. 103.

for all these are in mind when the authority is created, and in some sense are of its substance, whatever may be the words under which it is expressed. . . . Then the treaty-making power, whatever be the nature of the government, if to be exercised by any subordinate of the sovereign and not by the sovereign directly, must not set aside or disregard any authoritative expression of the sovereign will, and it must not do acts or enter into negotiations that tend to undermine or overturn any existing institution of the country, or to change in any particular the established government. . . . When a treaty is said to be the supreme law, it is nevertheless to be understood that the Constitution, which is the highest expression of sovereign will and the authoritative representative of sovereign power in the nation, in fixing limitations upon the exercise of authority under it in regard to the subjects above indicated and many others, restrains the treaty-making power quite as much as any other. If it did not, and any treaty entered into in due form was in itself necessarily supreme law, a State might possibly by the force of it be set off from the Union to another nation, or the government might gradually and imperceptibly be overturned through a line of precedents constituting what at the time were perhaps not seen to be encroachments."

§ 16. Alexander Hamilton, writing to General Washington July 9, 1795, says:

"A treaty cannot be made which alters the Constitution of the country, or which infringes any express exceptions to the power of the Constitution of the United States. But it is difficult to assign any other bounds to the power." [1]

§ 17. Professor Thayer,[2] in a note says:

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself *and of that of the States*.[3] It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the

[1] Hamilton's Works, Vol. IV, p. 342.
[2] "Cases on Constitutional Law," Vol. I, p. 373.
[3] Author's italics.

territory of the latter, without its consent. Fort Leavenworth Railroad Co. *v.* Lowe, 114 U. S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

§ 18. Mr. Blaine, when Secretary of State, was called upon to consider this question in relation to the Chinese question. A letter of his of March 25th, 1881, on this subject, to Chen Lan Pin, the Chinese Ambassador, is of great force, and is fully quoted herafter.[1]

§ 19. The following letter is of interest, bearing also on this subject:

MR. HAY TO MR. TOWER[2]

"No. 1509. "DEPARTMENT OF STATE,
WASHINGTON, July 19, 1899.

"SIR:

"Referring to previous correspondence in regard to legislation enacted or proposed to be enacted in various States of the Union unfavorable to foreign insurance companies, and with reference particularly to the suggested negotiation of a treaty between the United States and Great Britain on the subject, with the view of averting the injury with which British insurance companies are threatened by discriminatory legislation on the part of several of the United States, I have the honor to say that the negotiation of such treaty would probably be futile on account of the many difficulties and obstacles which it would be likely to encounter from the indisposition of the people of the United States to suffer encroachment upon the ordinary and constitutional exercise of the legislative functions of the respective States by the making of treaties which are passed on by only one branch of the Federal Congress but which have the force of the supreme law. The fact that such treaties were made with Switzerland and Belgium could hardly be considered as a precedent for such enactment of law in the form of a treaty with nations having the great commercial interests of Great Britain. However much I might be pleased to respond affirmatively to your request, yet in the light of all

[1] See Chapter IX, p. 252.

[2] Foreign Relations of the U. S. 1899, p. 346.

the circumstances and of the vigilance with which any apparently important invasion of the rights of the States to regulate their own domestic concerns is guarded against, I am persuaded that such treaty, if negotiated, would fail of ratification by the Senate.

"For these reasons the proposed negotiation would, in my judgment, be fruitless, even if such treaty could be agreed upon and submitted to the Senate.

"I have etc.,

"JOHN HAY."

§ 20. Professor Amos S. Hershey, in an article discussing "The Japanese School Question and the Treaty-making Power," closes his discussion in the following words:

"The writer, although by no means a strict constructionist, does not believe that the federal government has the right, by treaty or otherwise, to encroach upon the police power or reserved rights of the States to the extent of directing or controlling their public school systems. If there are any constitutional limitations upon the treaty-making power, if the States retain any autonomy whatsoever, they surely preserve a right to the exclusive control of the schools which they maintain out of their resources. What greater trespass upon the province of self-government, what more serious violation of fundamental rights can be imagined than federal interference with a State's management of its own schools? If our federal government should barter away such fundamental rights as these, and the courts hold such action constitutional, then the double structure of State and federal government which our fathers reared will crumble into ruins, and a new centralized edifice will take its place in which the States will be reduced to mere provinces or administrative units."

§ 21. Judge Shackelford Miller delivered recently a very able address before the Jefferson School of Law of the city of Louisville on the Treaty-making Power under the Constitution. It is undoubtedly one of the most thoroughly digested articles that has appeared on the subject. In the course of his address he uses the following language:

"The text of a sound treatise on any subject of law is based upon and confined by the decisions of the courts upon that

subject. I have followed this historical treatment of the treaty-making power from the Constitutional Convention of 1787, to the present time, purposely omitting any direct mention of the decisions in order that we might see what effect those decisions had from time to time upon the definitions and descriptions of the power as given by subsequent writers. The result is interesting and peculiar. In 1802 Tucker, the first author, cited no authority except the text of the Constitution; thirty years later Story cited Tucker, Rawle and Jefferson; while in 1880 Cooley cites Tucker and Story, as herein quoted, in support of his text. The reason for this is plain, since the judicial decisions have been only so many applications of the general rule to specific statements of fact. For it is readily seen that while many of the decisions contain broad general statements to the effect that treaties are the supreme law of the land, there is always the accompanying qualification that it must be a constitutional treaty in order to be so considered.

"It is clear that there may be an unconstitutional treaty, just as there may be an unconstitutional act of Congress. This point is well illustrated by the treaty negotiated in 1854 at Caracas by the United States minister and the Venezuelan Government, which provided, in its twenty-fifth article, that in case a citizen of either country should accept a commission in the service of an enemy at war with the other country he should be deemed a pirate and so punished. Mr. Marcy, Secretary of State, promptly repudiated the treaty, which was satisfactory in other respects, upon the ground that the Constitution provided that Congress should define the crime of piracy and its punishment, and that it could not be made the subject of a treaty. If the treaty had been ratified, there can be no doubt that the courts would have sustained Mr. Marcy's view."

§ 22. Senator Isidor Rayner, on the 12th day of December, 1906, delivered a speech in the Senate of the United States, "In support of his resolutions holding that the educational institutions of the States cannot be interfered with by the Federal Government in the exercise of its treaty-making power." In the course of his speech he used the following language:[1]

[1] 59th Congress, 41 Congressional Record, No. 8, p. 281.

"I plant myself firmly and unalterably upon the proposition that we can make no treaty that violates any of the provisions of the Constitution of the United States, that the treaty-making power in the sixth Article must be construed *in pari materia* with all the other provisions contained in the Constitution, and if the treaty comes in conflict with any of the limitations of the instrument the treaty must yield and the Constitution prevail.

"As a corollary of this proposition I plant myself upon the doctrine that any treaty that violates Article X of the Constitution and infringes upon the reserved rights of the States which have not been delegated to the General Government, and embraces subjects that belong to the States, and that are not necessary to carry out the purposes of the Government as defined in the Constitution, is *ultra vires* and not within the capacity of the Government to make. . . . There are two separate schools of construction upon the subject at issue. These schools are professional schools and schools of commentators and text writers upon the Constitution, and it is not entirely accurate to designate them as the respective advocates of national and States' rights systems.

"One of these schools claims that the treaty-making power is an inherent element of sovereignty, and though it is a conferred power in the Constitution it would exist as an essential attribute of this Government without delegation, and that when it is once delegated it need not derive its authority from the Constitution, and that whenever it comes in conflict with the provisions of a State law or a State constitution, by the terms of Article VI of the Constitution, the treaty prevails. Some of the adherents of this school have proceeded to the most unfortunate limits in their construction of the treaty-making power, and have held that this power is superior to the Constitution and is not in any manner governed by its inhibitions or limitations.

"The second school stand upon the doctrine that the treaty-making power exists for the purpose of carrying out the purposes and objects of this Government as prescribed and defined by the Constitution, and that no treaty is valid that violates the Constitution, or that under its provisions surrenders the rights reserved and belonging to the States.

"I am a disciple of the second school, not only as a party man, but as a student of Constitutional history, and I proceed now to give the reasons for the faith that is in me."

§ 23. William C. Morey, Professor of History and Political Science in the University of Rochester, in 1909 published a paper on the "Treaty-making Power and Legislative Authority of the States." [1] In concluding his paper he says:

"We may conclude that our present federal system is entirely adequate to meet the dangers arising from any apparent conflict between a treaty and a State law. The Constitution itself is the ultimate and only standard by which the validity of a State law as well as that of a treaty must be determined. There cannot, therefore, in the nature of our constitutional system, be any legal antagonism between the treaty-making power of the Federal government and the legislative authority of a State. They are, in fact, the co-ordinate and harmonious functions of one body-politic. And apparent conflict between them is due to a misconception of their proper relations, either on the part of the Federal government or on the part of the State authorities. Any such a misconception need not long exist, since the legitimate province of both is capable of being determined by a supreme judicial tribunal. The united sovereignty of the nation is not destroyed by the distribution of its powers. That sovereignty remains undiminished in spite of the delegation of certain powers to the Federal government and the reservation of certain powers to the States; and is capable of meeting all the complex demands of a new experience, either by a liberal interpretation of its fundamental law, or as a last resort by an amendment to the Constitution itself."

§ 24. Another distinguished author says: [2]

"What limits does it place upon the treaty-making power? None whatever. There is no limit to the exercise of this power, when reduced to any particular case, but it is to the form of executing the power which is a simple concurrence of two thirds of the Senate. I do not say that there is no check or restriction upon the functions of the Government, for there is this limit, that it cannot be exercised in the destruction of or in opposition to any known Constitutional right or power, and must be subordinate to every other right recognized. But if the exercise of the treaty-making power does not conflict

[1] Important discussions, Post Express Specials, Series B, No. 1.

[2] William Archer Cocke's "Constitutional History of the United States," p. 235.

with some right or come in opposition with some class of powers specified in the Constitution, there is no restriction upon its employment whenever used in accordance with the form of the Constitution."

§ 25. In an address before the New York State Bar Association, at Albany, in 1903, Mr. Heman W. Morris, of Rochester, New York,[1] discusses "The powers of Congress over Treaties," and in the course of his address he discusses the Chinese Exclusion Cases,[2] involving the Act of 1888, which was an amendment to a former Act forbidding the return to this country of Chinese lawfully residing here but who had temporarily left. He says:

"It was conceded that both the Exclusion Act of 1888 and the Deportation Act of 1892 were in contravention of the express stipulations of the Burlingame treaty and the supplementary treaty of 1880, but the court affirmed the doctrine squarely that treaties are of no greater force as the supreme law of the land than are Acts of Congress.

"A treaty, it was said, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the powers of Congress, it can be deemed, in that particular, only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. Congress may, as with an ordinary statute, modify its provisions, or supersede them altogether. In either case, the last expression of the sovereign will must control. . . .

"In the view of the Court, if the legislative department sees fit for any reason to refuse, upon a subject within its control, compliance with the stipulations of a treaty, or to abrogate them entirely, it is not for the courts to call in question the validity or wisdom of its action. If the nation with which the treaty is made objects to the legislation, it may complain to the executive head of our government, and take such measures as it may deem advisable for its interests, even to a declaration of war.

[1] Am. Law Rev. Vol. 37, p. 363.
[2] 130 U. S. 581, 32 L. ed. 1068, 9 S. C. 645.

"But the power of Congress, over a subject within its jurisdiction, can neither be taken away nor impaired by any treaty. Inasmuch as treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the President, while they continue unrepealed; and inasmuch as the power of repealing these municipal laws must reside somewhere, and no body other than Congress possesses it, the legislative power is applicable to such laws whenever they relate to subjects which the Constitution has placed under that power. . . .

"A treaty may be simply a compact between two or more States in their sovereign or corporate capacities; of this class are treaties of alliance, or it may operate mainly upon the rights of individuals within the respective jurisdictions of the contracting parties, in which case it is like a statute, and capable of enforcement by the courts in the same way. Most treaties are of this kind. Of course, behind every treaty is the guaranty of the State that its provisions shall be scrupulously enforced within its own jurisdiction for the benefit and protection of the citizens of the other State.

"Now in so far as a treaty between the United States and a foreign nation can have effect as a law within this country, it is subject to be modified or amended by an Act of Congress. So much was necessarily involved in, and decided by the Supreme Court, in the Chinese Exclusion cases. What power Congress has, if any, over a treaty, regarded merely as a compact between this nation and another, was not involved in those cases, and, so far as I am aware, has never been the subject of judicial consideration. Indeed, such a question would involve matters so purely political in their nature, belonging so exclusively to the political departments of the government, that the courts might well decline to consider it for want of jurisdiction." (pp. 375–377.)

§ 26. Mr. Marcy has said:[1]

"The Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other. It would be difficult to find a reputable lawyer in this country who would not yield a ready assent to this proposition. Mr. Dillon's

[1] Mr. Marcy, Secretary of State, to Mr. Mason, Minister to France, Sept. 11, 1854. MS. Inst. France XV, 210. Moore's Int. Law Dig., Vol. V, p. 167.

counsel admitted it in his argument for the consul's privilege before the court in California. The Sixth Amendment to the United States Constitution gives, in general and comprehensive language, the right to a defendant in criminal prosecutions to have compulsory process to procure the attendance of witnesses in his favor. Neither Congress nor the treaty-making power are competent to put any restriction on this constitutional provision. There was, however, at the time of its adoption, some limit to the range of its operation. It did not give to such a defendant the right to have compulsory process against all persons whatever, but only against such as were subject to subpœna process at that time, such as might by existing law be witnesses. There were then persons and classes of persons who were not thus subject to that process, who, by privileges and mental disqualifications, could not be made witnesses and this constitutional provision did not confer the right on the defendant to have compulsory process against them. As the law of evidence stood when the Constitution went into effect, ambassadors and ministers could not be served with compulsory process to appear as witnesses, and the clause in the Constitution referred to did not give to the defendant in criminal prosecutions the right to compel their attendance in court. But what was the case in this respect as to consuls? They had not the diplomatic privileges of ambassadors and ministers. After the adoption of the Constitution the defendant in a criminal prosecution had the right to compulsory process to bring into court as a witness in his behalf any foreign consul whatsoever. If he then had it, and has it not now, when and how has this constitutional right been taken from him? Congress could not take it away, neither could the treaty-making power, for it is not within the competence of either to modify or restrict the operation of any provision of the Constitution of the United States."

And again he says:[1]

"It is not, as you will perceive by examining Mr. Drouyn de L'Huys's dispatch to the Count de Sartiges, the application of the 'principle' to the particular case of M. Dillon, which is to be disavowed, but the broad and general proposition that

[1] Mr. Marcy, Secretary of State, to Mr. Mason, Minister to France, Jan. 18, 1855. MS. Inst. France XV, 249. Moore's Int. Law Dig., Vol. V, p. 168.

the Constitution is paramount in authority to any treaty or convention made by this government. This principle, the President directs me to say, he can not disavow, nor would it be candid in him to withhold an expression of his belief that if a case should arise presenting a direct conflict between the Constitution of the United States and a treaty made by authority thereof, and be brought before our highest tribunal for adjudication, the court would act upon the principle that the Constitution was the paramount law."

§ 27. At another time he wrote:[1]

"In reply, the undersigned hastens to inform Mr. Aspurúa that it is believed not to be competent to the treaty-making power of the United States to enter into such an engagement as that contained in the twenty-fifth article of the convention concluded at Caracas on the 20th day of September by the plenipotentiaries of Venezuela and the United States, viz:

"'Whenever one of the contracting parties shall be engaged in war with another State, no citizen of the other contracting party shall accept a commission or letter of marque for the purpose of assisting or co-operating hostilely with the said enemy against the said party so at war, under the pain of being considered as a pirate.'

"The Constitution of the United States provides that Congress shall 'define and punish piracies and felonies committed on the high seas.' Although several conventions have been made by this Government with foreign Governments, some of which still continue in force, containing in substance, the stipulation just quoted, they were evidently contracted by an oversight of one of the provisions of the Constitution — the supreme law of this country. The President, entertaining this opinion, cannot consent to transmit the convention negotiated by Mr. Eames, which in all other respects meets with his approval, to the Senate for ratification without presenting to that body his objections to the article aforementioned."

§ 28. Mr. Wirt, as Attorney General of the United States, gave the following opinion:[2]

"*An alien can inherit, carry away, and alienate personal property, without being liable to any jus detractus; but not real estate.*

[1] Mr. Marcy, Secretary of State, to Mr. Aspurúa (International Law Digest, Wharton, Vol. II, Sec. 138, p. 68).

[2] Opinions of Attorneys General, Vol. I, p. 275.

"RICHMOND, July 30, 1819.

"SIR:

"I have received at this place your communication of the 23d instant, presenting for my opinion certain questions submitted to you by Mr. Gahn, the Swedish chargé d'affaires to the United States, to which I hasten to answer.

"An alien can, in the United States, inherit, with the faculty of carrying away and alienating, every species of *personal* property, without being liable to any *jus detractus*. But he cannot inherit real or fast property at all; nor is there any power in the general government, as I conceive, to alter, either by law or treaty, the provisions of the particular States in this respect. The 6th article of the old treaty of amity and commerce, between the United States and Sweden, is understood as applying to personal property only.

"I have the honor to be, &c.,

"WM. WIRT.

"To the Secretary of State."

§ 29. John Page, of Virginia, friend of Washington, a Revolutionary soldier, and afterwards governor of Virginia, once said:

"I may agree that a treaty is necessary to establish a commercial intercourse between two nations to their mutual advantage and satisfaction, but I must affirm that as that treaty would be a commercial regulation, and as Congress is expressly empowered by the Constitution to regulate commerce, whenever such treaty shall be made between the United States and any other nation, Congress must either direct that the negotiation be commenced upon conditions approved or sanction the ratification of such treaty by some act showing that the regulation of commerce by the treaty was made by the authority of Congress, in conformity to the Constitution. Besides, if the President and Senate can regulate the commerce of the United States with one nation, they can with all nations, and if they can with all, what nation can there be with whom Congress can regulate commerce? This argument must therefore fall to the ground. We are told, however, that the treaty-making power, from its nature, is competent to all the objects and is not to be controlled or checked by the House. . . .

"If it be true then, can the President repeal, as he has by the treaty, the laws of Congress, although by the Constitution

he cannot negative them? He can oblige Congress to levy taxes; can withdraw impost and tonnage from their reach; prohibit the exportation of sundry articles of produce of the United States, although the Constitution forbids the Senate and the House of Representatives concurring to lay the smallest duty on the exportation of any article; he can create offices and annex salaries thereto, destroy the rights of the House to provoke war; in short he can do anything: but this we are sworn to deny. The absurdity of that construction must be evident, and *the recollections of our oaths to support the Constitution*, of which we have been reminded, must force us to revolt at the thoughts of adopting such a monstrous construction of the Constitution." [1]

§ 30. Henry Clay, in 1820, said, in the House of Representatives, speaking of the Treaty with Spain relating to the boundary between Louisiana and Mexico:

"The Constitution of the United States has not defined the precise limits of that power, because from the nature of it they could not be presented. It appears to me, however, that no safe American statesman will assign to it a boundless scope. I presume, for example, that *there is a functionary without limits*. The first great bound to the power in question, I apprehend, is that no treaty can constitutionally transcend the very object and purpose of the Government itself. I think also that wherever there are specified grants of power to Congress they limit and control or, I would rather say, modify the exercise of the general grant of the treaty-making power upon a principle which is familiar to everyone. . . . But if the concurrence of this house be not necessary in the cases asserted, if there be no restriction upon the power I am considering, it may draw to itself and absorb the whole of the power of the Government. To contract alliances, to stipulate for raising troops to be employed in a common war about to be waged, to grant subsidies, even to introduce foreign troops within the bosom of the country, are not infrequent instances of the exercise of this power; and if in all such cases the honor and faith of the Nation are committed by the exclusive act of the President and Senate, *the melancholy duty alone might be left to Congress of recording the ruin of the Republic*." [2]

[1] Annals of Congress, Vol. V, 562.

[2] Author's italics.

§ 31. Mr. Jefferson expressed his views on this subject at various times and on different phases of it. In his "Manual of Parliamentary Practice," [1] speaking of treaties, he used the following language:

"By the Constitution of the United States this department of legislature is confined to two branches only of the ordinary legislature; the President originating and the Senate having a negative. To what subject this power extends, has not been defined in detail by the Constitution, nor are we entirely agreed among ourselves. (1) It is admitted that it must concern the foreign nation, party to the contract, or it would be a mere nullity, *res inter alios acta*. (2) By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty and cannot be otherwise regulated. (3) It must have meant to except out of these *the rights reserved to the States*,[2] for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way. (4) And also to except those subjects of legislation in which it gave a participation to the House of Representatives. This last exception is denied by some, on the ground that it would leave very little for the treaty power to work on. The less the better, say others."

And again, on March 13, 1816, writing of Washington's real attitude on the question between himself and the House of Representatives, in 1796, and also indicating his own, says:

"A writer in the National Intelligencer of February 24 who signs himself B., is endeavoring to shelter himself under the cloak of Gen. Washington, in the present enterprise of the Senate to wrest from the House of Representatives the power, given them by the Constitution, of participating with the Senate in the establishment and continuance of laws on specified subjects. This aim is by associating an Indian chief, or foreign government, in form of a treaty, to possess themselves of the power of repealing laws becoming obnoxious to them, without the assent of the third branch, although that assent was necessary to make it a law. We are then to depend for the secure possession of our laws, not on our immediate Repre-

[1] p. 186.

[2] Author's italics.

sentatives chosen by ourselves, and amenable to ourselves every other year, but on Senators chosen by the Legislatures, amenable to them only, and that but at intervals of six years, which is nearly the common estimate for a term for life. *But no act of that sainted worthy,*[1] no thought of General Washington, ever countenanced a change of our Constitution so vital as would be the rendering insignificant the popular, and giving to the aristocratical branch of our Government the power of depriving us of our laws." [2]

In November, 1795, Mr. Jefferson, in a letter to Mr. Madison, speaking of John Marshall, said: [3]

"His doctrine of the whole commercial part of the treaty (and he might have added the whole unconstitutional part of it) rests in the power of the H. of R. is certainly the true doctrine, and as the articles which stipulate what requires the consent of the three branches of the Legislature must be referred to the H. of R. for their concurrence, so they, being free agents, may approve or reject them, either by a vote declaring that, or by refusing to pass acts."

§ 32. Richard Henry Lee, the Revolutionary general and a distinguished writer of that time, when the Constitution was under consideration by the States for ratification, writing over the title of "The Federal Farmer," said:

"On a fair construction of the Constitution, I think the Legislature has a proper control over the President and Senate, in settling commercial treaties. By one article 'the Legislature shall have power to regulate commerce with foreign nations,' etc., and by another article the President, with the advice and consent of two-thirds of the Senate, shall have power to make treaties. These clauses must be considered together: and we ought never to make one part of the same instrument contradict another, if it can be avoided by any reasonable construction. By the first recital clause the Legislature has the power, that is, as I understand it, the sole power — to regulate commerce with foreign nations or to make all the rules

[1] Author's italics.

[2] "Memorial Edition of Writings of Thomas Jefferson," Vol. XIV, 442.

[3] Ford's "Jefferson," Vol. VII, p. 38.

and regulations respecting trade and commerce between our citizens and foreigners. By the second recital clause the President and Senate have power generally to make treaties. There are several kinds of treaties, as treaties of commerce or peace, of alliance, etc. I think the words 'to make treaties' may be consistently construed, and yet so as it shall be left to the Legislature to confirm commercial treaties. They are in their nature and operation very distinct from treaties of peace and of alliance. The latter generally require secrecy. But it is but very seldom they interfere with the laws and internal police of the country, and operate immediately on persons or property, especially in commercial towns — they have in Great Britain usually been confirmed by Parliament. They consist of rules and regulations respecting commerce; and to regulate commerce, or to make regulations respecting commerce, the Federal Legislature, by the Constitution, has the power. I do not see that any commercial regulation can be made in treaties that will not infringe upon this power in the Legislature. Therefore, I infer that the true construction is that the President and Senate shall make treaties, but all commercial treaties shall be subject to be confirmed by the Legislature. This construction will render the clauses consistent, and make the powers of the President and Senate respecting treaties much less exceptional." [1]

§ 33. Mr. Arthur English, in a letter to Hon. James E. Martine, Congressional Record, June 9, 1914, page 10929, says on the subject of the relative powers in different nations to make treaties:

"There is even another ground for holding this Treaty to be invalid and that is the lack of power in the President and Senate and the King of Great Britain to deprive the American people of a right which they own. Whence this power to grant any interests of the country without compensation? It is certainly not given by the Constitution. In England for an ambassador to agree to do what is beyond his authority is ground for impeachment, and it was held even by Washington's friends that he might be impeached if he went beyond his authority in agreeing to the Jay treaty with England.

[1] "Letters of Richard Henry Lee," published by Thomas Greenleaf, New York, in 1787. Also found in Annals of Congress, Vol. V, 581.

"What say the writers of despotic countries on this subject? Martin (L. U. Ch. 1, Sec. 3, p. 49) says:

"'Anything that has been promised by the chief or his agent beyond the limits of the authority with which the State has intrusted him is at most no more than a simple promise (*sponsio*) which only obliges the promisor to use his endeavors to produce the ratification.'"

"Again he says that:

"'Even the stipulation of a monarch, though he should be absolute, can not be valid if it militates against the fundamental law of the State unless ratified by the nation.'

"Fiore, in his Volkerecht, section 98, says: 'All treaties are to be looked upon as null and void, which are in any way opposed to the development of the activities of a nation, or which hinder the exercise of its own natural rights.'

"He after declares to the same effect.

"Vattel (2nd Book, Ch. 22, p. 298) says: 'A treaty pernicious to the State is null and not obligatory, no conductor of the nation having power to make such treaties. The nation itself cannot enter into engagements contrary to its indispensable obligations. In the year of 1506 the States General of the Kingdom of France, assembled at Tours, engaged Louis XII to break the Treaty he had concluded with the Emperor Maximilian, and the Archduke Philip, his son, because that Treaty was pernicious to the kingdom. They found that neither the Treaty nor the oath that had accompanied it could oblige the King to alienate the dominions of the Crown. From the same reason, a want of power, a treaty is absolutely null.'

"Yet these writers were speaking of treaties made by monarchs, and not by a servant of the people, like the President of the United States, whose powers are limited by a written Constitution, and where the sole body that can make law is Congress.

"Under what theory of interpretation can it be claimed that the President of the United States can make a treaty that a despot can not?

"'The powers of the President . . . can not be enlarged by analogy to the powers of an English King, because the two have their origin and mode of existence in different and opposite principles.' (10 Opin. Atty. Gen. 545)

"'But they are not prerogatives — they are legal powers vested in, and duties imposed upon, the President by the letter

of the Constitution; and they are to be exercised and judged of as other granted powers and imposed duties are.' (*Ibid.*)

"Therefore the powers exercised by the King of Great Britain or of the chief executive of any foreign nation is not authority in the United States."

§ 34. Mr. Gallatin, writing to Mr. Everett, in 1835, said:[1]

"In every constitutional Government the power of raising and granting money is vested in the legislature; that of making treaties in the executive. In every such Government the question may arise whether the treaty-making power is, in every instance, paramount, and imposes on the legislature the duty of granting without examination the money necessary to pay the subsidies or indemnities promised by the treaty; or, whether the *power* of granting money, vested by the Constitution in that body, does not necessarily imply the *right* of examining and deciding each case according to its original merits.

"The present Administration of the United States is of opinion that here the Treaty-making power is paramount. It may thence have been too hastily inferred that that power was in France also acknowledged to be supreme and to pledge absolutely the legislature and the nation. There may be found in the Constitution of the United States some clauses not to be found in that of France, which sustain the construction adopted by our Executive Magistrate. But even in the United States the question has been considered as doubtful.

"Mr. Madison's resolution of the year 1796, which asserts the abstract right of the House of Representatives, was adopted by a majority of the House, and remains, unrepealed, of record on its journal. And it cannot be denied that, during the sixteen years of the administration of Presidents Jefferson and Madison, that was the avowed construction of the Constitution by the Government of the United States. It is not necessary here to inquire whether that construction is correct. I may not be an impartial judge of that question, and only mean to show that even here, it is one on which opinions have been divided."

[1] Mr. Gallatin to Mr. Everett, Jan'y. 1835, 2 Gallatin's Writings, 479 (International Law Digest, Wharton, Vol. II, p. 66).

§ 35. Patrick Henry, in the Virginia Convention, assailed the treaty-making power with great eloquence. And if he did not see the "poison under its wing," he at least pictured it as one of the beasts in the Apocalypse. He said:

"Gentlemen say that the king of Great Britain has the same right of making treaties that our President has here. . . . I will have no objection to this, if you make your President a king. . . . I say again that, if you consent to this power, you depend on the justice and equity of those in power. We may be told that we shall find ample refuge in the law of nations. When you yourselves have your necks so low that the President may dispose of your rights as he pleases, the law of nations cannot be applied to relieve you. Sure I am, if treaties are made infringing our liberties, it will be too late to say that our constitutional rights are violated. We are in contact with two powers — Great Britain and Spain. They may claim our most valuable territories, and treaties may be made to yield them. It is easy on our part to define our unalienable rights, and expressly secure them, so as to prevent future claims and disputes. Suppose you be arraigned as offenders and violators of a treaty made by this government. Will you have that fair trial which offenders are entitled to in your government? Will you plead a right to the trial by jury? You will have no right to appeal to your own Constitution. You must appeal to your Continental Constitution. A treaty may be made giving away your rights, and inflicting unusual punishments on its violators. It is contended that, if the king of Great Britain makes a treaty within the line of his prerogative, it is the law of the land. I agree that this is proper, and, if I could see the same checks in that paper which I see in the British government, I would consent to it. Can the English monarch make a treaty which shall subvert the common law of England, and the constitution? Dare he make a treaty that shall violate Magna Charta, or the bill of rights? Dare he do anything derogatory to the honor, or subversive of the great privileges, of his people? No, sir. If he did, it would be nugatory, and the attempt would endanger his existence." [1]

Colonel George Mason of Gunsten Hall, in the same Convention, uses this language:

[1] Elliott's Debates, Vol. III, p. 503.

"Though the king can make treaties, yet he cannot make a treaty contrary to the constitution of his country. Where did their constitution originate? It is founded on a number of maxims, which, by long time, are rendered sacred and inviolable. Where are there such maxims in the American Constitution? In that country, which we formerly called our mother country, they have had, for many centuries, certain fundamental maxims, which have secured their persons and properties, and prevented a dismemberment of their country. The common law, sir, has prevented the power of the crown from destroying the immunities of the people. We are placed in a still better condition — in a more favorable situation than perhaps any people ever were before. We have it in our power to secure our liberties and happiness on the most unshaken, firm, and permanent basis. We can establish what government we please. But by that paper we are consolidating the United States into one great government, and trusting to constructive security. You will find no such thing in the English government. The common law of England is not the common law of these States. I conceive, therefore, that there is nothing in that Constitution to hinder a dismemberment of the empire. Will any gentleman say that they may not make a Treaty, *whereby the subjects of France, England, and other powers, may buy what lands they please in this country?* [1] This would violate those principles which we have received from the mother country. The indiscriminate admission of all foreigners to the first rights of citizenship, without any permanent security for their attachment to the country, is repugnant to every principle of prudence and good policy. The President and Senate can make any treaty whatsoever. We wish not to refuse, but to guard, this power, as it is done in England. The empire there cannot be dismembered without the consent of the national Parliament. We wish an express and explicit declaration, in that paper, that the power which can make other treaties cannot, without the consent of the national Parliament — the national legislature — dismember the empire. The Senate alone ought not to have this power; much less ought a few States to have it. No treaty to dismember the empire ought to be made without the consent of three fourths of the legislature in all its branches. Nor ought such a treaty to be made but in case of the most

[1] Author's italics.

urgent and unavoidable necessity. When such necessity exists, there is no doubt but there will be a general and uniform vote of the Continental parliament." [1]

Gov. Randolph said:

"The honorable gentleman says that, if you place treaties on the same footing here as they are in England, he will consent to the power, because the king is restrained in making treaties. Will not the President and Senate be restrained? Being creatures of that Constitution, can they destroy it? Can any particular body, instituted for a particular purpose, destroy the existence of the society for whose benefit it is created? It is said there is no limitation of treaties. I defy the wisdom of that gentleman to show how they ought to be limited. When the Constitution marks out the powers to be exercised by particular departments, I say no innovation can take place. An honorable gentleman says that this is the Great Charter of America. If so, will not the last clause of the 4th Article of the Constitution secure against dismemberment? It provides that 'nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.' And if this did not constitute security, it follows, from the nature of civil association, that no particular part shall sacrifice the whole." [2]

§ 36. In replying to Patrick Henry and Colonel George Mason, Mr. George Nicholas said: [3]

"The worthy Member says, that they can make a treaty relinquishing our rights and inflicting punishments; because all the treaties are declared paramount to the constitutions and laws of the States. An attentive consideration of this will show the committee that they can do no such thing. The provision of the 6th article is, that this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all the treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land. They can, by this, make no treaty which shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers. The treaties they make must be under the authority of the United States, to be within their province. It is sufficiently secured, because it only declares

[1] Elliott's Debates, Vol. III., p. 508. [2] *Ibid.*, p. 504. [3] *Ibid.*, p. 507.

that, in pursuance of the powers given, they shall be the supreme law of the land, notwithstanding anything in the constitution or laws of the particular states."

§ 37. An eminent authority on the Constitution, referring to the difficulties of enforcing treaties under the Articles of Confederation, and the limitations of that power under the Constitution, has said:

"Thus, for example, the treaty-making power was expressly vested in the United States in Congress assembled; but when a treaty had been made, it depended entirely upon the separate pleasure of each state whether it should be executed. If the state governments did not see fit to enforce its provisions upon their own citizens, or thought proper to act against them, there was no remedy, both because the Congress could not legislate to control individuals, and because there was no department clothed with authority to compel individuals to conform their conduct to the requirements of the treaty, and to disregard the opposing will of the state.

"This defect was now to be supplied, by giving to the national authority, not only theoretically but practically, a supremacy over the authority of each state. But this was not to be done by annihilating the state governments. The government of every state was to be preserved; and so far as its original powers were not to be transferred to the general government, its authority over its own citizens and within its own territory must, from the nature of political sovereignty, be supreme. There were, therefore, to be *two supreme powers* [1] in the same country, operating upon the same individuals, and both possessed of the general *attributes of sovereignty.*[1] In what way, and in what sense, could one of them be made paramount over the other?

"It is manifest that there cannot be two supreme powers in the same community, if both are to operate upon the same objects. But there is nothing in the nature of political sovereignty to prevent its powers from being distributed among different agents for different purposes. This is constantly seen under the same government, when its legislative, executive, and judicial powers are exercised through different officers; and in truth, when we come to the law-giving power alone,

[1] Author's italics.

as soon as we separate its objects into different classes, it is obvious that there may be several enacting authorities, and yet each may be supreme over the particular subject committed to it by the fundamental arrangements of society. *Supreme laws, emanating from separate authorities, may and do act on different objects without clashing,* or they may act on different parts of the same object with perfect harmony. They are inconsistent when they are aimed at each other, or at the same indivisible object. When this takes place one or the other must yield; or, in other terms, one of them ceases to be supreme on the particular occasion. It was the purpose of the framers of the Constitution of the United States to provide a paramount rule that would determine the occasions on which the authority of a state should cease to be supreme, leaving that of the United States unobstructed. Certain conditions were made necessary to the operation of this rule. The state law must conflict with some provision of the Constitution of the United States, or with a law of the United States enacted in pursuance of the constitutional authority of Congress, or with a treaty duly made by the authority of the Union. The operation of this rule constitutes the supremacy of the national government. It was supposed that, by a careful enumeration of the objects to which the national authority was to extend, there would be no uncertainty as to the occasions on which the rule was to apply; and as all other objects were to remain exclusively subject to the authority of the states within their respective territorial limits, the operation of the rule was carefully limited to those occasions." [1]

§ 38. Mr. Madison's views were elaborately expressed in the Virginia Convention of 1788, called to ratify the Constitution. He was a strong advocate of the adoption of the Constitution. The history of this Convention, by Hugh Blair Grigsby, edited by R. A. Brock and published by the Virginia Historical Society, is worthy of perusal by the student of the history of those times. The pictures of the great characters of the Convention are drawn by a master hand. Patrick Henry, Washington, Jefferson, Randolph, Madison, Pendleton, and others are pictured in living light. Called upon to reply to Patrick Henry, George

[1] Curtis' "Constitutional History of the United States," Vol. I, 556, 557, Harper & Brothers.

Mason, and others, who were claiming the treaty-making power as unlimited, Madison said:

"I am persuaded that, when this power comes to be thoroughly and candidly viewed, it will be found right and proper. As to its extent, perhaps it will be satisfactory to the committee that the power is, precisely, in the new Constitution as it is in the Confederation. In the existing confederacy, Congress are authorized indefinitely to make treaties. Many of the states have recognized the treaties of Congress to be the supreme law of the land. Acts have passed, within a year, declaring this to be the case. I have seen many of them. Does it follow, because the power is given to Congress, that it is absolute and unlimited? I do not conceive that power is given to the President and Senate to dismember the empire, or to alienate any great, essential right. I do not think the whole legislative authority have this power. The exercise of the power must be consistent with the object of the delegation. One objection against the amendment proposed is this, that, by implication, it would give power to the legislative authority to dismember the empire — a power that ought not to be given, but by the necessity that would force assent from every man. I think it rests on the safest foundations as it is. The object of treaties is the regulation of intercourse with foreign nations and is external. I do not think it possible to enumerate all the cases in which such external regulations would be necessary. Would it be right to define all the cases in which Congress could exercise this authority? The definition might, and probably would, be defective. They might be restrained, by such a definition, from exercising the authority where it could be essential to the interest and safety of the community. It is most safe, therefore, to leave it to be exercised as contingencies may arise." [1]

§ 39. At another time during this Convention, he uses this language:

"The Confederation is so notoriously feeble, that foreign nations are unwilling to form any treaties with us; they are apprized that our general government cannot perform any of its engagements, but that they may be violated at pleasure by any of the states. Our violation of treaties already entered

[1] Elliott's Debates, Vol. III, p. 514.

into proves this truth unequivocally. No nation will, therefore, make any stipulations with Congress, conceding any advantages of importance to us; they will be the more averse to entering into engagements with us, as the imbecility of our government enables them to derive many advantages from our trade, without granting us any return. But were this country united by proper bands, in addition to other great advantages, we could form very beneficial treaties with foreign states. But this can never happen without a change in our system. Were we not laughed at by that minister of that nation, from which we may be able yet to extort some of the most salutary measures for this country? Were we not told that it was necessary to temporize till our government acquired consistency? Will any nation relinquish national advantages to us? You will be greatly disappointed, if you expect any such good effects from this contemptible system." [1]

Subsequently, after the organization of the government, when Mr. Madison was a member of the House of Representatives and known as the "Father of the Constitution," and possessing the highest right of any man of his day to speak on this subject, he was drawn into the debate on the ratification of the Jay Treaty, which provided for an appropriation of money. Since Congress alone under the Constitution can appropriate money, the right of the House as one branch of Congress to consider the treaty was claimed. President Washington, in a paper of great power and dignity, refused to submit the treaty to the House, and the question before the House was whether they had a right to inspect the treaty whose validity depended upon their action; on this question the House asserted its prerogative by a vote of 63 to 36. Mr. Madison said he

"Would appeal to the Committee to decide, whether it did not appear, from a candid and collective view of the debates in those conventions, and particularly in that of Virginia, that the treaty-making power was a limited power; and that the powers in our Constitution, on this subject, bore an analogy to the powers on the same subject in the government of Great Britain. . . . On a review of these proceedings, may not the question be fairly asked, whether it ought to be supposed

[1] Elliott's Debates, Vol. III, pp. 135, 136.

that the several conventions — who showed so much jealousy with regard to the powers of commerce, of the purse, and of the sword, as to require for the exercise of them in some cases two-thirds, in others three-fourths, of both branches of the legislature — could have understood that, by the treaty clauses in the Constitution, they had given to the President and Senate, without any control whatever from the House of Representatives, an absolute and unlimited power on all these great objects." [1]

William Loughbridge, a celebrated lawyer of Iowa, on June 30, 1868, on the floor of the House, said:

"An attempt is made, through the means of the treaty-making power, to concentrate almost all of the power of this Government in the hands of the President, subject only to the advice and consent of the Senate. And this proposition is, if adopted, a long step in that direction. I hesitate not to say, sir, that if, without any explanation, disaffirmance, or protest, we make this appropriation, we shall, so far as this House can do it, have surrendered practically all the power of the Government into the hands of the treaty-making department and reduced this House to the position of an involuntary agent of that power, with no discretion but to carry out its expressed will. That we are rapidly drifting in that direction, it seems to me, must be apparent to the most casual observer.

"By substituting a foreign Government or an Indian tribe in place of this House, on the principle claimed by the Executive, there is nothing within the whole scope of the legislative powers of the Government that can not be done without the consent or intervention of this House. I defy any gentleman to point out a single act of legislation that can not be done through and by the treaty-making power, if we admit that power to the extent claimed by the Executive." [2]

Among the recent contributions to this subject, distinguished alike for legal acumen, thorough investigation, and scholarly presentation, none is more worthy of perusal than "Limitations on the Treaty-making Power," etc., by Prof. William E. Mikell, of the University of Pennsylvania.[3]

[1] "The Life and Times of James Madison," Rives, Vol. III, pp. 558, 559. Also found in Annals of Congress, Vol. V, p. 562.

[2] Congressional Globe, 40th Congress, 3621.

[3] University of Pennsylvania Law Review & American Law Register, for April and May, 1909, Vol. LVII, Nos. 7 and 8.

CHAPTER II

Opinions of Judges, Federal and State, on the Treaty-Making Power, from Decided Cases

§ 40. In the last chapter we gave the views of many public men and statesmen from the early history of the country down to the present day on the treaty-power under the Constitution of the United States, and in this chapter the opinions of many of the judges of the country, both Federal and State, are sought to be collected.

Professor Willoughby, in his work on the Constitution, says:[1]

"Judicial Dicta that Reserved Rights of the States may not be Infringed.

"Upon this point the declarations of the Supreme Court are not completely satisfactory. In various of its opinions this tribunal has explicitly asserted that the rights reserved by the Constitution from the control of the other departments of the Federal Government may not be infringed by its treaty-making power."

§ 41. Mr. Justice Daniel, in the License Cases, speaking of Article VI of the Constitution where treaties are declared to be the supreme law of the land, says:

"This provision of the constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the federal government, must be expounded in coincidence with a perfect right in the

[1] Vol. I, Section 213.

States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the general government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no 'authority of the United States,' save what is derived mediately or immediately, and regularly and legitimately, from the constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State. In cases of alleged conflict between a law of the United States and the constitution, or between the law of a State and the constitution or a statute of the United States, this court must pronounce upon the validity of either law with reference to the constitution; but, whether the decision of the court in such cases be itself binding, or otherwise, must depend upon its conformity with, or its warrant from, the constitution. It cannot be correctly held, that a decision, merely because it be by the Supreme Court, is to override alike the constitution and the laws both of the States and of the United States." [1]

§ 42. Chief Justice Taney, in the Passenger Cases,[2] uses the following language:

"The first inquiry is, whether, under the Constitution of the United States, the federal government has the power to compel the several States to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit. In my judgment, this question lies at the foundation of the controversy in this case. I do not mean to say that the general government have, by treaty or act of Congress, required the State of Massachusetts to permit the aliens in question to land. I think there is no treaty or act of Congress which can justly be so construed. But it is not necessary to examine that question until we have first inquired whether Congress can lawfully exercise such a power, and whether the States are bound to submit to it. For if the people of the several States of this Union reserved to themselves the power of expelling from their borders any person, or class of persons,

[1] 5 How. 613, 12 L. ed. 256. [2] 7 How. 465, 12 L. ed. 702.

whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this court could neither recognize or enforce. I had supposed this question not now open to dispute."

§ 43. Justice Swayne, in United States *v.* Rhodes,[1] uses this language:

"A treaty is declared by the Constitution to be the 'law of the land,'" but adds, "What is unwarranted or forbidden by the Constitution can no more be done in one way than in another. The authority of the national government is limited, though supreme in the sphere of its operation. As compared with the State governments, the subjects upon which it operates are few in number. Its objects are all national. It is one wholly of delegated powers. The States possess all which they have not surrendered; the government of the Union only such as the Constitution has given to it, expressly or incidentally, and by reasonable intendment. Whenever an act of that government is challenged a grant of power must be shown, or the act is void."

Justice Swayne also in the Cherokee Tobacco case[2] uses this language:

"It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government."

§ 44. Mr. Justice Clifford uses this language in Holden *v.* Joy, in speaking of the treaty-power:[3]

"That the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States."

[1] U. S. Cir. Ct. 1866, 1 Abb. U. S. Rep. 43, 44. Fed. Cases 16151.
[2] 11 Wallace 616, 20 L. ed. 227.
[3] 17 Wallace 243, 21 L. ed. 523.

§ 45. Justice White, in Downes *v.* Bidwell, says:[1]

"The theory as to the treaty-making power upon which the argument which has just been commented upon rests, it is now proposed to be shown, is refuted by the history of the government from the beginning. There has not been a single cession made from the time of the Confederation up to the present day, excluding the recent treaty with Spain, which has not contained stipulations to the effect that the United States through Congress would either not disincorporate or would incorporate the ceded territory into the United States. There were such conditions in the deed of cession by Virginia when it conveyed the Northwest Territory to the United States. Like conditions were attached by North Carolina to the cession whereby the territory south of the Ohio, now Tennessee, was transferred. Similar provisions were contained in the cession by Georgia of the Mississippi territory, now the States of Alabama and Mississippi. Such agreements were also expressed in the treaty of 1803, ceding Louisiana; that of 1819, ceding the Floridas, and in the treaties of 1848 and 1853, by which a large extent of territory was ceded to this country, as also in the Alaska treaty of 1867. To adopt the limitations on the treaty-making power now insisted upon would presuppose that every one of these conditions thus sedulously provided for was superfluous, since the guaranties which they afforded would have obtained, although they were not expressly provided for.

"When the various treaties by which foreign territory has been acquired are considered in the light of the circumstances which surrounded them, it becomes to my mind clearly established that the treaty-making power was always deemed to be devoid of authority to incorporate territory into the United States without the assent, express or implied, of Congress, and that no question to the contrary has ever been even mooted."

Justice White, in Downes *v.* Bidwell,[2] further says:

"And, looked at from another point of view, the effect of the principle asserted is equally antagonistic, not only to the express provisions but to the spirit of the Constitution in other respects. Thus, if it be true that the treaty-making power has the authority which is asserted, what becomes of that

[1] 182 U. S. 318, 45 L. ed. 1088, 21 S. C. 770. [2] *Id.*, p. 313.

branch of Congress which is peculiarly the representative of the people of the United States, and what is left of the functions of that body under the Constitution? For, although the House of Representatives might be unwilling to agree to the incorporation of alien races, it would be impotent to prevent its accomplishment, and the express provisions conferring upon Congress the power to regulate commerce, the right to raise revenue — bills for which, by the Constitution, must originate in the House of Representatives — and the authority to prescribe uniform naturalization laws would be in effect set at naught by the treaty-making power. And the consequent result — incorporation — would be beyond all future control of or remedy by the American people, since, at once and without hope of redress or power of change, incorporation by the treaty would have been brought about. The inconsistency of the position is at once manifest."

And again he says:[1]

"If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions. If the proposition be true, then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the Government be overthrown. While thus aggrandizing the treaty-making power on the one hand, the construction at the same time minimizes it on the other, in that it strips that authority of any right to acquire territory upon any condition which would guard the people of the United States from the evil of immediate incorporation. The treaty-making power then, under this contention, instead of having the symmetrical functions which belong to it from its very nature, becomes distorted — vested with the right to destroy upon the one hand and deprived of all power to protect the government on the other."

§ 46. Chief Justice Fuller, in Downes *v.* Bidwell,[2] *supra*, says:

[1] 182 U. S. 312, 45 L. ed. 1088, 21 S. C. 770. [2] Page 370.

"Indeed a treaty which undertook to take away what the Constitution secured or to enlarge the Federal jurisdiction would be simply void. . . . And it certainly cannot be admitted that the power of Congress to lay and collect taxes and duties can be curtailed by an arrangement made with a foreign nation by the President and two thirds of a quorum of the Senate. See 2 Tucker on the Constitution, §§ 354–356."

§ 47. In Turner *v.* The American Baptist Missionary Union,[1] Justice McLean, in delivering the opinion of the Court, says:

"A treaty under the federal constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government, can be regarded as a law, until it shall have all the sanctions required by the constitution to make it such. As well might it be contended, that an ordinary act of Congress, without the signature of the President, was a law, as that a treaty which engages to pay a sum of money, is in itself a law.

"And in such a case, the representatives of the people and the States, exercise their own judgments in granting or withholding the money. They act upon their own responsibility, and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required."

§ 48. Mr. Chief Justice Murray, in Siemssen *v.* Bofer,[2] delivered the following strong opinion:

"In my opinion, the treaty-making power can only be coeval with the express grant of power to the Federal Government, and can never be extended, by implication, to the reserved

[1] 5 McLean 347. Fed. Cases 14251.

[2] 6 California Reports, pp. 250–252.

powers of the State, or matters which belong to State Sovereignty, or the right which appertains to each State to govern her own domestic concerns, and establish her own police regulations; neither can the exercise of this power, on the part of the President and Senate, be extended to matters which are the proper subject of congressional legislation; 'for it would,' as Mr. Jefferson truly remarks, in his letter to Mr. Monroe, in 1796, upon the subject of the British treaty, 'be virtually transferring the powers of legislation from the President, Senate and House of Representatives, to the President, Senate and Piamingo, and any other Indian, Algerine or other chief.'

"The true rule of interpretation, in my opinion, is, that whenever the treaty embraces matters which are the subject of legislation by Congress, it will require an act of legislation to carry the treaty into effect; otherwise the House of Representatives is a useless appendage to the political machinery of our government, and powers which are expressly prohibited to Congress, or reserved to the States, may be exercised through the instrumentality or omnipotence of the treaty-making power.

"To assert the proposition that the President and Senate are above the Constitution in this particular, and that they may do in this behalf, what the President, and both Houses of Congress cannot do, would be destructive of the government; for, under the cover of a resort to the treaty-making power, every outrage and injustice which illiberality can conceive, or fanaticism execute, may be perpetrated. By a treaty with England, her free black citizens may be introduced into South Carolina and other slave States of the Union, contrary to the police regulations of those States. The Asiatics, and the convicts of the penal colonies of the South Pacific, may be introduced into California on the same footing as the intelligent and virtuous population of the more favored portions of Europe, and every branch of trade, agriculture, commerce and manufactures, may be prostrated at the feet of this unconstitutional mastodon. Nay, more; by a treaty of amity and friendship with the Emperor Soulouqe of Hayti, every slave in the Southern States may be emancipated, and turned loose upon their present masters.

* * * * * * *

"It cannot be contended, with any show of reason, that the Federal Government took this grant of power in the enlarged

sense in which it is exercised by England, and the nations on the continent of Europe; or that she is vested with the same plenary powers that the individual States were before the adoption of the Constitution.

"The political structure of our government forbids such an idea. The power must be construed in reference to the powers delegated to the United States, and those reserved to the States, and must be further limited to objects which are the peculiar and proper subject matter of treaty stipulation.

"The exercise of this power under the Constitution, can scarcely extend beyond that of declaring war, making peace, regulating commerce, and adjusting national misunderstandings or differences; and for the execution of such purposes, the power to alter the rules of descent, to change the domestic policy of a State, and to alter the laws of evidence are not incidents, any more than the right to abolish slavery, or any of the other acts we have enumerated."

§ 48 *a*. In The People *v.* Naglee,[1] a case involving the constitutionality of a law of California requiring a license fee of all foreigners for the privilege of working the gold mines in said State, one of the questions being whether said law contravened a treaty between the United States and China, Judge Bennett, delivering the unanimous opinion of the Court, said:

"But even if the provisions of the statute did clash with the stipulations of that, or of any other treaty, the conclusion is not deducible that the treaty must, therefore, stand, and the state law give away. The question in such case would not be solely what is provided for by the treaty, but whether the state retained the power to enact the contested law, or had given up that power to the general government. If the state retains the power, then the president and senate cannot take it away by a treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that

[1] 1 Cal. 246, pp. 246, 247. See dissenting opinion of Judge Field in Lin Sing *v.* Washburn, 20 Cal. 584, sustaining the judgment in this case.

body, it cannot supersede a state law which enforces or exercises any power of the state not granted away by the constitution. To hold any other doctrine than this, would, if carried out into its ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective states, or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the states to a foreign nation. . . .

"It is not within the scope of a constitutional treaty to interfere with the reserved powers of taxation and of control over foreigners, which we have above discussed. No treaty, within our knowledge, has attempted to do it; and if such attempt should be made, the stipulation would, we apprehend, be neither recognized nor enforced by the supreme tribunal of the nation. . . ."

In 1878 the legislature of California passed an act entitled "An Act to protect public health from infection," etc., and which prescribed certain conditions for exhuming the dead, and certain fees to be paid, and so on, the Act being general in its character and applicable to all persons. It was objected to the Act that it was in conflict with the Burlingame Treaty between the United States and China. Sawyer, C. J., in delivering the opinion of the Court in a noted case held that the Act did not conflict with said treaty, and adds:[1]

"Besides, it may well be questioned whether the treaty-making power would extend to the protection of practices, under the guise of religious sentiment, deleterious to the public health or morals, or to a subject-matter within the acknowledged police power of the state. . . ."

§ 49. In the case of Compagnie Française de Navigation *v.* State Board of Health,[2] involving a conflict between an Act of Louisiana, giving powers to the State Board of Health to prohibit the introduction of infected persons, etc., and a Treaty between the United States and Italy, Chief Justice Nicholls, speaking for the court, said (pp. 660 and 662):

[1] *In re* Wong Yung Quy, Fed. Rep. Vol. 2, p. 632.
[2] 51 La. Ann. 645.

"Appellants maintain that the act of the General Assembly is violative of the constitution of the United States, and in contravention of its treaties with France and Italy, and its immigration laws. We are not of that opinion. It is the right and duty of the different States to protect and preserve the public health. This right is not held by the States by permission of the Federal government nor is its legitimate and proper exercise controlled by that government simply by reason of the existence of a power in the latter 'to regulate commerce.' As a matter of course, State legislation which would cross the boundary line which separates the State's police power of protecting the public health, to really interfere with and invade the right and power of the general government to regulate commerce, would be set aside, but it is not every restriction upon commercial operations, remotely and incidentally brought about by the passage of State health laws, which can properly be designated as such interference or invasion. *In re* Rahrer, 140 U. S. 554, the Supreme Court of the United States, speaking through Chief Justice Fuller, made use of the following language: 'The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized State legislation, legitimately for police purposes, as not, in the sense of the Constitution, infringing upon any right which has been confided, expressly or by implication, to the general government. . . .'

"The treaties and laws of the United States must be held to have been passed with reference to and subsidiary to the rightful exercise of the police power by the different States in aid of the protection and preservation of the public health within their respective borders. We scarcely think it could be pretended that an act of the General Assembly of Louisiana, under the provisions of which a shipload of citizens of the State of New York could be legally prevented from being landed in the city of New Orleans during an epidemic, could, by reason of a treaty, be held as against foreigners coming to our shores, to be inoperative, null and void. They could have no broader rights than our own citizens, in this matter, and should be

subjected to the same restrictions and inconveniences which they are, when these are demanded at their hands for the preservation and protection of the public health. . . ."

This case was appealed to the Supreme Court of the United States and affirmed in an opinion by Justice White.[1]

§ 50. In the case of Jones *v.* Walker,[2] Chief Justice Jay in his opinion discusses the validity of treaties in an interesting way as follows:

"Perhaps it may tend to elucidate the subject if we were to consider *validity* applied to treaties, as admitting of two descriptions, viz., *necessary* and *voluntary*.

"By *necessary* validity, I mean that which results from the treaty's having been made by persons authorized by, and for purposes consistent with the constitution. To this kind of validity all such questions as these relate, viz.: Has the treaty been made and ratified by the President, by the advice and consent of three-fourths of the senators present? Is it temporary, and has it expired? Is it perpetual? Has it been dissolved with mutual agreement? Has it been annulled and declared to be void by the nation, or by those to whom the nation has committed that power? Does it contain articles repugnant to the constitution? Are those articles void? Do they vitiate the whole treaty? etc., etc.

"By *voluntary* validity, I mean that validity which a treaty, become voidable by reason of violations, afterwards continues to retain by the silent volition and acquiescence of the nation. I call it *voluntary*, because it entirely depends on the will of the nation, either to let it continue to operate, or to annul and extinguish it.

"To this head such questions as these relate, viz.: Has the treaty been so violated as justly to become voidable by the injured nation? Is it advisable immediately to declare it void? Would such a measure probably produce a war? Would it be more prudent first to remonstrate and demand reparation, or to direct reprisals? Are we in condition for war? Ought we at this juncture to risk it, or shall we postpone that risk until we can be better prepared for it? Shall we at this moment

[1] Compagnie Française *v.* Board of Health, 186 U. S. 380, 46 L. ed. 1225, 22 S. C. 895.

[2] 2 Paine C. C. 695. Fed. Cases 7507.

take *any* measures, or would it be more prudent to remain silent for the present, and let the treaty go on and continue to operate as if nothing had happened? etc., etc.

"On comparing the principles which govern and decide the *necessary* validity of a treaty, with those on which its *voluntary* validity depends, we cannot but perceive that the former are of a *judicial*, and that the latter are of a *political* nature. That diversity naturally leads to an opinion that the former are referable to the judiciary, and the latter to those departments who are charged with the political interests of the States."

§ 51. In Doe *v.* Braden,[1] Chief Justice Taney says:

"The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of the provisions, *unless they violate the Constitution of the United States.*" [2]

[1] 16 How. 635, 14 L. ed. 1090. [2] Author's italics.

CHAPTER III

The Treaty Power under the Articles of Confederation as Strong as under the Constitution. The Chief Difference being that under the Former there was no Judicial Tribunal to enforce Treaties

§ 52. Since the Constitution of the United States was developed from the Articles of Confederation, it will be necessary to examine the following Articles in that instrument bearing upon the treaty power:

Article II. "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled."

Article V. . . . "Each state shall have one vote."

Article VI. "No state without the consent of the United States in Congress assembled, shall enter into any conference, agreement, alliance, or treaty, &c."

Article IX. "The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war; . . . Entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatever." . . .

"The United States, in Congress assembled, shall never engage in a war, . . . nor enter into any treaties or alliances; . . . unless nine states assent to the same."

ARTICLE XIII. "Every state shall abide by the determination of the United States in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every state; and the Union shall be perpetual."

§ 53. In the consideration of the treaty-making power under the Articles of Confederation, we will consider first the Articles themselves, quoted *supra*, as to their scope and meaning; and second, we will consider historically their adoption, by whom adopted, and their binding effect upon the parties to them.

First: In the Declaration of Independence each of the original thirteen States had declared "That these united colonies are, and of right ought to be free and independent States . . . and that as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do." That Declaration proclaimed the fact that each one of the States was clothed with all of the powers incident to free and independent States. How long they retained all of these original powers before yielding some of them to the Continental Congress it is needless to inquire. The statement in the Declaration of Independence did not clothe them with these powers, it was merely the declaration of what already existed; and when the representatives of each State in the Continental Congress undertook to frame the Articles of Confederation, each State possessed and retained all of the rights of sovereign States, except such as had been accorded the Congress in their voluntary union for their mutual defense and welfare against a common enemy.

The Continental Congress was plainly inadequate to the needs of the hour. A common cause, a common patriotism, and their threatened subjugation by the Mother Country, united in demanding a closer union and greater powers in the Congress for the establishment of the freedom of the American people. And so it came to pass, in order to effect this closer union, while each State was to retain those powers which were

necessary for its domestic development, that the powers which each possessed affecting their relations with foreign countries, or their common interests at home, such as the power to carry on war, to conclude peace, to make treaties, etc., were to be surrendered by each to a central hand to be administered for the benefit of all; and hence we find this idea expressed in Article II, "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this Confederation *expressly* delegated to the United States in Congress assembled." This Declaration was clear, simple, and complete.

If a question during this period arose, as to whether Congress possessed a certain power, it was only necessary to refer to the Articles to see if such power was *expressly* granted to Congress therein. There was no room here for the doctrine of implied powers. This was impossible. Nor was there any place here for the doctrine of inherent powers, for the Congress under this Article possessed only those which were *expressly* granted. No State could declare war, make a treaty, or regulate the alloy and value of coin, or fix the standard of weights, or establish post-offices, or commission officers in the service of the United States, because these were all expressly given to Congress. But every power, jurisdiction, and right pertaining to the State in its sovereign capacity, remained with each, except such as had been expressly delegated to Congress.

§ 54. Having adopted Article II, defining the powers of Congress, and the States under the Articles, in order to leave no doubt in the minds of any one as to its scope and meaning, Article XIII followed. "Every State shall abide by the determination of the United States in Congress assembled, *on all questions which by this Confederation shall be submitted to them.*[1] And the Articles of Confederation shall be *inviolably observed by every State;*[1] and the Union shall be perpetual."

The binding effect of Article II on each and every State is here made clear and unequivocal. The effect of any power

[1] Author's italics.

herein granted to the Congress, on the domestic policy of any State, need not be considered. They had solemnly considered what questions should be considered by the Congress in the enumeration of those powers which had been granted to the Congress in Article IX. They had the right to withhold, or to give power; they had the right to limit such powers, as they had done in Article IX, as to treaties of commerce; and in the same Article where the assent of nine States was necessary to enact a binding treaty. So that when in Article IX, the United States in Congress assembled were given "the sole and exclusive right and power of . . . entering into treaties and alliances," there could be no ground for questioning its power and extent. The power of the Congress to make such treaties is sanctioned in Article II, wherein it is declared that the Congress in order to possess a power, must find it *expressly* delegated to them. The extent of the power is shown in Article XIII, where every State is required to abide by "all questions which by this Confederation shall be submitted to them; and the Articles of this Confederation shall be inviolably observed by every State." When once the power is found, as in this case, *expressly* delegated to Congress, the States are bound by it. It would be difficult to find a stronger presentation of the supremacy of any power than is shown in the Articles of Confederation, for the treaty-making power. There was no divided supremacy, as found in Article VI of the Constitution.

In Article VI, the State is prohibited from entering into any treaty. This sovereign power, which each possessed before the adoption of these Articles, each surrendered. Added to this, is Article XI, "The United States, in Congress assembled, shall have the *sole* and *exclusive* right and power of entering into treaties," etc. The State is denied the right to make a treaty. The United States, in Congress assembled, are given the sole and exclusive right to make them. Human language could not be stronger or clearer. The use of the words, *sole* and *exclusive* in the power to make treaties, excludes any possible interference that might be offered by any State, and with the binding effect

of Article XIII on the States, no loophole for escape against these provisions in favor of the *sole* and *exclusive* power of Congress to make treaties is left the State.

§ 55. *Second.* Having considered the several Articles bearing upon the treaty-making power in the Articles of Confederation — in their full scope and meaning — it becomes necessary now to consider the origin of the Articles; and whether their adoption was by a body competent and authorized to make them effective and conclusive upon the newly liberated States.

The scope and meaning of these Articles may be broad and clear, and yet, if they were without authority or binding force when adopted, and never ratified afterwards by a competent authority, they were powerless for good. On the other hand, if they were the product of a body empowered to act for the people of the several States in the premises; or, if without authority originally to bind the several States, these unauthorized provisions were accepted and adopted by the States in binding form, they are effective and conclusive.

The Articles of Confederation were passed November 15, 1777, by the Continental Congress. Whom did this Congress represent? And what powers did it possess to make the Articles of Confederation binding upon the States? If we regard the Continental Congress as a mere committee of safety whose delegates were appointed by the several States to "confer and resolve," with no power to act; as a Parliament with all the exterior badges of authority, but in reality, lacking every element of initiative and action, it is at least historically true, that by recorded vote of its members on the 15th of November, 1777, they adopted these Articles, not as final nor as binding on the States, but with this provision attached to them: "These Articles shall be proposed to the Legislatures of all the United States, and if approved by them, they are advised to authorize their delegates to ratify the same in the Congress of the United States, which being done, the same shall become conclusive." This provision required the ratification by all of the States

before the Articles could become binding on any one of them. A copy of the Articles was sent to each State, who gave them their legal sanction by their separate and independent ratification; and if originally proposed by the Continental Congress without authority, their ratification by the several States made them as conclusive upon the States as if proposed by a competent authority. *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.*

§ 56. But the Continental Congress was not, as supposed above, a body unauthorized to formulate the Articles of Confederation; and in so doing, the delegates were representing their several States under their credentials which authorized such action. An appeal to their credentials will settle this question completely. Judge Story says, speaking of the first Continental Congress which met on the 5th of September, 1774: "The Convention, thus assembled, exercised *de facto* and *de jure* a sovereign authority; not as the delegated agents of the governments *de facto* of the colonies, but in virtue of original powers derived from the people." The learned author was hardly warranted in attributing such power to this Convention, for many of the delegates, notably, those from Massachusetts, Rhode Island, Connecticut, Pennsylvania, and South Carolina were appointed either by the popular branch of the General Assembly of their State, or by both branches, the Senate and the House; and therefore, such delegates could only exercise a delegated authority, since sovereign authority can only emanate from the people. In the other States, where the Assemblies had been dissolved by the King, the selections were made by the people in convention. The Congress itself recognized its own limitations, for it did not claim, in adopting the Articles of Confederation, that such act was binding on the States; for they referred them back to the States for their ratification; and without the ratification by all, it was binding on none. If the Congress, as Judge Story claims, was exercising original sovereign powers, referring the Articles back to the States for ratification was an unnecessary step.

§ 57. The credentials of the delegates to the first Congress will be found in the First Journal of Congress, page 69. A marked similarity is shown in all of these.

In New Hampshire, it was declared that "They (the delegates) and each of them, in the absence of the other, have full and ample power in behalf of this province to consent and agree to all measures which said Convention shall deem necessary," etc.

In North Carolina, the credentials contained this provision, "And they are hereby invested with such powers as may make any acts done by them, or any of them, or consent given in behalf of this province, obligatory in honor upon every inhabitant thereof."

In Maryland, they were appointed with "full and ample power to consent and agree to all measures that such Convention shall deem necessary."

New Jersey and Delaware required their delegates to report their proceedings "to the next session of the General Assembly." In New York the delegates were commissioned "to consent and determine upon such measures as shall be adjudged most effectual." These credentials gave ample latitude to the Congress to consider and propose the Articles of Confederation to the States, but it is clear that without the ratification of them by the several States, the action of the Congress would have been futile. The credentials of the delegates to the Congress, which passed the Articles of Confederation, are in many respects similar to those just quoted, given to the members of the First Continental Congress. The States which commissioned delegates to the Congress which enacted the Articles of Confederation by their General Assemblies, were Connecticut,[1] Massachusetts,[2] North Carolina,[3] Maryland,[4] Pennsylvania,[5] and Virginia.[6]

New Hampshire selected its delegates by its House of Representatives,[7] New York elected its delegates through a Con-

[1] Journals of Congress, III, p. 5. [2] *Id.*, p. 7.
[3] *Id.*, p. 37. [4] *Id.*, p. 53. [5] *Id.*, p. 54. [6] *Id.*, p. 261.
[7] *Id.*, pp. 32 and 134.

vention of the Representatives of the State of New York.[1] Rhode Island and Providence Plantation elected its delegates by the people.[2]

§ 58. It is manifest from the mode of these appointments that the delegates were not clothed with sovereign power; but were merely the delegated agents of their respective States. Only two of the States, New York and Rhode Island, elected by the people, or by a Convention of the people, the only source of sovereign power, and hence the Congress, after adopting the Articles of Confederation, referred them back to the States for their ratification.

The form of some of these credentials are interesting: In Connecticut, after giving full authority to their delegates, "To consult, advise and resolve upon measures necessary to be taken and pursued for the defense, security and preservation of the rights and liberties to the United States," etc., they were required to send to the General Assembly of the State, such of their "proceedings and resolves," etc.

Massachusetts empowered her delegates to "Concert, direct, and order such further measures . . . for prosecuting the present war, concluding peace, *contracting alliances*,"[3] and so on.

North Carolina invested her delegates with such powers "As may make any act done by them, or any of them, or consent given in the said Convention, in behalf of this State, obligatory upon every inhabitant thereof."

Maryland authorized her delegates to "Execute every measure which they . . . together with a majority of the Continental Congress, shall judge necessary for the defense, security and interest or welfare of this State in particular, and of America in general."

It is clear from the above recital, that the delegates to the Continental Congress, from its beginning in 1774 to its close in 1788, represented the several States from which they came; and each delegate was responsible to his own State, under his credentials, for his action. The separate credential of each

[1] Journals of Congress, III, p. 169. [2] *Id.*, p. 171. [3] Author's italics.

gave them power to consult, advise, and resolve upon measures which were necessary and expedient for the security of all the States. The separate States, through their General Assemblies, or Conventions of the people, commissioned them, and with their commissions, they took their credentials, giving them the authority above stated, which was similar in its nature to the charter granted to a corporation by the State. We conclude, therefore, that the Continental Congress represented the several States, and each commissioned its own delegates. And though the number of delegates from each State was not the same, yet, in the Congress each State had but one vote, and the vote was by States, and not by numbers. Having the power, as shown by their credentials, to consult, advise, and propose what might be best for all in the defense of common rights and of common liberties, this body had the unquestioned right to adopt the Articles of Confederation, and propose them to the States for their ratification; but had no power to bind the States, since, under their credentials, they were only authorized to consult, propose, advise and so on. But when they were proposed by the Congress, then referred back to the States for their approval and ratification, and approved by each of the States, they became binding upon all.

§ 59. We have thus sought to give the full scope and meaning of the provisions of the Articles of the Confederation relating to the treaty-making power, wherein the Congress is given the sole and exclusive power of making treaties and to show their binding effect after being ratified by the Congress; but undoubtedly there was a division of sentiment among individuals and States as to how far the treaty-making power was vested in the Congress to the exclusion of the rights of the States. But few treaties were made by the Congress during that period; but by some of those, some of the States refused to be bound.

During the Revolutionary War in some States laws were passed to confiscate British debts; and there can be no doubt that the feeling throughout America — held by a considerable number of people, was against the payment of debts to their

enemies, who, by a destructive war lasting seven years, had drained the resources of the country practically to the verge of bankruptcy. And the argument was strongly used, that if British subjects, by waging an unjust war, had reduced the capacity of Americans to pay their debts, the latter should be released from their obligations. The payment of debts, recognized as one of the highest duties of good citizenship, though rarely accompanied by ecstasy, even when paid to a friend, is robbed even of that solace when compelled by an enemy, who has taken away from his debtor the means of payment. While this view is sound from neither a personal nor a national point of view, it is one which inevitably arises after a war between two countries. It was therefore not surprising that the Revolutionary period, as well as the post-Revolutionary period produced such sentiment; and America being largely the debtor nation at the close of the Revolution, it was not the least surprising that when the definitive Treaty of Peace came to be made that Great Britain should have exhibited the greatest interest in securing the rights of creditors. It is a part of the history of the times that on the part of Great Britain it was regarded as one of the most important features of the proposed treaty, while the better thought of America, rising above the passions engendered by the long and bloody war, recognized this as a legitimate subject for settlement when peace was declared. The Congress had no doubt of its power to make a treaty which would be binding on the States, as may be seen from a letter of theirs, a part of which I quote:[1]

"The Secretary for foreign affairs, (John Jay) having in pursuance of an order of Congress, reported the draft of a letter to the states to accompany the resolutions, passed the 21st day of March, 1787, the same was taken into consideration and unanimously agreed to as follows;

"Sir;

"Our secretary for foreign affairs has transmitted to you copies of a letter to him, from our minister at the court of Lon-

[1] Journals of Congress, Vol. XII, p. 45.

don, of the 4th day of March, 1786, and of the papers mentioned to have been enclosed with it.

"We have deliberately and dispassionately examined and considered the several facts and matters urged by Britain, as infractions of the treaty of peace of the part of America, and we regret that in some of the states too little attention appears to have been paid to the public faith pledged by that treaty.

"Not only the obvious dictates of religion, morality and national honor, but also the first principles of good policy, demand a candid and punctual compliance with engagements constitutionally and fairly made.

"Our national constitution having committed to us the management of the national concerns with foreign states and powers, it is our duty to take care that all the rights which they ought to enjoy within our jurisdiction by the laws of nations and the faith of treaties, remain inviolate. And it is also our duty to provide that the essential interests and peace of the whole confederacy be not impaired or endangered by deviations from the line of public faith, into which any of its members may from whatever cause be unadvisedly drawn.

"Let it be remembered that the Thirteen Independent Sovereign States have, by express delegation of power, formed and vested in us a general though limited sovereignty, for the general and national purpose specified in the confederation. In this sovereignty they cannot severally participate (except by their delegates) nor with it have concurrent jurisdiction; for the ninth article of the confederation most expressly conveys to us the sole and *exclusive* right and power of determining on *war* and *peace*, and of entering into *treaties* and alliances, &c.

"When therefore a treaty is constitutionally made, ratified and published by us, it immediately becomes binding on the whole nation, and superadded to the laws of the land, without the intervention of state legislatures. Treaties derive their obligation from being compacts between the sovereign of this and the sovereign of another nation; whereas laws or statutes derive their force from being the acts of a legislature competent to the passing of them. Hence it is clear that treaties must be implicitly received and observed by every member of the nation; for as state legislatures are not competent to the making of such compacts or treaties, so neither are they competent in that capacity, authoritatively to decide on, or ascertain

the construction and sense of them. When doubts arise respecting the construction of state laws, it is not unusual nor improper for the state legislatures, by explanatory or declaratory acts, to remove those doubts: but the case between laws and compacts or treaties is in this widely different; for when doubts arise respecting the sense and meaning of a treaty, they are so far from being cognizable by a state legislature, that the United States in Congress assembled have no authority to settle and determine them; for as the legislature only, which constitutionally passes a law, has power to revise and amend it, so the sovereigns only, who are parties to the treaty, have power by mutual consent and posterior articles, to correct or explain it. . . . Thus much we think it useful to observe, in order to explain the principles on which we have unanimously come to the following resolution, viz.:

"'*Resolved*, That the legislatures of the several states cannot of right pass any act or acts for interpreting, explaining, or construing a national treaty, or any part or clause of it; nor for restraining, limiting, or in any manner impeding, retarding or counteracting the operation and execution of the same; for that on being constitutionally made, ratified and published, they become in virtue of the confederation, part of the law of the land, and are not only independent of the will and power of such legislatures, but also binding and obligatory on them.'"

§ 60. Again: John Jay, subsequently the first Chief Justice of the United States Supreme Court, was Secretary of Foreign Affairs under the Congress of the Confederation. Under the direction of Congress he was requested to report to them his views of their powers to make binding treaties without objection by the States. This Report is found in Vol. IV of the Secret Journals of Congress, page 185. I quote from page 203:

"On considering the before recited papers, these important questions present themselves:

"1. Whether any individual state has a right, by acts of their own internal legislature, to explain and decide the sense and meaning in which any particular article of a national treaty shall be received and understood within the limits of that state?

"2. Whether any and which of the acts enumerated in the

list of grievances do violate the treaty of peace between the United States and Great Britain?

"3. In case they or any of them should be found to violate it, what measure should be adopted in relation to Great Britain? And

"4. What measures should be adopted in relation to the state or states which passed the exceptionable acts?

"Of these in their order; and

"1. Of the right of an individual state to enact in what sense a national treaty shall be understood within its particular limits.

"Your secretary considers the thirteen independent sovereign states as having, by express delegation of power, formed and vested in Congress a perfect though limited sovereignty for the general and national purposes specified in the confederation. In this sovereignty they cannot severally participate (except by their delegates) or have concurrent jurisdiction; for the ninth article of the confederation most expressly conveys to Congress the sole and *exclusive* right and power of determining on war and *peace*, and of entering into treaties and alliances, etc.

"When therefore a treaty is constitutionally made, ratified and published by Congress, it immediately becomes binding on the whole nation, and superadded to the laws of the land, without the intervention, consent or fiat of state legislatures."

And further, in concluding his report, he says:

"In the present case he thinks it would be proper to resolve,

"1. That the legislatures of the several States cannot of right pass any act or acts for interpreting, explaining or construing a national treaty, or any part or clause of it; nor for restraining, limiting or in any manner impeding, retarding or counteracting the operation or execution of the same; for that on being constitutionally made, ratified and published, they become, in virtue of the confederation, part of the law of the land, and are not only independent of the will and power of such legislatures, but also binding and obligatory on them.

"2. That all *such* acts or parts of acts as may be now existing in either of the states, repugnant to the treaty of peace, ought to be forthwith repealed; as well to prevent their continuing to operate as violations of that treaty, as to avoid the disagreeable necessity there might otherwise be of raising and discussing questions touching their validity and obligation.

"3. That it be recommended to the several states, to make such repeal rather by describing than reciting the said acts; and for that purpose to pass an act, declaring in general terms, that all such acts and parts of acts repugnant to the treaty of peace between the United States and his Britannic majesty, or any article thereof, shall be and thereby are repealed; and that the courts of law and equity in all causes and questions cognizable by them respectively, and arising from or touching the said treaty, shall decide and adjudge according to the true intent and meaning of the same, anything in the said acts or parts of acts to the contrary thereof in any wise notwithstanding."

§ 61. In the Continental Congress, when the discussion of Mr. Jay's report came up, in which were incorporated the above resolutions declaring the views of the Congress as to their powers over the States in the enactment of treaties, Mr. Madison gives the following record of the proceedings on Tuesday, March 20, and Wednesday, March 21, 1787, in the Congress:[1]

"Tuesday, March 20th. Mr. Jay's report on the Treaty of Peace taken up. Mr. Yates objected to the first resolution, which declares the Treaty to be a law of the land. He said the States, or at least his State, did not admit it to be such until clothed with legal sanction. At his request he was furnished with a copy of the resolution, for the purpose of consulting such as he might choose.

"Wednesday, March 21st. The subject of yesterday resumed.

"Mr. Yates was now satisfied with the resolutions as they stood. The words 'constitutionally made,' as applied to the Treaty, seemed to him, on consideration, to qualify sufficiently the doctrine on which the resolution was founded.

"The second and third resolutions, urging on the States a repeal of all laws contravening the Treaty, (first, that they might not continue to *operate* as violations of it; secondly, that questions might be avoided touching their validity), underwent some criticisms and discussions.

"Mr. Varnum and Mr. Mitchell thought they did not consist with the first, which declared such laws to be void, in which case they could not *operate* as violations.

"Mr. Madison observed, that a repeal of those contravening laws was expedient; and even necessary, to free the courts

[1] Madison Papers, Vol. II, p. 595.

from the bias of their oaths, which bound the judges more strongly to the State than to the Federal authority. A distinction too, he said, might be started possibly between laws prior and laws subsequent to the Treaty; a repealing effect of the Treaty on the former not necessarily implying the nullity of the latter. Supposing the Treaty to have the validity of a law *only*, it would repeal all antecedent laws. To render succeeding laws void, it must have more than the *mere* authority of a *law*. In case these succeeding laws, contrary to the Treaty, should come into discussion before the courts, it would be necessary to examine the foundation of the Federal authority, and to determine whether it had the validity of a Constitution, paramount to the legislative authority in each State. This was a delicate question, and studiously to be avoided, as it was notorious that, although in some of the States the Confederation was incorporated with, and had the sanction of, their respective constitutions, yet in others it received a legislative ratification only, and rested on no other basis. He admitted, however, that the word 'operate' might be changed for the better, and proposed, in its place, the words 'be regarded,' as violations of the Treaty, — which was agreed to without opposition."

Mr. Curtis, in his "Constitutional History of the United States," [1] referring to the response of the States to the action of Congress, said:

"Most of the States passed acts, in compliance with recommendation of Congress, to repeal their laws which prevented the collection of British debts. But the State of Virginia, although it passed such an act, suspended its operation until the governor of the State should issue a proclamation, giving notice that Great Britain had delivered up the western posts, and was taking measures for the further fulfilment of the Treaty, by delivering up the negroes belonging to the citizens of that State, which had been carried away, or by making compensation for their value."

In a note to this paragraph he says:

"New Hampshire, Massachusetts, Rhode Island, Connecticut, Delaware, Maryland, Virginia, and North Carolina passed such acts."

[1] Vol. I, 174.

§ 62. Mr. Madison, in the 45th number of the Federalist, sets forth the fact that the Federal Constitution differed from the Articles of Confederation not so much in the addition of new powers to the Federal Government, as in the strengthening of those powers in the Articles which were granted to the Federal Government. He says:

"The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the Articles of Confederation. The proposed change *does not enlarge* [1] its powers. It only substitutes a more effectual mode of administrating them."

Chief Justice John Jay, in the 44th number of the Federalist, writes, as all the Articles in the Federalist were written, to induce the people of the United States to accept the Constitution:

"The proposed Constitution therefore has not in the least extended the obligations of treaties. They are just as binding and just as far beyond the lawful reach of legislative acts now as they will be at any future period or under any form of government."

§ 63. The above quotations show conclusively that the Congress itself believed in the complete power of the Congress, under the Articles, to enact a treaty without opposition from the States. Why then, did some States enact laws which had for their object the annulment of treaties?

The reason is plain, and is well stated by Mr. Hamilton in the 22d number of the Federalist, wherein he says:

"A circumstance which crowns the defects of the Confederation remains yet to be mentioned, the want of a judiciary power. Laws are a dead letter, without courts to expound and define their true meaning and operation. The Treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws be ascertained by judicial determinations. To produce uniformity in these determinations they ought to be submitted, in the last resort, to one supreme tribunal."

[1] Author's italics.

This seems to have been the fatal defect in the Articles of Confederation as to their treaty-making power. Practically all writers on this subject admit that there was ample power given to the Congress by the Confederation to make treaties, but that it did not possess sufficient power to enforce them. That power could be supplied as suggested by Mr. Hamilton, and so the Constitution of the United States remedied that defect, by providing that the judicial power of the United States should extend to all questions arising under treaties. The lack of the Federal Judiciary in the Articles of Confederation was one of the most serious impediments to their efficiency; and while undoubtedly the Constitution was the outcome of a universal recognition of the need of a more effective government, this lack of efficiency was in no wise due in all cases to the lack of ample powers granted to the Congress in the Articles of Confederation; and in respect to this special power that we are considering, the treaty-making power, we feel justified in asserting that the powers of the Congress under the Articles of Confederation to enact treaties were as strong and complete as under the Constitution of the United States.

But of what avail were those ample powers if there was no judicial power to enforce them, in case of disagreement with the States? And Mr. Jefferson himself declared that one of the objects of the calling of the Annapolis Convention was not only the regulation of commerce between the States, but the adoption of some provision by which treaties, which under the Articles of Confederation were disregarded by many of the States, might be enforced by a federal Judiciary.

CHAPTER IV

Treaty Power under the Constitution: its Supremacy considered in Relation to other Supreme Powers. Rules of Construction

§ 64. The consideration of the treaty-making power under the Constitution of the United States requires the consideration of the following clauses of the Constitution, which seem to be the only ones in which this power is involved:

Article VI, Clause 2. "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Article I, § 10, Clause 1. "No State shall enter into any treaty, alliance, or confederation."

Article I, § 10, Clause 2. "No State shall, without the consent of Congress . . . enter into any agreement or compact with another State or with a foreign power."

Article II, § 2, Clause 2. "He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

Article III, § 2, Clause 1. "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

Out of these provisions of the Constitution relating to the treaty-making power, together with others which may conflict

with them, will arise the real questions to be discussed in these pages.

§ 65. Article VI, Section 2, *supra*, taken by itself seems to contain a sweeping power with no restraint or limitation; and the error which has crept into the opinions of authors on this subject would seem to have come from the consideration of this clause by itself as if it were an independent, separate paper, without the important consideration that it was a part, and only a part of an instrument, which must be construed in its relation to all other sections of it in its entirety. This is an error which is often made but which has as often been exposed; nor need this view be dwelt upon because the judges of the Supreme Court from Marshall to White have insisted always that no proper construction of the Constitution can be had which does not take into consideration the unity of the whole instrument; that each of its provisions may enjoy its full powers, not by the destruction of any other, but by an interpretation which will harmonize the whole in the development of all at the expense of no one power. And, while there have been at times conflicts between State and Federal powers and difficulty in determining by which government certain powers should be exercised, the courts have not failed in determining such conflicts to recur to the cotemporaneous history of the formation of the Constitution, the record of which forms an illuminating page in the true interpretation of this instrument.

§ 66. That the Constitution was a compromise in its final form cannot be denied; nor can it be claimed by the advocates of a centralized government any more than by the advocates of State Sovereignty, that their views were finally incorporated into the Constitution. Indeed, the true theory of our government is simple and adequate: that in all local matters, of which only the locality has need, the people of such locality should be supreme in determining them; while in matters of more far-reaching effect, of national character, peculiar to no one State, but of common interest to all, the stronger hand of the Federal

Government should control in the interest of all; and that the State in providing local legislation for local interests must not, under the cover of that claim, invade the domain of Federal power, nor must the Federal Government, under pretense of National legislation, deprive the States of their right of supplying the local needs of the people. These simple principles need only to be expressed to command the approval of all. The practical application of them is a more serious problem, and in the careful demarcation of the line which defines the limits of State and Federal power, the real trouble has arisen.

In National affairs we are a unit; in local matters we represent forty-eight distinct and independent units, with laws, institutions, social customs, religious affinities, and aspirations as distinct as the billows. The strength of our government has been from the beginning in the recognition of these two principles — not antagonistic, but mutually helpful when rightfully maintained; and while there have been, undoubtedly, in our history, difficulties in adjusting the exact line dividing these powers, yet, it must be admitted that the Supreme Court, with evenhanded justice, has maintained the equilibrium without a jar to the great structure, and has faithfully repelled the aggressions by each upon the other.

§ 67. So, then, when any section of the Constitution is under consideration, the recognized rule of construction not only requires the examination of the section itself, in its verbiage, punctuation, and relation to other sections — for the maxim, *noscitur a sociis* must often be invoked — but equally important and necessary to its proper interpretation is its relation to the whole instrument, in letter and spirit. The Biblical sentiment "No man liveth to himself" is no less true in its application to man in his relations to society, than is the consideration of any one section of the Constitution in its relation to all others. This same principle applies to the construction of wills, deeds, and contracts.

If, therefore, Article VI of the Constitution was presented for interpretation as an independent instrument, standing alone

and by itself, its construction would be quite different from that which must be invoked in its construction as one section of the whole Constitution, carrying in its varied sections immutable and inalienable rights which are imbedded in its provisions, as well as in the hearts of the people. These latter rights, which pertain to the American citizen — the ready defender of his country, and the potential factor in its advancement, should surely be regarded as no less sacred and no less important than those which relate to "the stranger within our gates."

A due regard for the rights of strangers is readily accepted in the true spirit of hospitality inbred in every American, but there must be limitations upon the highest concept of hospitality. The stranger who enjoys the private hospitality of an individual can hardly be justified in abusing the rules and traditions of the home into which he is invited. The violation of any rule of propriety laid down by the master of the house would hardly be excused as a breach of decorum, under the flimsy excuse that the stranger had been invited to the house. The invitation carries with it, by distinct implication, the agreement to conform to the rules of the household — to do less would make him an intruder, rather than a guest and would justify the master in showing him the door. The Statue of Liberty at the great port of entry of our country, standing, with open arms, kindly beckoning the oppressed of every land to these shores, invites the foreigner to *our* home, established under *our* government, and controlled by *our* laws, and we ask him to come and accept these as we have developed them under our Christian civilization. And so when we come to consider Article VI, § 1, of the Constitution we must not forget the principles imbedded in the body of the Constitution as well as in the Amendments, of civil and religious liberty guaranteed to all citizens of America. In its consideration we must also keep in mind that the Tenth Amendment to the Constitution declares "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," and that this Amendment

is a part of the Constitution, which is "supreme," and therefore is itself "supreme."

§ 68. Article VI, § 1, in the Constitution, where this power is lodged, declares "supremacy" to treaties boundless and limitless in its scope and extent; but in the same Article, side by side with this, we find this same "supremacy" granted to "this Constitution" and to "the laws which shall be made in pursuance thereof," so that "this Constitution and the laws that shall be made in pursuance thereof, and all treaties made, or that shall be made, under the authority of the United States," shall be, *each of them*, the supreme law of the land.

The effect of this "trinity in unity" of supremacy in the same paragraph has been the subject of much controversy, and no little division of opinion, by those who have considered this subject.

It would seem impossible that three unlimited, uncontrolled supreme powers could coexist in one constitution or in one government; for the grant of "supremacy" to one negatives the grant of the same "supremacy" to another; for if the grant of "supremacy" to the second be valid, it must operate as a denial of the grant to the first, for "supremacy" admits no superiority or control. When under this paragraph the laws of Congress made in pursuance of the Constitution, are made the supreme law of the land, it would seem clear that no other power could supersede or annul it, and when it is said that the treaty is the supreme law of the land, the same must be said of the law of Congress.

§ 69. The necessity of a reconciliation of these provisions was in our early history forced upon the judiciary, and in Foster *v.* Neilson,[1] and The Cherokee Tobacco Case,[2] it was decided that a subsequent treaty annulled a prior Act of Congress, and reciprocally, a subsequent Act of Congress annulled a prior treaty, showing that one supreme power could annul another supreme power: These decisions in effect prove against the clear language of Article VI, § 2, that neither is supreme,

[1] 2 Peters 314, 7 L. ed. 688. [2] 11 Wall. 616, 20 L. ed. 227.

though the language of the Constitution declared both to be supreme, *for supremacy can never be predicated of any power that can be annulled by any other.* The Court recognized in these decisions that the term "supreme" was only a relative term, and that in its construction all other coördinate powers were to be considered, and that each supreme power in the Constitution of the United States must be considered not only in reference to the language that accords it supremacy, but in its relation to all others with which that supremacy may conflict.

That a treaty may supersede a law of Congress, or the law of Congress annul a treaty, makes clear the equality of power of each, but the statement of the fact is a denial of the absolute supremacy of the one over the other.

The treaty is regarded as a law of the land. The act of one legislature may be repealed by a subsequent one. The treaty being the law of the land may therefore be annulled by a subsequent law of the land, and the boasted supremacy of the treaty finds itself restricted, and despoiled of its birthright by its foster brother, the law of Congress.

§ 70. But Article VI of the Constitution, wherein is granted supremacy to treaties, unlike the power in Article IX of the Articles of Confederation, contains a limited supremacy, a divided supremacy, divided between the supremacy of the Constitution, the supremacy of the laws made in pursuance thereof, and the supremacy of treaties. Each cannot be supreme if either one of the other powers may destroy it. The supremacy herein declared of the Constitution forbids the treaty-making power to annul any of its provisions. Its supremacy would not permit the treaty power to abrogate or annul other powers granted to any branch of the Federal Government. The long list of enumerated powers granted in this instrument to the Congress cannot be absorbed or annihilated by the treaty-making power because these powers, being parts of the Constitution, are supreme under Article VI. To hold otherwise would be to recognize only chaos and confusion in the inter-

pretation of the Constitution. A due regard to the proper construction of any instrument, requiring that all parts of it must be made effective if possible, would certainly deny the right of the treaty-making power to annihilate others equally important and equally supreme. The treaty-making power may embrace in its extent every subject or object of human action and human endeavor. And every one of these subjects, which are expressly or by implication contained in any grant by the States to the Federal Government might be a proper subject of a Constitutional treaty, if each and every one of them was either specifically assigned in the Constitution to the treaty power or if they were not specifically given by the Constitution to some other branch of the Government for its protection and care. For example, had the Constitution declared that the power to regulate commerce among the States should reside in the Federal Government without designating Congress as the repository of that power, the treaty power under such conditions could regulate commerce; for the grant of power to the President and Senate to make treaties is a general grant and not limited by any words to any special subject, and no other branch of the Government (as Congress) would by such assignment be robbed of its specific charge. But since the treaty-making power as claimed is so broad, and may embrace every right or power of the people, pertaining not only to their national but to their State and local rights, to say that this power may include the rights and powers of the citizens of the States not granted to the Federal Government, as well as the rights and powers granted to the President, the Congress, and the Judiciary, is to claim a superiority for that power over the powers of Congress, the powers of the Executive, the powers of the Judiciary, and the powers of the States, which are equally supreme with the treaty-making power. To illustrate: Article VI is the source from which the treaty-making power and the laws of Congress made in pursuance of the Constitution derive their supremacy. Exactly the same words are used to infuse into each the attribute of "supremacy." Could any authority be found to claim

the right of Congress to pass a law which would be constitutional and valid, fixing the tenure of real estate in any State of the Union? Judge Field in his opinion in Fox *v.* United States,[1] has fixed that question irrevocably in the States; but there are those who hold that though such a law of Congress would be unconstitutional and void, yet if such were attempted under a treaty made by the United States with a foreign country, it would be valid because the treaty, under Article VI of the Constitution, is the supreme law of the land. But such treaty is not more the supreme law of the land than is the law of Congress on any subject granted to Congress. Or suppose the President in dealing with China, whose friendship and good offices we regard as important to be retained by the United States, should by proclamation or otherwise, announce to such nation rules of naturalization by which the citizens of such country could become naturalized as citizens of the United States; such a declaration on his part would be clearly unconstitutional and void because Congress alone under Article I, § 8, has the power to establish uniform rules of naturalization. If this be true, could it be claimed that a treaty between the United States and China which contains such provisions as suggested, for naturalization, would be valid and constitutional? Or suppose a Federal Judge in the trial of an Italian for robbing the United States mail should deny him the right of trial by jury, it cannot be doubted that the Supreme Court would reverse such ruling because of the Constitutional right under Article III, § 2, Clause 3, which declares the trial of all crimes, except in cases of impeachment, shall be by jury. If so, could a treaty between Italy and the United States be valid and constitutional which limited the trial of residents of each country in the courts of the other to a trial by the judge excluding the jury? This could hardly be admitted, though in view of racial feeling and local prejudice both countries might feel that their own citizens would obtain a fairer share of justice if tried before a court than before a jury. Article I, § 9, Clause 8 of the Constitution declares:

[1] 94 U. S. 315, 24 L. ed. 192.

"That no title of nobility shall be granted by the United States." This is a prohibition on the President or the Congress of the United States, or both. Can it be claimed that a treaty between Great Britain and the United States would be valid which provided for such reciprocal honors under certain circumstances to be accorded citizens of each country by the governments of the other? Article II, § 1, Clause 5, of the Constitution declares that: "No person except a natural-born citizen . . . shall be eligible to the office of President." Would a treaty between the United States and Hayti providing that citizens of Hayti born in that country should be eligible to the Presidency of the United States be valid? The Supreme Court has decided frequently that all matters which pertain to the health, morals, safety, etc., of the people in their domestic lives belong by right to the States to determine under their police power and are not included in any grant to the Federal Government under the Constitution. The State of Maine for nearly half a century, in obedience to the claims of health and morality of its people, has enacted and has preserved throughout that time on its statute books a prohibition law denying the right of sale or manufacture of intoxicating liquors within its bounds. Could it be claimed by any one that a treaty between France and the United States, giving the citizens of each country the right to engage in business in the country of the other, would be effective in the State of Maine in allowing a citizen of France to open a bar-room for the sale of intoxicating liquors?

§ 71. The language of the Constitution will be examined in vain to find that supremacy is anywhere given to any one power over all others. Article VI does not give it, for there supremacy is divided between the Constitution, the laws of Congress, and treaties. But, even if the language of Article VI, standing by itself, admitted of such interpretation, we still must recognize that for its proper construction, it must be read in relation to all other parts of the Constitution. When this is done, it is plain that no such power exists, and when the whole scheme of the instrnment is taken into consideration, and the spirit of the

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be doubted tha[illegible] United States which shall be made in
because of th[illegible] all treaties made," etc., "shall be the
Clause 3, wh[illegible] shall." The advocates of the supremacy of
of impeachm[illegible] over all else must eliminate that part
Italy and t[illegible] the Constitution which makes the Con-
limited th[illegible] laws of Congress coequal in supremacy with
other to [illegible] claim can be admitted. The ordinary
hardly h[illegible] tion which govern the courts must be up-
prejudi[illegible] of supremacy to the three, "This Con-
obtain [illegible] laws that shall be made in pursuance thereof,
a jur[illegible] must be construed to be a grant to one only,

vail is it to limit the power of Congress in legislating
ts if, under another power of the Constitution,
r legislative, the same thing may be accom-
Government? I need not go into the history
that adopted the Constitution just now to
jealousies on the part of many to the exten-
al powers; and I need only refer to the great
re the State Conventions in the ratification of this
by the several States and its final ratification by
ates upon the assurance that certain amendments sug-
by them would be incorporated into the Constitution.
first ten Amendments were the result of this feeling, and if
he claim of those to-day that the treaty-making power is
supreme over the Constitution and all other powers within it
can be admitted, then, indeed, has our birthright been sold for
"a mess of pottage."

§ 73. By the Hamiltonian School of Statesmen it is claimed that the Constitution was the product of one body politic, — the whole mass of the people of the United States, giving the Federal Government the large powers contained therein and denying certain powers to the States, as well as certain others to the Federal Government; and that this body politic, the United States, ante-dated the States, and in effect created them, etc., etc. The Jeffersonian School holds that the States, prior to the adoption of the Constitution, existed as independent sovereigns; that they created the Constitution by proposing it to the people of the several States, who ratified it, and that from the reservoir of their original powers they granted certain ones to the Federal Government, denied others to the States, reserving all others "to the States respectively, or to the people." While historically we hold the latter view, the adoption of either will serve our purpose in showing that the reserved rights under the Tenth Amendment, secured in either of the above mentioned methods can no more be taken from the States than can any power granted to the Federal Government be taken from it. Under the Hamiltonian School each power, Federal and State,

has a common origin and a common grantor; each is a part of the same Constitution, each is supreme in its sphere because the Constitution, which embraces both, is confessedly supreme. There is one reservoir from which flowed all powers, the people of the United States as one body politic. This same body politic delegated the enumerated powers as given in the Constitution to the various departments of the Federal Government, and then declared that all powers not delegated were reserved "to the States respectively, or to the people"; and when the Constitution was pronounced the supreme law of the land this supremacy was infused into every part of it, into every section and every paragraph of it. The supremacy of the judicial power, of the legislative power, and of the executive power in the Federal Government in their respective spheres, was complete and unchallenged; while the powers not delegated, but which were reserved "to the States respectively, or to the people," were left undisturbed by the Constitution as not needed by the Federal Government; and because the supremacy of the Constitution declared in Article VI pervades every part of it, and the Tenth Amendment is as much a part of it as Article VI, or any other section of that instrument, the reserved powers contained therein are, in their sphere, equally supreme, and subordinate to no other power in the Constitution.

§ 74. By the Jeffersonian School it is held that the Constitution was proposed by the thirteen original States as independent bodies politic. Each gave up certain of its original sovereign powers to the Federal Government and for the good of all denied to the States the use of certain other powers. They gave freely of national powers, denied themselves without stint, and left in the possession of each State or with the people all other powers. They gave part and retained part. They gave up national powers and retained local powers. So that without the declared supremacy of the Constitution in Article VI these reserved powers referred to in the Tenth Amendment were supreme in their sphere. With Article VI they are doubly so.

Judge Cooley [1] strongly confirms our view:

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

§ 75. But it is urged that the language of the Constitution placing the treaty-making power in the President and Senate, with no limitations upon its scope, but merely declaring that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur," shows that there is no limit to the subjects or rights which may be incorporated in a treaty. That had the framers of the Constitution intended any limitations they would have been made, just as the subjects upon which Congress can legislate are specifically enumerated in the Constitution. A moment's consideration will show that the difference between the two is palpable. A treaty, generically, is an agreement or contract between two nations, which may embrace any subject or right incident to the citizenship of either country. An enumeration of subjects or objects which could properly be contained in a treaty would therefore be practically impossible. But the legislative powers of Congress, being few, could be easily enumerated. Mr. Rawle, in speaking of this matter, says:

"To define them (the subjects of a treaty) in the Constitution would have been impossible, and therefore a general

[1] Cooley's "Constitutional Law," p. 31.

term could only be made use of, which is, however, to be scrupulously confined to its legislative interpretation." [1]

§ 76. Mr. Calhoun also says of this:

"The reason is to be found in the fact that the treaty-making power is vested exclusively in the government of the United States; and, therefore, nothing more was necessary in delegating it than to specify, as is done, the portion or department of the government in which it is vested. It was then, not only unnecessary, but it would have been absurd to enumerate, specifically, the powers embraced in the grant. Very different is the case in regard to legislative powers. They are divided between the Federal Government and State Governments; which made it absolutely necessary, in order to draw the line between the delegated and reserved powers, that the one or the other should be carefully enumerated and specified; and, as the former was intended to be but supplemental to the latter, and to embrace the comparatively few powers which could not be either exercised at all, or, if at all, could not be so well and safely exercised by the separate governments of the several States, it was proper that the former, and not the latter, should be enumerated and specified. But, although the treaty-making power is exclusively vested and without enumeration or specification in the government of the United States, it is nevertheless subject to several important limitations." [2]

§ 77. It would be to convict the framers of the Constitution of a lack of foresight, which cannot properly be imputed to them, to suppose they intended to give to this treaty-making power unlimited scope to absorb every right of the people of the States, against which they had so carefully guarded in the enumeration of the powers of Congress and by the reservations in the Tenth Amendment. The powers of Congress, the Executive, and the Judiciary were enumerated in detail. And all powers not granted were, under the Tenth Amendment, reserved to the States or to the people respectively. Of what avail is it to know that the Framers of the Constitution securely pre-

[1] Rawle, "View of the Constitution of the United States," 2d Ed., p. 64.

[2] See Chapter I, pp. 5, 9, for these limitations.

served to the people their sacred local rights from the grasp of Congress, the President, or the Judiciary if they can be absorbed under the treaty-making power? If the Federal Government can take them, it matters little what department may claim the right. A man who is robbed of a precious jewel of great price, dear to him by the ties of every sacred association, cannot be comforted in his loss by the knowledge that a different person from the one he supposed to be the thief was really his despoiler.

§ 78. In the Constitutional Convention this clause seems to have been but little discussed, and such discussion as was had was not so much as to the scope and extent of the power as to where it should be lodged in the Federal Government. But the debates in the several State Conventions are more illuminating and instructive. The authors of the Federalist, Mr. Jay, Mr. Hamilton, and Mr. Madison, contributed in the several numbers of that publication their general views on the subject. But even in these dignified pages we find nothing of especial interest from any of the three authors. Mr. Jay, it is true, in the 44th number, in discussing this power and its relations to the law-making power lays down a principle which seems to be persuasive but which the Supreme Court has repeatedly overruled. Mr. Hamilton, as in all things pertaining to the Constitution, wanted strength and exclusive strength for this power. In the 22d number of the Federalist,[1] in speaking of the crowning defect of the Confederation being the lack of any judicial power, he says:

"Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States to have any force at all must be considered as part of the law of the land. Their true import as far as respects individuals must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations they ought to be submitted in the last resort to one supreme tribunal."

[1] Ford's Edition, p. 140.

In Number 23 of the Federalist, Mr. Hamilton uses this language in speaking of the Federal powers, including that of the treaty-making power: they

"ought to exist without limitation because it is impossible to foresee or define the extent or variety of national exigencies or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be more extensive with all the possible combinations of such circumstances; or to be under the direction of the same councils which are appointed to preside over a common defence."

§ 79. Mr. Madison, in the 45th number of the Federalist, uses this language:

"The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the Articles of Confederation. *The proposed change does not enlarge these powers;* it only substitutes *a more effectual mode of administering them.*" [1]

Mr. Madison's views were more elaborately expressed in the Virginia Convention of 1788, called to ratify the Constitution.

§ 80. In the enumeration in Article I, § 8, of the powers of Congress, with first the power "to lay and collect taxes, duties, imposts, and excises," we find the words "taxes, duties, imposts, and excises" have a meaning confined within certain well defined limits; in the power to regulate commerce with foreign nations and among the several States, while the words "commerce among the several States" embrace a large field of action, they are yet limited within the definite meaning which attaches to the word "commerce"; so as to the powers to establish uniform rules of naturalization and to coin money, to establish post-offices and post-roads, to declare war, to raise and support armies, to provide and maintain a navy, etc. These are all powers granted to the Federal government, and as to which the States are excluded generally from exercising any

[1] Author's italics.

jurisdiction; certainly excluded after the Congress finds it necessary or convenient to make any one of them an exclusive subject of its own power.

Each one of these powers of Congress may embrace many collateral objects which are included in the original generic term in which the grant is made, but still each is confined to that specific grant, and is not, by the well established rule of judicial interpretation, allowed to transcend these boundaries. After Article I, § 8, has exhausted itself in grants of power to the Congress in the eighteen successive paragraphs of that section, (which practically embraces the whole grant of powers to Congress in the Constitution) we find these powers belong to Congress alone and can be used by no other arm of the Government, for Article I, § 1, clause 1, declares "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."

§ 81. Having thus laid down what legislation Congress shall be empowered to enact, the Tenth Amendment, as part of the Constitution, declares "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Sixth Article makes the laws of the United States made in pursuance of the Constitution, supreme. The grants of power in Article I, § 8, are exclusive (as well as supreme) when Congress chooses to so make them. Any power which may otherwise legitimately be used by a State, must yield to the Federal power on the same subject, when Congress deems it necessary and wise to use it, but all State powers (and they are almost limitless in number) not granted to the Federal Government, are free from the control of Congress, and are as supreme as any powers granted to the Federal Government, because they are included in the Tenth Amendment, a part of the Constitution, and the Constitution, by Article VI, is itself declared to be the supreme law of the land; and for the further reason that they are the original sovereign powers of the States, left untouched by the Constitution in the possession of the States or the people.

It seems to be overlooked by many writers that these reserved rights of the States, local it may be in their nature and scope, having no application outside of their own State, are by the very language of the Constitution, made *as supreme as laws of Congress or of treaties made under the authority of the United States:* for when Article VI declares that this Constitution shall be the supreme law of the land, it does not mean simply that the laws of Congress are to be supreme, or that treaties are to be supreme, but that every part and every section of that Constitution is the supreme law of the land. Those rights of the States being all of the rights that inhere in any State, except such as were given up and enumerated in the Constitution itself, not only have the vigor and force which inhere in them as powers of a sovereign State, but they have the additional strength of supremacy infused into them by the very language of the Constitution itself.

§ 82. Under Article II the powers of the executive are defined with precision and exactness, and his duties and powers enumerated and restricted. Article III is devoted to the judicial power of the United States, describing and limiting its power and functions, and other sections of the Constitution place prohibitions upon the powers of the United States, as well as of the States, while the Amendments thereto secure to the citizens of the United States certain civil and political rights which cannot be taken from them, except by change of the Constitution. We are justified, therefore, in holding that a careful examination of the whole instrument shows unmistakably an intention to place nowhere in the government of the United States or of the States any one supreme and uncontrollable power. The division of the functions of government between the Federal government and the States, the limitations on each, the prohibitions on both, all show the conclusiveness of this assertion; but the Sixth Article, which grants supremacy to this Constitution, to the laws of Congress made in pursuance thereof, and to treaties made under the authority of the United States, it is now claimed by some writers was inserted in the Constitu-

tion near its close — after the powers of the Federal government and those of the States had been delicately adjusted, for the purpose of securing a national government that would deal with national affairs and State governments that would conserve their peculiar local needs, — to supersede and destroy what had already been accomplished.

The laws of the United States could not do it, for the objects for which the Federal government could legislate had been specifically enumerated, but since a treaty may embrace any subject, and some of those subjects may be included in the grants to Congress, while others may be among the reserved powers of the States secured in the Tenth Amendment, it is argued that all these must be included in the treaty power, and that when it acts with the insignia of supremacy attached to it, it sweeps away every prohibition and limitation that may have been prescribed in the Constitution.

§ 83. Great weight is attached by some writers to the fact that Article VI specifically declares that treaties and laws of Congress are to be the supreme law of the land. When Article VI declares "This Constitution . . . shall be the supreme law of the land," the words are sufficient without any other declaration as to the laws of Congress or treaties to make them the supreme law of the land; because the laws of Congress and treaties made under the authority of the United States emanate from the Constitution, and when the Constitution is declared to be the supreme law of the land, every part of it is supreme. The insertion of the words "the laws of Congress," and "all treaties made," in Article VI, serves to emphasize the supremacy of the powers of Congress and of treaties, but certainly no more strength is given to either by these words, for the words "this Constitution shall be the supreme law of the land" makes each equally supreme.

§ 84. The real difficulty in the construction of Article VI is found in the scope and breadth of the word "Treaty." The power to regulate commerce restricts all such regulations to conditions that arise from commerce; to establish post-offices

and post-roads, gives to Congress only the power to legislate on those subjects or those which naturally flow from it, but the word treaty, which may embrace any subject, in its very nature, has no such limitation. It is as broad and conclusive as national ambition or human activities could make it. Every personal right, every property right, every civil right, every political right, every social right, every religious right known to the American citizen may be included in its ample folds. All of these, as applied to the citizens of the United States and the States, had been adjusted by the Constitution before Article VI was reached and the question which is to be answered in America to-day is whether the framers of the Constitution, after spending weeks and months in erecting a structure which was to protect these rights, and after their work had been practically accomplished, intended by the insertion of this Article, to destroy the structure they had so successfully builded.

§ 85. If we are to accept, therefore, the literal meaning of the words in Article VI, as applied to treaties, and give to them the supremacy which it is claimed the letter of the Constitution accords them, what is the result? In the first place, every power delegated to the Congress of the United States for its execution may be surrendered to the treaty power. The purpose which the framers of the Constitution had that the imposition of taxes, the regulation of commerce, the establishment of post-offices and post-roads, the coining of money, the naturalization of foreigners, and the like, should be accomplished only through the action of representatives elected by the people of the States, and the Senators representing the States, is abandoned and the powers are surrendered to the President and the Senate in the making of treaties with foreign countries; in the second place, after providing, as was their intention, for a republican form of Government, it must be presumed they deliberately inserted Article VI to change that form to the government of an oligarchy; and, thirdly, that after they had determined in their wisdom to concede to Congress powers of legislation in certain particulars, and that all else was to be left with the States

or the people, who were supposed to know better than anyone else what was best for them in their respective localities, they deliberately reversed their action and inserted this article, which might exclude their representatives in Congress from a voice in any legislation, and give to the President and the Senate the power to uproot and destroy what had already been conceded to Congress and the States. And all this results, it is claimed, because the word "Treaty" may embrace any subject that pertains to the people as citizens of the State or Nation.

§ 86. St. George Tucker, Story, Rawle, Willoughby, Pomeroy, and Cooley, and every reputable writer upon the Constitution, declare that the treaty-power can do nothing which tends to destroy the Constitution itself. Can it be doubted that the power to take away the right of Congress to legislate, or the right of the people of the States to regulate their own local affairs is the power to destroy the basic principles of the Constitution of our country?

§ 87. The claim asserted for the treaty-making power that it may embrace all rights and all subjects because the word "Treaty" may embrace such, cannot be maintained for another reason. The principle must be accepted as established, that where in any instrument a *general* grant is made, which is followed in the same instrument by a *specific* grant, that the "general" is limited by the "specific" grant. This is undoubtedly true of wills and deeds. A testator who devises *all* of his real estate to his wife and in a subsequent portion of his will devises his home place to his son, is considered to have limited the devise of *all* of his real estate to his wife by the *specific* devise of the home place to his son. The same principle will apply to a deed of real estate.

This principle applies peculiarly to the case of the treaty power. Article II, § 2, grants to the President and Senate the power, without any limitation, to make treaties; since treaties may embrace all rights of person and property, some of which may be included in the powers granted in the same Constitution, to the President, to the Congress, the Judiciary, and some

also, which by the same instrument, are reserved to the States, this would seem to be a sweeping and unlimited general grant to the treaty-making power; but when we find the same instrument, which has made this unqualified *general* grant to the treaty power, has granted to the President, to the Congress, to the Judiciary, certain specific powers, and reserved to the States certain *specific* powers and rights, the *general* grant to the treaty-making power is limited by the *specific* grants mentioned. This is the well-established rule of construction, and to hold otherwise would be to hold that the Convention, after carefully constructing a constitutional government, granted to one of the branches of the government the power to destroy it all.

CHAPTER V

Analysis of the Views of Charles Henry Butler as disclosed in his Book, "The Treaty-Making Power under the Constitution of the United States" — under Nine Headings — considered Seriatim

§ 88. The opinions expressed in chapters one and two by the many distinguished statesmen who considered the treaty-making power, either as participants in the framing of the Constitution itself or when called upon to carry out its provisions in the Congress of the United States, or to construe it as judges upon the highest courts of the land, are in some instances brought into sharp conflict with the opinions of a recent distinguished author, Mr. Charles Henry Butler, who, in the third paragraph of his work on the treaty-making power,[1] lays down the following propositions as containing his views of the extent of this power:

"The author fully appreciates that any attempt to extend Federal jurisdiction to matters which are not clearly expressed in the Constitution carries with it the *onus probandi* to its fullest extent. He is, however, so firmly convinced that the Government of the United States is completely endowed with all the essential attributes of nationality and sovereignty in regard to National affairs that he feels fully justified in expressing the following opinion: First: That the treaty-making power of the United States, as vested in the Central Government, is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed *by that Government as an attribute of sovereignty*,[2] and that it extends to

[1] Butler, "Treaty-making Power under the Constitution," Vol. I, p. 4.

[2] Author's italics.

every subject which can be the basis of negotiation and contract between any of the sovereign powers of the world, or in regard to which the several States of the Union themselves could have negotiated and contracted if the Constitution had not expressly prohibited the States from exercising the treaty-making power in any manner whatever and vested that power exclusively in, and expressly delegated it to, the Federal Government.

"Second: That this power exists in, and can be exercised by, the National Government, whenever foreign relations of any kind are established with any other sovereign power, in regulating by treaty the use of property belonging to States or the citizens thereof, such as canals, railroads, fisheries, public lands, mining claims, etc.; in regulating the descent or possession of property within the otherwise exclusive jurisdiction of States; in surrendering citizens and inhabitants of States to foreign powers for punishment of crimes committed outside of the jurisdiction of the United States or of any State or territory thereof; in fact, that the power of the United States to enter into treaty stipulations in regard to all matters, which can properly be the subject of negotiation between sovereign States, is practically unlimited, and that in no case is the sanction, aid or consent of any State necessary to validate the treaty or to enforce its provisions.

"Third: That the power to legislate in regard to all matters affected by treaty stipulations and relations is co-extensive with the treaty-making power, and that acts of Congress enforcing such stipulations which, in the absence of treaty stipulations, would be unconstitutional as infringing upon the powers reserved to the States, are constitutional, and can be enforced, even though they may conflict with State laws or provisions of State constitutions.

"Fourth: That all provisions in State statutes or constitutions which in any way conflict with any treaty stipulations, whether they have been made prior or subsequent thereto, must give way to the provisions of the treaty, or act of Congress based on and enforcing the same, even if such provisions relate *to matters wholly within State jurisdiction.*" [1]

§ 89. An analysis of the above views of the author shows the following claims: I. That excluding the granted power to make

[1] Author's italics.

treaties in the Constitution to the President and Senate as contained in Article II, § 2, this power exists in the government of the United States as an attribute of sovereignty. II. That it embraces every subject that could be embraced in any treaty between Russia and Germany, Japan and China, or any two sovereign powers of the world. III. That it extends to any subject that might have been the subject of a treaty between any two of the States of the Union, but for the prohibition in the Constitution against their right to make treaties. IV. That under this power in the Government of the United States it is permissible and legitimate to regulate by a treaty with any other government "the use of property belonging to States or the citizens thereof, such as canals, railroads, etc." V. That the treaty power can regulate "the descent or possession of property within the otherwise exclusive jurisdiction of the States." VI. That it may surrender "citizens or inhabitants of States to foreign powers for punishment of crimes committed outside of the jurisdiction of the United States or of any State or territory thereof." VII. "That the power of the United States to enter into treaty stipulations in regard to all matters which can properly be the subject of negotiation between sovereign States is practically unlimited." VIII. That if a treaty between the United States and a foreign power embraces a subject which requires the legislation of Congress, Congress can enact such legislation, though it would be unconstitutional for it to do so if the subject of it were not embraced in the treaty. IX. That a treaty, or act of Congress enforcing its provisions, annuls or abrogates all state laws or Constitutions in conflict therewith, without any exception, even if the provisions thereof relate to matters wholly within State jurisdiction.

Mr. Butler's position, as above stated, has been analyzed and will be considered because his book is the most valuable contribution to the subject that has been given to the profession. It is the work of an earnest, industrious, able writer, and is entitled to the highest respect and consideration not only because

of the high professional attainments of the author, but because of its own intrinsic merit. And while we cannot give assent to many propositions advanced in the book, we are pleased to record in these pages our obligations to the author for his great labors in the elaborate presentation of all sides of this question. The analysis above made of his views will now be considered.

THE ANALYSIS OF MR. BUTLER'S CLAIMS

§ 90. I. The claim made by Mr. Butler that the Government of the United States has the power to make treaties independent of the Constitution as an attribute of sovereignty, we think cannot be sustained by reason, authority, or judicial decision. It is true that dicta may be found wherein some of the Justices of the Supreme Court have used such expressions as "inherent power" as applied to the Federal Government, but we believe we are safe in saying that no decision of that great tribunal can be cited resting its judgment upon the claim of inherent powers in the Government of the United States independent of the Constitution. If such power existed independently of the Constitution, the inquiry is certainly pertinent, why was the grant of power ever given in the Constitution? Why grant what already existed? The exact character of our government with its limitations of power has been so often and so well stated that the answer to this position can best be given by quoting the opinions of judges and statesmen on this subject:

Justice Brewer,[1] in the case of Turner *v.* Williams, has used the following language:

"While undoubtedly the United States as a nation has all the powers which inhere in any nation, Congress is not authorized in all things to act for the nation, and too little effect has been given to the Tenth Article of the Amendments to the Constitution. . . . The powers the people have given to the General Government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the people and can be exercised only by them, or upon further grant from them."

[1] 194 U. S. 279–295, 48 L. ed. 979, 24 S. C. 719.

Again, the same Justice [1] speaks the final word on this subject, when he says:

"Appreciating the force of this, counsel for the Government relies upon 'the doctrine of sovereign and inherent power,' adding, 'I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference.' His argument runs substantially along this line: All legislative power must be vested in either the State or the National Government; no legislative powers belong to a State government, other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure *of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act.*[2] It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to-wit: 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, 'we, the

[1] Kansas *v.* Colorado, 206 U. S. 89–91, 51 L. ed. 950, 27 S. C. 655.

[2] Author's italics.

people of the United States,' not the people of one State, but the people of all the States, and Article X reserved to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning."

And he further says, page 88:

"From this and other declarations it is clear that the Constitution is not to be construed technically and narrowly, as an indictment, or even as a grant presumably against the interest of the grantor, and passing only that which is clearly included within its language, but as creating a system of government whose provisions are designed to make effective and operative all the governmental powers granted. Yet while so construed it still is true that no independent and unmentioned power passes to the National Government or can rightfully be exercised by the Congress."

§ 91. On the 12th of June, 1823, Mr. Jefferson wrote the following to William Johnson:[1]

"MONTICELLO, June 12, 1823.

"The States supposed that by their tenth amendment, they had secured themselves against constructive powers. They were not lessened yet by Cohen's case, nor aware of the slipperiness of the eels of the law. I ask for no straining of words against the General Government, nor yet against the States.

[1] Ford's "Jefferson," Vol. X, 232, note.

I believe the States can best govern our home concerns, and the General Government our foreign ones. I wish, therefore, to see maintained that wholesome distribution of powers established by the Constitution for the limitation of both; and never to see all offices transferred to Washington, where, further withdrawn from the eyes of the people, they may more secretly be bought and sold as at market."

Chief Justice Chase, in Lane County *v.* Oregon,[1] uses this striking language:

"Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But, in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the National Government are reserved."

§ 92. Chief Justice Taney held, in Gordon *v.* United States:[2]

"By the Tenth Amendment the powers not delegated to the United States nor prohibited by it to the States, are reserved to the States respectively or to the people. The reservation to the States respectively can only mean the reservation of the rights of sovereignty which they respectively possessed before the adoption of the Constitution of the United States, and which they had not parted from by that instrument. And any legislation by Congress beyond the limits of the power delegated, would be trespassing upon the rights of the States or the people, and would not be the supreme law of the land, but null and void; and it would be the duty of the courts to declare it so."

In Collector *v.* Day,[3] Justice Nelson uses this language:

"It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State gov-

[1] 7 Wall. 71–76, 19 L. ed. 101.
[2] 117 U. S. 697–705, 29 L. ed. 921.
[3] 11 Wall. 113–124, 20 L. ed. 122.

ernments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments. . . . The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."

Judge Marshall, in McCulloch *v.* State of Maryland,[1] says:

"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

Professor Willoughby,[2] speaking of "inherent sovereign powers," says:

"The latter doctrine, upon the contrary, would derive federal authority not from powers expressly granted, but from an abstraction, and would, at a stroke, equip the Federal Government with every power possessed by any other sovereign State.

"There can be no question as to the constitutional unsoundness, as well as of the revolutionary character, of the theory thus advanced. To accept it would be at once to overturn the long line of decisions that have held the United States Government to be one of limited, enumerated powers."

[1] 4 Wheaton, 316, 4 L. ed. 579.

[2] Willoughby on the Constitution, Vol. I, page 66.

§ 93. Judge Marshall also, as a member of the Virginia Convention of 1788 called to ratify the Constitution of the United States, in a speech on the powers of the States and the general government over the militia, used this language:

"The State governments did not derive their powers from the General government. But each government derived its powers from the people: and each was to act according to the powers given it. . . . Could any man say that this power was not retained by the States, as they had not given it away? For does not a power remain until it is given away? The State legislatures had power to command and govern their militia before, and have still, undeniably, unless there be something in this Constitution that takes it away. . . . There are no negative words here. It rests, therefore, with the States. . . . All the restraints intended to be laid on the State governments (besides where an exclusive power is expressly given to Congress) are contained in the tenth section of the first article. . . . The power of governing the militia was not vested in the States by implication; because being possessed of it antecedent to the adoption of the government, and not being divested of it by any grant or restriction in the Constitution, they must necessarily be as fully possessed of it as ever they had been; and it could not be said that the States derived any powers from that system, but retained them, though not acknowledged in any part of it."

§ 94. Mr. Madison, in the 39th number of the Federalist, said:

"The proposed government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects and leaves to the several States a residuary and inviolable sovereignty over all other objects."

The language of Judge Story in the delivery of the opinion of the Court in Martin *v.* Hunter,[1] is of interest:

"It is perfectly clear that the sovereign powers vested in the state governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States." (He refers

[1] 1 Wheat. 325.

to the words of the Tenth Amendment in confirmation.) . . . "The government, then, of the United States *can claim no powers which are not granted to it by the Constitution*,[1] and the powers actually granted must be such as are expressly given, or given by necessary implication."

§ 95. Judge Marshall, in Cohens *v.* Virginia,[2] said:

"That the United States form, for many and for most important purposes, a single nation has not yet been denied. In war we are one people. In making peace we are one people. In all commercial relations we are one and the same people. In many other respects the American people are one. And the government which is alone capable of controlling and managing their interests in all these respects is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for these objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire, — for some purposes sovereign, for some purposes subordinate."

In speaking of the reserved powers of the States in Gibbons *v.* Ogden,[3] the same learned judge said they represented:

"that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State."

These citations are sufficient to show the character of our Government as explained by the judges of the Supreme Court, and those who framed the Constitution itself. The differences

[1] Author's italics.

[2] 6 Wheat. 264, 5 L. ed. 257.

[3] 9 Wheat. 1, 6 L. ed. 23.

in constitutional construction have generally been as to the extent and scope of Federal and State powers, and in the exclusiveness of the one over the other. All recognize that the Federal Government is one of delegated powers. While therefore the claim of inherent power in the Federal Government cannot be justified, the grant of a power like that of regulating commerce naturally carries with it the regulation of all that "inheres" in commerce. So with treaties; and while there is no inherent power in the Federal Government to regulate commerce or to make treaties, the words themselves carry all that "inheres" in the generic term "commerce" and in the generic term "Treaty."

§ 96. II. "That it (the treaty power under the Constitution of the United States) embraces every subject that could be embraced in any treaty between Russia and Germany, Japan and China, or any two sovereign powers of the world." An agreement, of course, may embrace every subject about which the two parties may desire an agreement. If the two parties to the agreement stood with acknowledged powers to make such agreement or contract, and if the subjects of such agreement were likewise under the absolute control of the parties contracting, there could be no question, it seems, about the correctness of Mr. Butler's position; but in order to admit its correctness, two things must be conceded. 1st, that the parties to the agreement have the power to act, and 2d, that the subjects of the agreement are controlled by the same contracting parties. Every country of the world is controlled by its own peculiar form of Government, no two of them alike, and clearly two countries, the one a monarchy and the other a republic, may differ widely in the frame-work of their constitutions; and though in a treaty between Russia and Germany it may be recognized that the parties contracting have the power to contract for their respective governments, the subjects of the treaty may in the one country be under the absolute control of the treaty power, while in the other the concurrence of a separate branch of the Government may be

required to make it binding. The claim of Mr. Butler that the treaty power under the Constitution of the United States embraces every subject which can be the basis of negotiation between any two countries of the world, assumes as its basis that all governments of the world are similar and that the subjects of treaties which may embrace all the civil, personal, and property rights of the citizen, are protected and secured in exactly the same way in the constitutions of every nation of the world, and that every country in the world which undertakes to negotiate treaties can do so regardless of the character of its government, whether it be monarchical or republican in form, and without regard to the restrictions that may be placed upon such power by the constitutions of such countries. He fails to realize that all the subjects of treaties, whether they be personal or property rights, in different countries may be lodged in different departments of the government, and subject to a different control than that of the treaty power.

§ 97. The power to contract and make treaties may be absolute and exclusive in the parties to the contract, but the subjects of that treaty may be personal or property rights, which under the constitution of one of the contracting parties, may rest as absolutely in the control of the agency of the government making the treaty as does the right itself to make the treaty. On the other hand, the same rights of person or of property may be lodged by the constitution of the other contracting party in some department of the government to which the constitution has confided its exclusive control, and neither the treaty power of the government nor any other power can control, concede, or contract away such rights.

At this writing (1914), Germany might by treaty cede a portion of her territory to Russia as a condition of peace, or vice versa, in order to terminate the world's greatest war. Could the United States by treaty cede any part of one of the States of the Union?

Or if Japan, with no cause of war against Germany, should enter into a treaty with Great Britain agreeing to espouse her

cause in case she should become involved in war with Germany, this treaty might be valid and binding: but could the United States enter into such a treaty with Great Britain when Congress alone can declare war under the Constitution of the United States? In other words, when the Constitution has placed the power of declaring war in the Congress, could the President and Senate enter into a treaty with Great Britain to engage in war upon the happening of a certain event? Clearly not, unless the treaty power be superior to the Constitution itself. The words of Justice Daniel,[1] in his opinion in the Passenger Cases, speaking of the claim of an "unlimited" treaty power, are impressive:

"It must be viewed as the exercise of a power transcending that which called it into existence; a power single, universal, engrossing, absolute. Everything in the nature of civil or property right is thus engulfed in federal legislation and in the power of negotiating treaties."

§ 98. The Emperor of Germany has power to negotiate treaties, but cannot negotiate a final treaty involving the question of citizenship of Germany (see Division IV, Constitution of Germany, and Art. 4) by his own right and power. To make valid and effective a treaty involving such right, the approval of the Federal Council and of the Diet must be had. These rights of citizenship secured in the Constitution of Germany may be annihilated by the act of the Federal Council and the Diet. How different it is in America. The sacred rights of citizenship secured to the American citizen in our Constitution cannot be taken from him under a treaty, nor even by legislative action, for they are secured in the Constitution itself. Like examples could be deduced from the Constitutions of Great Britain, France, Prussia, Belgium, &c. The rights secured to the people of America in the 4th, 5th and 6th Amendments to the Constitution, to be secure from unreasonable search; immunity from the charge of a capital or infamous offense except by presentment or indictment of a grand jury;

[1] Passenger Cases, 7 Howard, 516, 12 L. ed. 702.

the security of life, liberty, or property under due process of law; trial by an impartial jury; the right of habeas corpus, can never be modified or taken from the American citizen, under the provisions of a treaty with any country. They are beyond the reach of government, because imbedded in the Constitution and can only be taken away by amendment to the Constitution. Most of these rights, above enumerated, are secured to the people of Germany, France, or Japan under their Constitutions. They boast their muniments of civil liberty for their citizens equally with those of the United States: but how different they stand from each other, for the Constitution of each of those countries may be changed by legislative enactment, and these fundamental rights may be swept out of their Constitutions by such act. Not so with these rights secured to the American citizen. Should a legislative act attempt to annihilate any one of them, it would be declared at once null and void, and the cumbrous process of an amendment to the Constitution would successfully check any effort to destroy it. The Czar of Russia with his limitless power and unrestrained will might destroy all of the rights of his subjects by treaty agreed to between him and some other high contracting power. It is even claimed that the King of England may exercise this power without restriction; that the Emperor of Germany or of Japan may do the same. This is not a just conclusion. The power of the Czar of Russia and the King of England to negotiate treaties is not the same. The one under an absolute monarchy, and the other under a constitutional monarchy may each exercise the right to make treaties according to the Constitution of their own country.

§ 99. *The Parlement Belge*, an English case decided March 15, 1879,[1] involved the question of how far a treaty between Great Britain and Belgium extending immunities to foreigners which affected the private rights of British citizens, was valid without an Act of Parliament: The opinion in the case was delivered by Sir Robert Phillimore, an eminent judge, and

[1] English Law Reports, Probate Division, Vol. IV, p. 149.

his opinion is quite pertinent to this discussion; he said in part:

"I now approach the consideration of the second question, viz., whether the convention between her Majesty and the King of the Belgiums, ratified on the 24th of March, 1876, does, so far as this country is concerned, place the *Parlement Belge*, while in British ports, in the category of a public ship of war and exempt her from the process of an English Court.

"I may observe in passing that the very fact that this packet is in terms given by the convention the privileges of a ship of war in British ports and there only, tends to shew that she had not such privileges by general international law, and that a convention was deemed necessary to confer them.

"It is admitted that this convention has not been confirmed by any statute; but it has been contended on the part of the Crown both that it was competent to her Majesty to make this convention, and also to put its provisions into operation without the confirmation of them by Parliament. The plaintiffs admit the former, but deny the latter of these propositions.

"The power of the Crown to make treaties with foreign states is indisputable. Passing by other authorities, I will cite the language of Blackstone, who was not disinclined to maintain the prerogative of the Crown. He says:

"'It is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes, for it is by the law of nations essential to the goodness of a league that it be made by the sovereign power; and then it is binding upon the whole community; and in England the sovereign power, *quoad hoc*, is vested in the person of the king. Whatever contracts, therefore, he engages in, no other power in the kingdom can legally delay, resist or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution, as was hinted before, hath here interposed a check, by the means of Parliamentary impeachment, for the punishment of such ministers as from criminal motives advise, or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation.' [1]

"The learned writer, however, was certainly aware that this general proposition must receive some modification and restraint besides that which he has mentioned. Blackstone

[1] Blackstone's Commentaries, vol. I, p. 256 (ed. 1844), c. 7, p. 2.

must have known very well that there were a class of treaties the provisions of which were inoperative without the confirmation of the legislature; while there were others which operated without such confirmation. The strongest instance of the latter, perhaps, which could be cited is the Declaration of Paris in 1856, by which the Crown in the exercise of its prerogative deprived this country of belligerent rights, which very high authorities in the state and in the law had considered to be of vital importance to it. But this declaration did not affect the private rights of the subject; and the question before me is whether this treaty does affect private rights, and therefore required the sanction of the legislature.

"The authority of Chancellor Kent was relied on. That learned writer observes:

"'Treaties of peace, when made by the competent power, are obligatory upon the whole nation. If the treaty requires the payment of money to carry it into effect, and the money cannot be raised but by an Act of the legislature, the treaty is morally obligatory upon the legislature to pass the law, and to refuse it would be a breach of public faith.'[1]

"And he further observes:

"'There can be no doubt that the power competent to bind the nation by treaty may alienate the public domain and property by treaty.'

"He then refers to the case of The United States *v.* The Schooner Peggy[2] (pp. 149, 150).

* * * * * * *

"The judgment in the case of The United States *v.* The Schooner Peggy does not establish the proposition that the Crown can dispose of the rights of a subject without the sanction of Parliament. A treaty may contain provisions which are *ultra vires* of the prerogative, in part valid and operative, and in part invalid and inoperative. A treaty is, indeed, not necessarily void by reason of the infraction of some of its conditions though it may be voidable; and the validity of it cannot be challenged, speaking generally, by any private person; but a court of justice when called upon to execute the provisions of a treaty may, at the instance of the subject, who is affected by them, examine whether those provisions are such as to be

[1] Kent's Comm. vol. I, p. 166 (ed. 1873).

[2] 1 Cranch, 103.

capable of legal enforcement, just as it may inquire into the validity of letters patent granted by the Crown; Long *v.* Bishop of Capetown;[1] and also into the validity of an order in council, duly passed and gazetted; Attorney General *v.* Bishop of Manchester.[2] There have been, not to go further back, during the reign of her present Majesty, various treaties confirmed by parliament; and by statute power has been given to the Crown by Order in Council to do certain things which it must be presumed without such power it could not have done, — for instance, the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), empowers the Crown by Order in Council to make rules and regulations respecting collisions and salvage services to be binding on the ships of foreign states; the Sea Fisheries Act, 1868 (31 and 32 Vict. c. 45), relating to a convention between France and England as to sea fisheries, and reciting (in s. 66) that doubts had arisen whether part of the convention between the United Kingdom and France of the 26th of January, 1826, relating to exemption from dues had been confirmed by Parliament, proceeded to give such confirmation; and to provide that where any similar convention should thereafter be concluded with any foreign country her Majesty should have power by Order in Council to confer exemption from dues on sea fishing vessels belonging to such foreign country; the 35 and 36 Vict. c. 45, A.D. 1872, confirms the Treaty of Washington between the United States and England, and as will presently be seen the very treaty of which this Belgian treaty is a sequel was confirmed by statute. Some of the treaties confirmed relate to the payment of and exemption from dues in harbours; one more, and not an insignificant one, will presently be added. I mention them merely as illustrative of the position that certain treaties do require Parliamentary confirmation. (pp. 152, 153)

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"If the Crown had power without the authority of Parliament by this treaty to order that the *Parlement Belge* should be entitled to all the privileges of a ship of war, then the warrant, which is prayed for against her as a wrong-doer on account of the collision, cannot issue, and the right of the subject, but for this order unquestionable, to recover damages for the injuries done to him by her is extinguished.

"This is a use of the treaty-making prerogative of the Crown

[1] 1 Moo. P. C. (N. S.) 411. [2] Law Rep. 3 Eq. 436.

which I believe to be without precedent, and in principle contrary to the laws of the constitution. Let me consider to what consequences it leads. If the Crown without the authority of Parliament, may by process of diplomacy shelter a foreigner from the action of one of her Majesty's subjects who has suffered injury at his hands, I do not see why it might not also give a like privilege of immunity to a number of foreign merchant vessels or to a number of foreign individuals. The law of this country has indeed incorporated those portions of international law which give immunity and privileges to foreign ships of war and foreign ambassadors; but I do not think that it has therefore given the Crown authority to clothe with this immunity foreign vessels, which are really not vessels of war, or foreign persons, who are not really ambassadors.

"Let me say one word more in conclusion. Mr. Bowen, in his very able speech, dwelt forcibly upon the wrong which would be done to this packet if, being invited to enter the ports of this country with the privileges of a ship of war, she should find them denied to her. I acknowledge the hardship, but the remedy, in my opinion, is not to be found in depriving the British subject without his consent, direct or implied, of his right of action against a wrong-doer, but by the agency of diplomacy, and proper measures of compensation and arrangement, between the Governments of Great Britain and Belgium. I must allow the warrant of arrest to issue." (pp. 154, 155)

§ 100. Under the Constitution of Belgium, Article 68, we find: "The King shall command the land and naval forces, declare war, make treaties of peace, of alliance and of commerce. He shall give information in respect to the foregoing matters to the two houses as soon as the interest and safety of the State permit it, joining therewith the customary communications. Treaties of commerce and those which might seriously burden the State, or *individually bind* the Belgians, shall go into effect *only after having received the assent of the houses.*[1] No cession, no exchange, no addition of territory can take place except by law. In no case shall the secret articles of a treaty be destructive of the published articles."[2] Under this clause we see that the rights of individuals in this kingdom cannot be taken from

[1] Author's italics. [2] Foreign Constitutions, Part 2, Vol. III.

them by the contracting power of the king. But they can only be deprived of them by the assent of both Houses of the legislative department. If under the Belgian Constitution, a treaty may take away individual liberties of its citizens, *the two houses consenting*,[1] and this is legitimate under the Constitution of Belgium, this cannot justify the conclusion that the same rights secured to the people of America in their Constitution can likewise be surrendered under the treaty power.

The constitution of each country must be examined to ascertain in what department of the government the subjects which are proposed in the treaty are lodged. If they are controlled by another branch of the government than that to which the power to make treaties is given, then a treaty that seeks to incorporate such subjects in its provisions will not be valid, until the assent of that department is given to it. This principle applies to all governments and is recognized by all European Powers. If these rights be imbedded in the constitution, the next inquiry is how can the constitution be changed. If a legislative act may change it, the constitution has no superior force over the power of the legislature, but if the legislative act is restrained by the constitution, and rights incorporated in the constitution are beyond legislative invasion, it is seen at once that two nations in the process of enacting a treaty may stand upon very different ground.

§ 101. Under the Constitution of the Empire of Germany (Subdivision IV) we find: "The Emperor shall represent the Empire among nations, declare war and conclude peace in the name of the same, enter into alliances and other conventions with foreign countries, accredit ambassadors and receive them. . . . So far as treaties with foreign countries refer to matters which, according to Article IV, are to be regulated by imperial legislation, the consent of the Federal Council shall be required for their conclusion, and the approval of the Diet shall be necessary to render them valid." [2]

Article IV, referred to, containing matters under the super-

[1] Author's italics. [2] Foreign Constitutions, Part 2, Vol. III.

vision and legislative control of the Empire, embraces largely the same class of subjects which under the Constitution of the United States are delegated to the Congress; so that under the German Constitution, while the Emperor is charged with the duty of negotiating treaties, when he undertakes to deal with a subject controlled by imperial legislation, that treaty will not be valid without the consent of the Federal Council nor without the approval of the Diet. When such consent is obtained, the treaty is valid and binding and cannot be denied by the government. Should a treaty with Germany be negotiated with the United States involving any subject embraced in Article IV, *without the consent of the Federal Council*,[1] would the United States be justified in attempting to hold Germany to the terms of such a treaty when its fundamental law declares that without the consent of the Federal Council, the treaty is not valid? And if not, why would not a treaty, entered into on the part of the United States disregarding fundamental requirements of the Constitution, be likewise invalid? The subjects, therefore, which may be embraced in a treaty differ in different countries, as in Germany those subjects enumerated in Article IV of the Constitution regulated by imperial legislation, are not and cannot be the subjects of treaty between Germany and any other country, except conditionally, and that condition is, the consent of the Federal Council and the approval of the Diet. While none of the many personal rights secured to the people of the United States in their Constitution, and especially in the amendments thereto, are the subject of contract, agreement, barter, modification, or diminution from any power within the Constitution, or without it, except that supreme power which placed them there, the people of the several States, constituting the United States. And so, if a treaty should be agreed upon between the United States and Belgium, carrying with it the appropriation of a large sum of money to be paid under it by Belgium to the United States, would not the Belgians have the right to object to carrying out such treaty on

[1] Author's italics.

the ground that it had never received the assent of the houses? Nor can it be denied that these limitations upon the right to make treaties in any country, and the constitutional requirements as to the subjects embraced in them are both legitimate, reasonable, proper, and necessary. The United States is presumed to know the Constitution of the countries with which it proposes to enter into treaties. Those countries are presumed to know the Constitution of the United States, and all countries are governed universally by the well-known maxim *qui cum alio contrahit, vel est, vel debet esse, non ignarus ejus conditionis.*

§ 102. The Constitution of the Republic of France on this subject is of equal interest, showing, that while the President of the Republic has the power to negotiate treaties, the two Chambers have powers in reference thereto which often must be secured before the treaty can be regarded as complete and valid. The following passage from Burgess [1] is of interest.

"The constitution of France empowers the President to negotiate and to conclude all treaties and agreements with foreign states. If, however, the proposed treaty should be one of *peace* or *commerce*, or should involve the *finances* or the *territory* of the state, or should relate to the *personal* or *property* rights of Frenchmen in foreign states, it must be voted by the *two* chambers before the President can constitutionally ratify it; [2] and if the foreign state should conclude with the President any agreement touching any of these subjects without the ratification of the legislature duly given thereto, France would not be bound by any principle of international law to fulfil the same. The foreign state, in dealing with the French President, is bound to know the extent of his powers as provided in the constitution. Almost every treaty which can be imagined would involve one or more of these points; a fact which makes it advisable when dealing with the French government, to demand the consent of the legislative bodies to all agreements entered into with the executive. In all cases, the President is constitutionally required to inform the chambers of his acts and agreements so soon as the security and welfare of the state will permit."

[1] Burgess' "Political Science and Constitutional Law," Vol. II, p. 294.
[2] Author's italics.

§ 103. In the discussion of this subject one question must be kept clearly in view at all times. The constitutions of the leading countries of the world, such as England, Germany, France, Japan, etc., can all be changed by legislative act. And while the constitutions of these countries are quite adequate in securing personal liberty to their citizens, such securities have no such enduring basis as those enjoyed by the citizens of the United States, for no act of Congress can take away these rights as can an Imperial act of the countries to which reference has been made. For example, all questions involving rights of citizenship under the German Constitution are embraced in Article IV, all such questions being under the supervision and legislative control of the Empire. Under the Fourteenth Amendment to the Constitution of the United States and other clauses, these rights are secured to the citizen of the United States. And under the Constitution of Germany all of these rights may be taken away by a legislative act repealing the Constitution, while in the United States an Act of Congress would be powerless, as is well known, to change the Constitution, which can only be done by slow process. And so, while Germany may make a treaty involving rights of citizenship which under Article IV of the German Constitution is declared to be a proper subject for a treaty, yet, since such rights are embraced in Article IV, it must receive the consent of the Federal Council and the approval of the Diet. The position of the United States in making a treaty involving the same subject is quite different. For the citizen of the United States, as such citizen, is clothed by the Constitution with certain fundamental rights of which he can be deprived only by a change of the Constitution. If this change can be made by a treaty, then of course the treaty power under the Constitution of the United States is superior to the Constitution itself. The suggestion of such an idea is its own refutation. And the statements of Story, Pomeroy, Cooley, and all the Fathers of the republic concur in denying any such claim or power.

§ 104. It is often insisted that since the Constitution gives

this exclusive power to the President and Senate, that nothing should interfere with its complete execution, because, as is said, the Czar of Russia, the King of England, the Emperors of Germany and of Japan, have the power to enact treaties as one of the great national powers peculiar to all nations; and that to limit the President and Senate when foreign rulers are unlimited or unrestrained, makes an inequality that is impossible in the operations between nations. Now, as we have seen, the treaty power as lodged in the President and Senate of the United States, is scarcely more circumscribed than is the same power in the great countries of the world, such as Germany, England, France, and Belgium; for in each of these countries, except England, the legislative power is needed on many subjects to effectuate a treaty, and in England in many cases the sanction of Parliament is required. An eminent English authority, Sir William R. Anson,[1] may be quoted on this subject:

"The prerogative of the Crown in making peace is so much involved in questions as to the prerogative in making treaties that the two must be dealt with together. Parliament has only indirect means of bringing a war to a close, but it is hard to conceive of a peace concluded simply by a cessation of hostilities and mutual assurances of amity. Some engagements must be entered into; liabilities incurred; territory acquired or ceded; and a question arises in this form: No one but the King can bind the community by treaty, but can he always do so without the co-operation of Parliament? It would seem to follow from the general principles of our constitution that a treaty which lays a pecuniary burden on the people or which alters the law of the land needs Parliamentary sanction. If it were not so the King, in virtue of this prerogative, might indirectly tax or legislate without consent of Parliament.

"Questions arise, however, in relation to this prerogative which need fuller consideration. Can the King cede territory by treaty without consent of Parliament, or can he confer immunities on foreigners, or affect the rights of private individuals except with such consent?

[1] Anson, "Law and Custom of the Constitution," Vol. II, The Crown, Part II, pp. 103, 104.

"The cession of territory is a matter 'in regard to which the practice of consulting Parliament has varied widely from time to time': but the tendency has been undoubtedly in the direction of obtaining the sanction of Parliament more regularly, and not merely by an address to the Crown, or a vote signifying approval, but making the treaty or convention conditional on the approval of Parliament and by the embodiment of the provisions relating to the cession in the schedule of a Statute."

Again he says:[1]

"There seems, however, to be a consensus of opinion that at the close of a war, and for the purpose of concluding a peace, the prerogative of cession is wider than it would be in time of peace."

And as illustrating with example he further says:[2]

"In 1890 Queen Victoria, in concluding a treaty with the Emperor of Germany, which provided among other things for the cession of Heligoland to the Emperor, was advised by her Ministers to make the cession conditional on the approval of Parliament. This invitation to Parliament to share in the exercise of the prerogative rights of the Crown, and therewith to assume the responsibilities of the Executive, was much criticized in debate. The views of the Opposition were thus forcibly stated by Mr. Gladstone: —

"'There is one thing which I think is still higher than the *dicta* of legal authorities, in this important question, and it is our long, uniform, and unbroken course of practice. It is one thing to stand upon the opinion of an ingenious or even a learned man: it is another thing to cite the authority of an entire State, signified in practical conclusions, after debate and discussion in every possible form, all bearing in one direction, and stamped with one and the same character. It is hardly possible, I believe, to conceive any kind of territory — colonies acquired by conquest, colonies acquired by settlement, with representative institutions or without representative institutions — it is not possible to point out any class of territory where you cannot show cases of cession by the Crown without the authority of Parliament.'

[1] Anson, "Law and Custom of the Constitution," Vol. II, The Crown, Part II, p. 105.

[2] *Id.*, pp. 106–108.

"Mr. Gladstone was doubtless right in his statement as to the facts of cession, though 'debate and discussion' can hardly be said to have been as exhaustive as he described them. Mr. Balfour spoke of the question as being 'in a nebulous condition,' but asserted that 'eminent legal authorities consulted specifically' had maintained the necessity for Parliamentary assent. Mr. Goschen admitted that the course taken by the Government was a departure from practice, and did not involve the proposition 'that the assent of Parliament is indispensable to treaty making or even to a cession of territory.'

"The course taken in 1890 was followed in the case of the Anglo-French Convention in 1904, in which various points at issue between the two countries were settled on terms which involved cessions of territory to France. No question was raised in either House of Parliament, except as to the expediency of the terms, when the Bill which embodied the Convention was under discussion.

"We seem, then, to be drawn to this conclusion, that apart from precedents relating to Indian territory, it has of recent years been thought desirable, if not necessary, that the consent of Parliament should be given to the cession of territory in time of peace. Cessions made at the conclusion of peace or in course of a war, or of lands acquired by conquest or cession, for which Parliament has not legislated, and for which the King has not by his own act deprived himself of the power of legislating by Order in Council would seem to stand on a different footing."

As to treaties of commerce, or those which involve a charge upon the people, the same authority makes this strong statement:[1]

"The assumption by this Government of any portion of the public debt of a country acquired by cession would lay a charge, or might do so, on the subjects of this country, and a definite and well-recognized limit on the treaty-making power of the Crown is found in the rule above mentioned, that where a treaty involves a charge upon the people, or a change in the general law of the land, it may be made, but cannot be carried into effect without the consent of Parliament.

"Treaties which thus affect the rights of the King's subjects

[1] Anson, "Law and Custom of the Constitution," Vol. II, The Crown, Part II, p. 109.

are made subject to the approval of Parliament, and are submitted for its approval before ratification, or ratified under condition.

"Such are treaties of commerce which might require a change in the character or the amount of duties charged on exported or imported goods: or extradition treaties which confer on the executive a power to seize, take up, and hand over to a foreign state persons who have committed crime there and taken refuge here.

"The right of the Crown, by treaty merely, to extend to foreigners immunities from the law of the land, which would affect the private rights of citizens, was raised in the case of the *Parlement Belge*."

Our conclusions may be summed up on this subject as follows: The subjects that may be the basis of treaties between any two powers of the world must depend upon the constitution of each country, for while every civilized nation has the power to make treaties, all subjects may not be available for such treaties, by reason of constitutional limitations; and if the subject which is contemplated by the treaty be secured by the constitution of the country, and in that country the constitution may be changed by legislative enactment, the treaty will be binding only when the consent of such legislative body is given. On the other hand, if the subject be one that is secured in the constitution of the country, and that constitution cannot be changed by legislative enactment, the treaty-power cannot reach it or control it unless it be superior to the constitution, or unless the constitution be changed or amended.

§ 105. When Mr. Butler declares that the treaty-making power of the United States "extends to every subject that may be the basis of negotiation . . . between any of the powers of the world," it is evident that his statement is too broad. Germany and Great Britain might by treaty agree to abolish trial by jury as to the citizens of each in the country of the other, but it is clear that no such treaty could be entered into by the United States, for this right is guaranteed in the Constitution itself, and cannot be the subject of diplomatic agreement.

These statements of the learned author that we are considering are made on page four of his work and are intended as a statement of his own views at the very threshold of his work, which he intended to justify and prove in the succeeding pages; and his statement is, that the treaty-making power under the Constitution "extends to every subject which may be the basis of negotiation and contract between any of the sovereign powers of the world." Near the close of the work, which was written for the purpose of sustaining his original propositions, in paragraph 455, he says: "*Power must be limited as no unlimited powers exist.* After perusing the foregoing chapters the reader may think he is justified in presuming that the author does not consider that there are any limitations whatever on the treaty-making power of the United States, either as to the extent to, or subject-matter over which it may be exercised. Such, however, is not the case; the fact that the United States is a Constitutional Government precludes the idea of any absolutely unlimited power existing. The Supreme Court has declared that it must be admitted as to every power of society over its members that it is not absolute and unlimited; and this rule applies to the exercise of the treaty-making power as it does to every other power vested in the Central Government. The question is not whether the power is limited or unlimited, but at what point do the limitations begin." This admission by Mr. Butler towards the close of his labors discloses the chivalry of his intellect and his loyalty to truth when once discovered.

§ 106. III. "That it extends to any subject that might have been the subject of a treaty between any two of the States of the Union but for the prohibition in the Constitution against their right to make treaties." The views advanced against the second proposition of Mr. Butler apply with equal force to this proposition, for the restrictions upon the States of the Union by their constitutions may embrace the same limitations as those which apply to the countries of the world. The States, as separate, independent, sovereign entities, undoubtedly could

have made treaties. But the subjects of such treaties would have been determined by the limitations in their constitutions. One State may have a clear right to contract with another on a subject which that other might be precluded from attempting to make the subject of a binding contract, because of constitutional restraints.

§ 107. IV. That this power exists in the Government of the United States to regulate by treaty with any other government "the use of property belonging to States or the citizens thereof, such as canals, railroads, fisheries, public lands, mining lands, etc." These subjects seem to be such as might naturally need adjustment between contiguous countries. The fact that the property, the subject of the treaty, belongs to a State or an individual does not preclude it from being the subject of adjustment between neighbors. The title or ownership of property in no wise affects the propriety of its being made the subject of adjustment by treaties. So that none of these subjects suggested by Mr. Butler would by the most extreme State-rights' man be precluded from the domain of treaties. How else could a State that owns the right of fisheries adjust difficulties arising under them with its neighbor? The State is precluded by the Constitution from entering into treaties. To whom could it go for the adjustment of its rights except to that power which is lodged exclusively by the Constitution in the President and the Senate? But, though it is admitted that these properties mentioned as belonging either to a State or to individuals may be the subject of a treaty, it will not be denied that in the adjustment of those rights, all of the muniments of right and title secured in the Constitution of the United States to American citizens must be recognized when such property is the basis of a treaty. Should such a treaty attempt to deprive the State or the individual of any one of the species of property referred to without just compensation or without due process of law, it could hardly be claimed that such act would be valid. The character of the property also might constitute an important factor in determining the validity of such a treaty, for, if the

proposition stated by Mr. Butler be broad enough to embrace as the subject of a treaty between Great Britain and the United States, the Capitol Building at Albany, New York, or the Penitentiary of that State or its Insane Asylums, it would seem to be doubtful whether such a treaty would be valid. Might not the taking of the Capitol of the State or any other instrumentality for the necessary discharge of its functions, tend to destroy the State? Or, if the property, the subject of the treaty, should be a railroad located in the United States, it would hardly be claimed that a provision in such treaty requiring the railroad to carry aliens at a lower rate than American citizens, or carry them free, would be valid. Justice White in Downes *v.* Bidwell,[1] said:

"I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every member of every department of the government of the United States to support and defend the Constitution."

Nor would any provisions attempting to regulate the use of a railway as an agency of interstate commerce be valid, since interstate commerce is placed by the Constitution under the exclusive regulation of Congress. But these examples only serve to illustrate in clearer form that though these classes of property may properly be the subjects of a treaty, they cannot be divested of the constitutional safeguards guaranteed in the Constitution in the making of such treaty.

§ 108. V. "To regulate the descent or possession of property within the otherwise exclusive jurisdiction of the States." This subject will be considered more appropriately and fully subsequently, when the cases that have been decided will be discussed.[2]

§ 109. VI. "To surrender citizens or inhabitants of States to foreign powers for punishment for crimes committed outside of the jurisdiction of the United States or of any State or ter-

[1] 182 U. S. 344, 45 L. ed. 1088, 21 S. C. 770.

[2] See *post*, Chapter VI, page 143.

ritory thereof." We see nothing to which objection can properly be had to this claim of power. We see no attempt in this proceeding on the part of the treaty-making power of the Federal Government to deprive the State or a citizen thereof of any constitutional right. It has been decided that without a treaty of extradition, the United States has no right to extradite a criminal. It is therefore one of the questions peculiarly controlled by treaty and can only exist by treaty. The criminal's offense is against the petitioning State. Its laws have been offended. The State of his own citizenship has no cause of complaint against him. He has offended no law of the State, and his own State therefore could try him for no offense. His own State is prohibited by the Constitution from entering into treaties of extradition with foreign countries, and the only power that can enter into such a treaty is the government of the United States. He is as completely subject to the law of the United States as to those of his State. He is a citizen of the United States as well as a citizen of the State. His obligations are to both. His rights are equal in both and his duties and obligations to the law of each are equally binding. In granting to the Federal Government this power no right is yielded which he can claim from the State and no right accorded to him under the Constitution of the United States, is denied to him.

The Government of the United States deals with him as a citizen of the United States, not as a citizen of the State, and yields him up to the State or country whose laws he has offended, to answer for his offense against those laws.

§ 110. VII. "That the power of the United States to enter into treaty stipulations in regard to all matters which can properly be the subject of negotiation between sovereign States is practically unlimited." This question has been partially considered under numbers II and III, and involves really the whole subject of this book.

Mr. Butler in this claim, has carefully guarded the proposition in these words: "Which can *properly* be the subject of negotiation between sovereign States." The power being ex-

clusive, and a sovereign power, if it attaches to "proper" subjects only it would still be limited to such subjects, but if these subjects are unlimited then indeed is the power unlimited. Judge Story in construing the words "necessary and proper," as found in the coefficient clause of the Constitution,[1] says that the word "proper" means "*bona fide*, appropriate." Good faith in the use and selection of such subjects is absolutely necessary. No sinister motive must be involved, no attempt to do by indirection what cannot be done directly, and no attempt to use subjects in the negotiation of treaties whose control is placed in some department of the government of the United States by the Constitution, or which involve essential powers of the States; but the subject must be "*bona fide*, appropriate." To what? To the spirit and maintenance of the Constitution in all its parts; not to destroy it.

So that if the negotiation of the treaty has for its end the taking of a right or power which is conferred by the Constitution upon another department of the Federal government, or by the Constitution is left to the States, as essential to their autonomy, that subject is not a "proper" subject of negotiation in a treaty.

§ 111. The views of Mr. John Randolph Tucker[2] on this subject are of interest.

"A grave question has arisen whether the exclusive power of treaty-making, vested in the President and Senate, is unlimited in its operation upon all the objects for which a treaty may provide. Can a treaty by compact with a foreign nation bind all the departments of our own government as to matters fully confided to them; can it surrender or by agreement nullify the securities for personal liberty engrafted upon the Constitution itself; can it cede to a foreign power a State of the Union or any part of its territory without its consent; can it regulate commerce with foreign nations in spite of the power of Congress to regulate commerce with them; can it provide for the rates of duty to be imposed upon certain articles imported from foreign nations, or admit them free of duty,

[1] Article I, § 8, cl. 18.

[2] Tucker on the Constitution, Vol. II, p. 723.

in the face of the power given to Congress to lay and collect taxes and duties; can a treaty appropriate money from the public treasury and withdraw it without the action of Congress; can a treaty dispose of any part of the territory of the United States, or any of their property, without the consent of Congress, which alone has power to dispose of and make rules and regulations concerning the territory and other property of the United States? These important questions have several times arisen for discussion in our history, and upon them authoritative decisions have been made by other departments of the government, which are based upon solid reason and sound principles of constitutional construction.

"It cannot be denied that very many of these questions must be answered in the negative, or the consequence would be that, under the treaty-making power, the President and Senate might absorb all the powers of the government. In favor of the extreme claim of power for the President and Senate, it has been urged that a contract between the United States and a foreign nation must be conclusive against all departments of the government, because it is a contract; but the answer to this contention is obvious and conclusive. It involves the *petitio principii*, by assuming that the contract is complete though it trenches upon the power of the other departments of the government, without their consent. . . . A treaty, therefore, cannot take away essential liberties secured by the Constitution to the people. A treaty cannot bind the United States to do what their Constitution forbids them to do. We may suggest a further limitation: a treaty cannot compel any department of the government to do what the Constitution submits to its exclusive and absolute will. On these questions the true canon of construction is, that the treaty-making power, in its seeming absoluteness and unconditional extent, is confronted with equally absolute and unconditioned authority vested in the judiciary. Therefore, neither must be construed as absolute and unconditioned, but each must be construed and conditioned upon the equally clear power vested in the others. For example, Congress has power to lay and collect duties; the President and Senate have power to make and contract with a foreign nation in respect to such duties. Can any other construction be given to these two apparently contradictory powers than that the general power to make treaties must yield to the specific power of Congress to lay and

collect all duties; and while the treaty may propose a contract as to duties on articles coming from a foreign nation, such an executory contract cannot be valid and binding unless Congress, which has supreme authority to lay and collect duties, consents to it. If it is then asked, how are you to reconcile these two powers which appear to be antagonistic, the answer is clear. Congress has no capacity to negotiate a treaty with a foreign power. The extent of its membership makes this impracticable. The Constitution, therefore, left the House of Representatives out of all consideration in negotiating treaties. The executory contract between the United States and a foreign nation is therefore confided to the one man who can conduct the negotiations, and to a select body who can advise and consent to the treaty he has negotiated. But this executory contract must depend for its execution upon the supreme power vested in Congress 'to lay and collect duties.' It is therefore a contract not completed, but inchoate, and can only be completed and binding when Congress shall by legislation consent thereto, and lay duties in accordance with the executory contract or treaty. The same reasoning may apply to all of the great powers vested in Congress, such as to 'borrow money, regulate commerce, coin money, raise armies and provide a navy, make laws as to naturalization, bankruptcies, and exercise exclusive legislation' in the District of Columbia and Territories of the country. If these are sought by treaty to be regulated by the President and Senate, it can only be done when the Congress vested with these great powers shall give its unconditional consent.

"Mr. Madison, in the reports of the convention which he has left to us, used an expression which is significant upon this point. He intimated that in making treaties eventual, that is, complete and final *per se*, the treaty-making power might be independent; but where they referred to matters that were incomplete without legislation, they would be incomplete until that consent was given.

"The absurdity of any other construction as to the power to lay taxes, duties and so on is very palpable. We have seen from the Constitution that all bills for raising revenue shall originate in the House of Representatives, to which the Senate may or may not assent, and the President may veto; but if the President and Senate have the power to regulate the system of taxation and revenue by treaty without the consent of Congress,

then the House of Representatives, which by the terms of the Constitution is made the originating body for such bills, without whose primal action the President and Senate can have no voice whatever in the matter, is to be excluded from any consent to the terms of the treaty of the President and Senate, who, by the constitutional method, are not entitled to act at all until the House of Representatives has inaugurated a bill."

§ 112. In defense of the claim of unlimited power to make treaties on all subjects by the United States with other countries, it is often recorded with pride that no treaty ever entered into by the United States has been set aside and declared null and void by the Supreme Court of the United States. This, if true, is indeed a subject upon which we have a right to congratulate ourselves and the country; for while we do not impugn the patriotism of the President, or the wisdom of the Senate, nor indeed the desire of each in the discharge of their duties under the treaty-making power, to conform to the restrictions of the Constitution, the possession of an unlimited supreme power in any person or any body of men is not consistent with a republican form of government and its possession by them is a constant menace to the liberties of the people.

Chief Justice Taney [1] has powerfully expressed his views on this subject:

"It will hardly be said, that such a power was granted to the general government in the confidence that it would not be abused. The statesmen of that day were too wise and too well read in the lessons of history and of their own times, to confer unnecessary authority under any such delusion."

In the same case, page 516, Justice Daniel says:

"If this extraordinary proposition can be taken as universally or as generally true, . . . the Constitution of the United States, with all its limitations on Federal power, and as it has been heretofore generally understood to be a special delegation of power, is a falsehood or an absurdity. It must be viewed as the creation of a power transcending that which

[1] Passenger Cases, 7 Howard, p. 474, 12 L. ed. 702.

called it into existence; a power single, universal, engrossing, absolute. Every thing in the nature of civil or political right is thus ingulfed in federal legislation, and in the power of negotiating treaties."

This division of the subject will be pursued no further, since the object of this book is to point out at every step of its progress, the limitations upon this "unlimited" treaty power in the Constitution of the United States.

§ 113. VIII. "That if a treaty between the United States and a foreign power embraces a subject which requires the legislation of Congress, Congress can enact such legislation, though it would be unconstitutional for it to enact such legislation if the subject of it were not embraced in the treaty."

This statement of the learned author would seem to mean that Congress can derive legislative powers, not only from its creator, the Constitution of the United States, but also from one of the coördinate branches of the government established under the Constitution; that is, though the Constitution makers by direct grant, conferred upon the Congress such powers as they thought were sufficient and ample for all purposes, yet, if the treaty-making power, composed of the President and Senate, in discharging its functions under the government, finds that it needs certain legislative powers which Congress does not possess to carry out its desires, it may by some subtle artifice unknown to the architects of our constitutional system, infuse into Congress such powers, although the Framers of the Constitution omitted to grant them to Congress. It is a plain case of a subordinate overruling his superior, of the creature being superior to the creator. Every reputable commentator upon the Constitution from Story down to the present day, has held that the legislative powers of Congress lie in grant and are limited by such grant. This statement in effect declares that when a treaty that may need legislation to carry it into effect, has embraced a subject which Congress cannot legislate upon, because not granted the power under the Constitution, that the treaty power may come to its own assistance and grant such

right to Congress, though the Constitution, the creator of both, has denied it. Such interpretation would clothe Congress with powers beyond the limits of the Constitution, with no limitations except the uncontrolled greed or ambition of an unlimited power.

The development of our Government under the Constitution shows that each branch of the government is greedy for power. And should such a construction as that asserted in the above statement obtain through judicial endorsement, our system of government would soon topple and fall.

§ 114. Under the coefficient clause of the Constitution,[1] Congress has power "to make all laws, which shall be *necessary* and *proper* for carrying into execution the foregoing powers, and *all other powers vested by this Constitution in the government of the United States, or in any department* or officer thereof."[2] Congress has the power to legislate to carry out the express powers granted in the Constitution, or those powers which may be implied from the express grants. The express grants are included in Article 1, § 8, in the seventeen clauses preceding this coefficient clause. But the power of Congress to legislate is not confined to "carrying into execution the foregoing powers," but Congress may also pass all laws *necessary* and *proper* for carrying into effect "all other powers vested by this Constitution in the government of the United States, or *in any department* or officer thereof." The treaty power is one of those vested in the government of the United States, so that Congress has power to legislate on the subject of treaties — to carry into effect the provisions that may require legislation.

§ 115. John Randolph Tucker[3] has discussed the meaning of the words "necessary and proper," in the following language:

"It must be observed that the legislation now under construction in aid of granted powers must be 'necessary and proper,' and however *necessary* any means proposed should seem to be in the opinion of Congress, it will not be constitutional

[1] Article 1, § 8, clause 18.
[2] Author's italics.
[3] Tucker on the Constitution, Vol. I, pp. 371–373.

unless it shall be *proper*. On the other hand, however appropriate it may be, unless it be a necessary means to effect the end, it will not be authorized by this clause. The two words together may therefore be interpreted as embraced in the canons of Chief Justice Marshall, *supra*.

"1st. The nature of the employed power exercised as a means must be legitimate; in other words, no power will be employed as a means to any end which is not legitimate, that is, not within the powers granted by the Constitution. The ancillary legislation must be a necessary and proper means to accomplish an end which is clearly constitutional.

"Thus Mr. Hamilton, while maintaining that Congress could create a bank to carry out the fiscal operations of the government, says: 'The only question in any case must be, whether it (the corporation) be such an instrument or means to carry into execution any specified power, and have a natural relation to any of the acknowledged objects of government. Thus, Congress may not erect a corporation for superintending the police of the city of Philadelphia, because they have no authority to regulate the police of that city. But if they possessed the authority for regulating the police of such city, they might, unquestionably, create a corporation for that purpose.' In other words, the power to create a corporation as a means to an end within the powers of Congress was constitutional; to create it for means not within the powers of Congress was unconstitutional.

"2d. But though the end be legitimate and be within the scope of the Constitution, no means are *appropriate* which are not plainly adapted to that end. The means must not only be adapted, but plainly adapted to the constitutional end.

"3d. No means are appropriate which are prohibited by the Constitution. The express prohibition condemns such a construction of those words; for how could the Constitution expressly condemn what in its view was 'necessary and proper' to be done?

"4th. No legislation can be proper which is inconsistent with the *letter* and *spirit* of the Constitution; hence the trial and conviction of Milligan to death by court-martial, though claimed to be a means for the preservation of the Union, was held unconstitutional, because such trial and conviction were forbidden by the Constitution; and where, taking the whole Constitution in its distribution of powers between the depart-

ments of government, and the relation it establishes between the granted powers to the Federal government and the reserved powers to the States, the act is not in accord with the whole scheme, but inconsistent with it, — it is unconstitutional.

"5th. If Congressional legislation be inconsistent with the reserved rights of the States and their autonomy, it is unconstitutional.

"6th. If legislation be contrary to the trust nature of the power of Congress — that is, to the duty which Congress owes in respect to the subject-matter of the legislation to all the States, or to any of them, — it would be contrary to the letter and the spirit of the Constitution.

"7th. If the power be granted for one purpose, it is not proper, and therefore unconstitutional, to exercise it for a purpose either *forbidden*, or not *within the scope of its granted powers*. This is a fraud upon the Constitution of the United States." [1]

§ 116. With this statement of the meaning of the words "necessary and proper," we ask, would any legislation by Congress be "necessary and proper," *i.e.* "*bona fide* appropriate," which sought to do in the interest of a treaty that which it is prohibited from doing for any purpose? If Congress be prohibited from doing at all, by what reasoning is a treaty excepted from the general prohibition?

If Mr. Butler's position be correct that a treaty may embrace any subject that may be the subject of agreement between any two nations of the world, and that its scope is "practically unlimited," if this were really true, the additional concession made in the claim we are now considering might well be admitted, for if the treaty power, without regard to the limitations of the Constitution, can absorb all subjects, and all rights, personal and civil, including the securities for liberty contained in this Constitution and its Amendments, it would seem to be both natural and *bona fide* appropriate, in order to make the destruction of the Constitution complete, that Congress should be made its efficient ally in the process of demolition and have full power to carry out its unlimited demands, whether granted to it in the

[1] Author's italics throughout this quotation.

Constitution or not. It will be admitted that Congress has no power to legislate in reference to the school system of a State. Should a treaty between the United States and China provide that the children of the citizens of each country should enjoy school privileges in the public schools of the other country, what would be the result in the United States? It is admitted that Congress could not legislate on the subject of school privileges for the children of the State of California. It will also be admitted that Congress could not by its legislation force the children of negro citizens of the State of California into the public schools of that State denied to them by her laws, but Mr. Butler contends that what cannot be done by Congress for the citizen children of a State, may be done for foreigners and aliens because it may be provided for by a treaty.

§ 117. If Mr. Butler's position which we are considering is sound it is difficult to understand why it was not brought into active operation during the controversy in California in 1906–7 when the State, by law, excluded Japanese children from the white schools of the State. Under the treaty between Japan and the United States the privileges of travel and *residence* were accorded the inhabitants of each in the country of the other, and it was claimed by President Roosevelt and others that the term "residence" carried with it school privileges in any State where the residence was acquired. It is admitted that Congress could not legislate on the school system of California, but Mr. Butler's claim is, that though that be admitted as a general proposition, still, that if the treaty gave the right to the Japanese to enter the schools of this country that Congress could legislate to enforce it. Secretary Root and President Roosevelt both claimed that the right of residence secured under the treaty carried school privileges with it, but the record of the controversy discloses no attempt by Congress to enforce such rights by law, nor was there even a suggestion of it by the President, who sent a special message to Congress on the subject.

§ 118. Mr. Butler will admit that Congress cannot legislate on the right of the people of Kansas to manufacture or sell

liquor. A law of Congress prohibiting the sale or manufacture of liquor in that State would hardly require the judgment of a court to expose its unconstitutionality, and yet, under this division of his views, he claims that if there be a treaty between Germany and the United States giving the right to the citizens of each country to engage in business in that of the other, by wholesale or retail (omitting the words "under the laws of the country") that the German citizen could go into the State of Kansas and open a bar-room, defying its laws, when the citizen of Kansas, Illinois, or Missouri, were he to attempt the same thing, would be promptly convicted for a violation of law; and then the German, if still denied by the authorities of the State of Kansas the right to open his bar-room, could appeal to Congress to carry out the treaty by passing such laws as would protect him in his treaty rights and if the State of Kansas persisted in denying the German the right to open his bar-room — despite the law of Congress — the President of the United States, in obedience to his oath of office, would be forced to send the Army of the United States into the State to see that the laws were faithfully executed. Such a result would be brought about by Congress attempting to give a right to a citizen of Germany residing in Kansas denied to any citizen of the States, and which, if attempted to be exercised by him, would land him in jail. How long would Americans trained in the school of liberty and equality stand such results in order to uphold the doctrine of the "unlimited" treaty-making power?

§ 119. IX. "That a treaty, or act of Congress enforcing its provisions, annuls or abrogates all State laws or constitutions in conflict therewith, without any exception, even if the provisions thereof relate to matters wholly within State jurisdiction."

Under II, page 105 *et seq. supra*, Mr. Butler claims that the treaty power embraces every subject that can be the subject of negotiation or treaty between any two countries of the world, without regard to their location in or control under the Constitution of the United States; while under Number VIII he claims

that the power of Congress to legislate to carry out subjects contained in treaties is not limited by the enumerations in the Constitution, but only by the variety of subjects which may be embraced in treaties, which he claims are practically unlimited under Number II. In this Division IX he advances a step, and to make plain the length and breadth of the subjects which may be embraced in a treaty, he declares that these may include any subjects which may "*relate to matters wholly within State jurisdiction;*" *i.e.*, a treaty may embrace practically all subjects, State or national rights, including rights of property, or rights of person, or questions involving in the highest sense the personal liberty of the citizen; and he thus broadens his former statement even to the point of practically annihilating the States, if their powers be needed by the treaty power.

Such a claim made by so eminent an authority must be carefully examined, for if true it shows that the Fathers of the Republic, after framing a Constitution with checks and balances between the States and the Federal Government so nicely adjusted as to give no cause for alarm to the special adherents of either faction developed in the Convention, were grievously mistaken in the character of the government they were building; and we now find that for over one hundred years we have been nursing to our bosom a viper that may sting us to death.

§ 120. "The Federal Government" is often carelessly spoken of as having its existence independent of and without relation to the States. Many fail to observe not only the close connection which the States have with the Federal Government, but the fact that the States are integral parts of the Federal Government, without which the latter could not exist. In one sense they are the underpinning, in another they are the piles upon which the structure rests, and neither can be withdrawn without damage to the structure they support.

An examination of the Constitution shows this very plainly. Article I, § 2, shows that the House of Representatives is dependent upon the States for its existence. Article I, § 3,

(now the 17th Amendment) shows that the Senate is dependent for its existence upon the States. Article II shows that the office of President is dependent upon the States. The judicial power of the United States, as set forth in Article III, recognizes the States as integral parts of the Federal Government; and when we look at the distribution of powers under the Constitution, giving to different departments specific powers, it is difficult to understand, if this was necessary to prevent the absorption of unlimited power in any one hand, how this power as now claimed found its way into the Constitution, supreme over all others and acknowledging its inferiority not even to the Constitution itself; with no guide but its own will; with no restraint but its own ambition; with no limits but its own greed: a power arrayed in royal robes and wielding the scepter of autocratic supremacy over State and Nation.

§ 121. It will be of interest to trace the division of powers under the Constitution to show its real meaning. Article I, § 8, in eighteen clauses recites the grants of power to Congress. Not satisfied with limiting these grants of power to Congress, it was thought necessary in § 9 of the same Article to specify certain things that Congress could not do, with reference to the suspension of the writ of *habeas corpus;* the passage of bills of attainder and *ex post facto* laws; the regulation and limitations upon the imposition of capitation, or direct taxes; the laying of taxes or duties upon articles exported from a State; in the regulation of commerce that no preference should be given to the port of one State over others; and that no money should be drawn from the Treasury but "in consequence of appropriations made by law." And so we find in Article I, § 10, limitations and prohibitions upon the States. In Article II, we find limitations upon the powers of the President, as well as provisions prescribing his duties. We find the first ten amendments full of provisions guarding the personal and civil liberty of the citizens of the United States; and, finally, after the governmental powers have been distributed and limited, and the new structure seems completed,

the Tenth Amendment, the key that unlocks th
whole structure, proclaims, "the powers not del
United States by the Constitution, nor prohibite
States, are reserved to the States respectively, or t
that is, the powers which have not been delegated
States, and which have been used by the State governments are still reserved to the States, and the innumerable powers which abide with the people which have not been employed by the State governments, still remain with the people to be used by them.

§ 122. Among the important powers in the Constitution is that found in Article II, § 2, clause 2, giving to the President and two thirds of the Senators present, the power to make treaties; and Article VI which says: "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 will be noticed in this Section that not only are treaties made "under the authority of the United States" the supreme law of the land, but the same section also declares, "This Constitution, and the laws of the United States which shall be made in pursuance thereof," are also "the supreme law of the land;" that is, the Constitution, which embraces among many powers the treaty-making power, is the supreme law of the land. It is doubtful, under proper construction, whether, in order to give supremacy to the treaty-making power, it was necessary to mention it at all after proclaiming that the Constitution, which included the treaty-making power, was supreme. For does not the greater include the less? In this clause it is also noted that "this Constitution," is placed first, "the laws of the United States which shall be made in pursuance thereof" second, and "and all treaties made" is placed after the other two. This clause does not single out the treaty-making power

alone as supreme, but it designates two others as supreme and carefully enumerates them with the treaty-making power, and if the location of each in the sentence is to be reckoned according to its importance, the first two, that is, "this Constitution, and the laws made in pursuance thereof," would be prior in dignity to treaties. If the Constitution, which includes the treaty-making power as well as many others, be the supreme law of the land, as cannot be denied under this clause, can a treaty which violates the Constitution be supreme? Is there anything in the clause which justifies holding a treaty supreme though clearly invading forbidden ground and denying the same to a law of Congress clearly unconstitutional? Can the Constitution be supreme when it embraces in its folds a provision that has the power to destroy it? Can supremacy be predicated of any instrument that contains within its provisions the badges of its own subordination? Can the Constitution be supreme in every article, in every section, in its whole scope and breadth, in its varied functions, and in its enumerated powers, if one power may destroy another, or one power destroy the whole? It is clear from this section that the law of the United States to be the supreme law of the land must be made in pursuance of the Constitution; whereas no such limitation is put upon "all treaties made, or which shall be made," but there is substituted for the words, "which shall be made in pursuance thereof" the words, "under the authority of the United States." Are not the two phrases equivalent? If not, then a law of Congress will be unconstitutional and void because against the Constitution, and a treaty constitutional and supreme though it violates the Constitution; but the words "under the authority of the United States" mean under the authority of the Government of the United States. The words "United States" as here used mean the Government of the United States established by the Constitution and not "the political society which lies back of that organic law and which was its author." If this be true we must examine the Constitution in its whole scope when examining a treaty to see

whether such treaty is in accordance with the Constitution; for, as Judge Cooley says,

"The Constitution itself never yields to *treaty or enactment:* [1] it neither changes with time, nor does it in theory bend to the force of circumstances." [2] We conclude therefore that the Federal Government is dependent for its existence upon the States, as we have shown it to be, and, therefore, no construction of any power in the Constitution is tenable that may result in the destruction of the States; and, further, that since the unlimited grant of power to the treaty-power would result in such destruction, such a grant of power, we have a right to conclude, was not intended: *ut res magis valeat quam pereat.*

§ 123. So that, when Mr. Butler and those of his school urge that a treaty may abrogate and annul the laws of the State, the whole basis of the claim is found in Article VI of the Constitution, which we have just quoted. If, therefore, the supremacy of a treaty depends upon this Article, we have the right to conclude that since the supremacy accorded treaties made under the authority of the United States is the same as that accorded the laws of Congress, no greater supremacy should be accorded the one than the other, for the grant of supremacy to each is exactly the same, and if the one (the law of Congress) must conform to the Constitution, surely the other must do likewise. If the one cannot legislate on local affairs within the States because it would be unconstitutional, the other cannot barter or trade them in agreements with foreign countries for the same reason.

The requirements that the law of Congress and the treaty should each conform to the Constitution are of like strength and potency. The language as to the former "In pursuance of" the Constitution is no less strong than that limiting treaties in the words "Under the authority of the United States." Both must be in conformity with the Constitution. Nor does the unlimited scope of the word "treaty," which in its generic sense may embrace all subjects of a national or State character

[1] Author's italics. [2] Cooley's "Constitutional Law," 33.

as claimed, carry with it forbidden subjects, *i.e.*, those subjects which the Constitution has assigned to other branches of the Government or to the States. It is claimed there are no limitations upon the word "treaty"; that it may be construed as authorizing treaties of all characters and descriptions, but such admission surely could not extend to the enactment of treaties to include subjects which have been specifically assigned to other branches of the Federal Government, or which have been carefully laid away in the keeping of the States by the Tenth Amendment. The general term "treaty" may of course include all subjects, but when any of such subjects have been specifically assigned to special departments of the Government by the Constitution, these must be excepted from it that the treaty may be a constitutional treaty, for all the authorities hold that a treaty cannot supersede or annul the Constitution. The argument is irresistible that if the whole scheme and genius of the Constitution was to save the ungranted powers of the States from interference by the Federal Government, that the framers of the Constitution would not have secured these against the ravages of all departments of the Government, and then quietly bestowed upon one of its branches, the treaty-power, the power to absorb them all.

§ 124. The law of the United States that would attempt to regulate the school system of any State, which is one of the reserved powers of the States under the Tenth Amendment, would be declared invalid, because it would not be in pursuance of the Constitution, but against it; and so the treaty to be supreme must be *under* the authority of the United States, and not above it, and therefore a treaty that undertook to control the school system of a State would be equally unconstitutional and void, for the treaty power must obey and not violate the authority that created it.

The contrary view drives us to this dilemma: That the Federal Convention, after weeks and months of intense labor in adjusting the views of the opposing factions in the Convention, and after arranging with delicate touch the location of

each power, local and national, so as to secure the rights of the people in their local concerns, free from the control of those who could have no special interest in them, while giving into the hands of the Federal Government all national powers, free from the touch or control of local State power, that after this was all concluded in order to induce harmony and produce unity where discord had reigned, they had agreed practically in the last article of the Constitution to sweep it all away by the introduction of a power which recognized none of the limitations or restrictions theretofore laid on the Federal or State Governments, and clothed it with a supremacy capable of destroying both. Of course such a thing is possible, but it is against precedent, against the spirit of the times, and against the opinion of all writers of the earlier or later days, except the distinguished author whose position on this subject is controverted, and the modern school which his views have inspired.

§ 125. Nor must we lose sight of the fact that the claim that is here made for the treaty power and the laws of Congress that may be necessary to effectuate the treaty (which if carried to its logical result must result in the total annihilation of the States) applies with equal force to every power granted in the Constitution to the Federal Government or to any department thereof, and our efforts to save the States from this disastrous result is intensified by the fact that the same unlimited and supreme power is not confined alone to the absorption of all State powers, but with equal rapacity it could take and destroy the powers of Congress, the powers of the Executive, and the rights of personal liberty secured to the people in the Constitution itself. It may with equal facility destroy the structure builded upon the States as it may destroy the States upon which the structure rests.

Of what advantage are the fundamental rights of civil liberty secured to the people of the United States by their Constitution which cannot be changed by law, if the treaty-making power may take them away at its pleasure, to conciliate some foreign

friend at the expense of the loss of such rights secured to American citizens in their own Constitution?

§ 126. A recent opinion of the Supreme Court of the United States tends strongly to sustain these views. In the case of Compagnie Française *v.* Board of Health [1] the question was presented whether a treaty annulled the law of a State passed in the exercise of one of the *essential* rights of a State — the right of quarantine. The question was clearly made by the pleadings in the case, and it was necessary for its proper decision — at least in the opinion of two of the Judges. In a dissenting opinion of Justice Brown, in which Justice Harlan concurred, he clearly shows that this was the issue in the case, when he said:

"If the law in question in Louisiana, excluding French ships from all access to the port of New Orleans, be not a violation of the provisions of the Treaty, . . . I am unable to conceive of a state of facts that would constitute a violation of that provision."

This decision carries with it the weight of the names of Chief Justice Fuller, Justices Gray, Brewer, Shiras, Peckham, and McKenna, who concurred in the opinion of Justice White. The cases of Rocca *v.* Thompson,[2] and Patsone *v.* Pennsylvania [3] tend strongly to confirm the position of the Court taken in the case of Compagnie Française *v.* Board of Health, *supra*.[4]

[1] 186 U. S. 380, 46 L. ed. 1209, 22 S. C. 811.
[2] 223 U. S. 317, 56 L. ed. 445, 32 S. C. 218.
[3] 232 U. S. 138, 58 L. ed. 539, 34 S. C. 281.
[4] For further discussion of this question see Chapter X on "The Police Power."

CHAPTER VI

The Cases of Chirac *v.* Chirac, Hauenstein *v.* Lynham, Geofroy *v.* Riggs, hold that the Treaty Power may Remove the Badge of Alienage from Foreigners, and do not hold that this Power may annul the Laws of Descent of the States

§ 127. In Chapter V, page 97, wherein an analysis of the views of Mr. Butler was attempted, Division V is as follows:

"That the treaty power can regulate 'the descent or possession of property within the otherwise exclusive jurisdiction of the States.'"

This Division V was based upon the following statement of Mr. Butler:

"Second, That this power exists in, and can be exercised by the National Government whenever foreign relations of any kind are established with any other sovereign power . . . in regulating the descent or possession of property within the otherwise exclusive jurisdiction of the States."[1]

If the distinguished author by this phrase means that under the treaty power of the United States a treaty could be made with France or any other country changing the laws of descent or the tenure of property in the several States of the Union, we must wholly dissent from his position. If, for example, the law of New York prescribed that in case of the death of a child the mother should inherit its real estate, and the law of France prescribed that in such case the father should inherit, we think it clear that a treaty between the United States and France

[1] Butler, "Treaty-making Power," Vol. I, p. 4.

providing that the inhabitants of each country might inherit real property in that of the other, *according to the laws of their own nationality*, would be invalid, null and void, and would not permit the father of a deceased French child to inherit real estate in New York belonging to the child. To hold such a treaty valid, would be contrary to the Constitution, for the tenure of real estate and the laws of its devolution have been recognized from the beginning of the government to this time as residing wholly within the jurisdiction of the States themselves, and, unless the treaty-making power is to be admitted as beyond the pale of constitutional restraint, no such treaty could be binding.

Judge Field, in Fox *v.* United States,[1] speaking for the Court, has enforced this view with his usual power.

"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

§ 128. That the Government of the United States, under its treaty power may change the status of an alien in this country, cannot be denied. The change of that status, it is admitted, may give the right of inheritance which would be unavailing to him but for such change; but this right is conceded to him by reason of the fact that his status as an alien has been changed to that of native, *quoad* the particular right. All of the cases without exception, decided by the Supreme Court, involving the question of inheritance by aliens, are based upon one principle, and that is the power of the United States, under the treaty power to remove the badge of alienage, which is conceded to be a legitimate exercise of power by the Government of the United States.

[1] 94 U. S. 320, 24 L. ed. 192.

§ 129. The cases of CHIRAC *v.* CHIRAC,[1] HAUENSTEIN *v.* LYNHAM,[2] and GEOFROY *v.* RIGGS,[3] represent a line of cases decided by the Supreme Court, in which it is claimed the right of inheritance, provided under treaties between the United States and foreign countries, is secured to the inhabitants of such countries by the annulment of the laws of the States to the contrary. These cases are constantly quoted as sustaining the broad proposition that the treaty is the supreme law of the land, and, as such, may annul the laws of the States. The principle upon which they have been decided shows quite clearly that no such claim can be made for them.

§ 130. In the case of Chirac *v.* Chirac the salient facts were as follows: John Baptiste Chirac, a citizen of France, became a resident of the State of Maryland in 1793. In the year 1795 he took the oath of citizenship according to the law of the State of Maryland passed in the year 1779, and the next day received a conveyance in fee of land lying within that State. In July, 1798, he was naturalized under the laws of the United States and in July, 1799, died intestate, leaving as his heirs certain natives and residents of France. His land was escheated to the State. In 1809 his heirs brought ejectment for the land against the grantee of the State of Maryland. At the time of his death the treaty between the United States and France, ratified in 1778, was still in existence, and the first point in the case was whether, under the State law of Maryland, passed in 1780, declaring the rights of subjects of France residing in that State, he had the right to hold this land, or whether it had escheated to the State. The third section of the Maryland act "contains a proviso restricting the privileges granted by the act and declaring that nothing therein contained shall be construed to grant to those who should continue subjects of his most Christian Majesty, and not qualify themselves as citizens of this State, any right to purchase or hold land or real estate, but for

[1] 2 Wheat. 259, 4 L. ed. 234. [2] 100 U. S. 483, 25 L. ed. 628.
[3] 133 U. S. 266, 33 L. ed. 642, 10 S. C. 257.

their respective lives or for years." [1] The Treaty of 1778 contains the following provision:

"ARTICLE XI. The subjects and inhabitants of the said United States, or any of them, shall not be reputed *au-bains* in France, and consequently shall be exempted from the *droit d'aubaine*, or other similar duty, under what name soever.

"They may by testament, donation, or otherwise, dispose of their goods, moveable and immoveable, in favour of such persons as to them shall seem good, and their heirs, subjects of the said United States, residing whether in France or elsewhere, may succeed them *ab intestat*, without being obliged to obtain letters of naturalization, and without having the effect of this concession contested or impeded under pretext of any rights or prerogative of provinces, cities or private persons; and the said heirs, whether such by particular title, or by *ab intestat*, shall be exempt from all duty called *droit detraction*, or other duty of the same kind, saving nevertheless the local rights or duties as much and as long as similar ones are not established by the United States, or any of them. The subjects of the Most Christian King shall enjoy on their part, in all the dominions of the said States, an entire and perfect reciprocity relative to the stipulations contained in the present article," etc.[2]

§ 131. Judge Marshall held that John Baptiste Chirac had the right as a French subject to purchase and hold the land in question, doubtless on the ground that the treaty removed the badge of alienage. This question was not discussed by Judge Marshall further than this brief statement:

"Upon every principle of fair construction, this article gave to the subjects of France the right to purchase and hold lands in the United States."

After the death of John Baptiste Chirac, and his heirs were seized in fee of his estate, subject to certain conditions, the Treaty of 1778 expired and the Treaty of 1800 between France and the United States was ratified. This treaty contained the following provision: [3]

[1] p. 270.

[2] Malloy, "Treaties, Conventions, Int. Acts," etc., 1776–1909, Vol. I, 471.

[3] *Id.*, 499.

"The citizens and inhabitants of either of the two countries who shall be heirs of goods, moveable or immoveable, in the other, shall be able to succeed, *ab intestato*, without being obliged to obtain letters of naturalization, and without having the effect of this provision contested or impeded under any pretext whatever," etc.

The fourth section of the law of Maryland above referred to, declares that if any subject of France who shall become a citizen of Maryland, "shall die intestate, the natural kindred of such decedent, whether residing in France or elsewhere, shall inherit his or her real estate in like manner as if such decedent and his kindred were the citizens of this State." . . . "But to this enacting clause is attached a proviso; that whenever any subject of France shall by virtue of this act, become seized in fee of any real estate, his or her estate, 'after the term of ten years be expired' shall vest in the State, unless the person seized of the same shall within that time, either come and settle in and become a citizen of this State, or enfeoff thereof some citizen of this or some other of the United States of America."[1]

§ 132. The heirs of Chirac on the death of their ancestor became seized of the estate, to which the law of Maryland attached a condition subsequent, namely, that they must within ten years become citizens of Maryland, or convey the estate to some citizen of Maryland or of the United States. It is admitted that the heirs complied with neither of these requirements. The Maryland act shows plainly on its face its object, which was to secure permanent residents of the State from France. Now what was the object of the language above quoted from the Treaty of 1800? Judge Marshall tells us:

"The direct object of this stipulation is to give French subjects the rights of citizens so far as respects property and to dispense with the necessity of obtaining letters of naturalization. It does away the incapacity of alienage and places the defendants in precisely the same situation with respect to lands, as if they had become citizens. It renders the performance of the condition an useless formality," etc.

[1] 2 Wheat. 273.

John Baptiste Chirac in 1795 took the oath of citizenship to the State of Maryland, but Maryland could not make the Frenchman a citizen after the adoption of the Constitution. This rested with the Federal Government. The plain object of the Maryland law was to secure permanent resident citizens from France, and when Judge Marshall says that the language of the treaty places the French subject "in precisely the same situation with respect to lands as if they had become citizens," the object of the Maryland law was accomplished, and those who, under the law of descent of Maryland were entitled to the estate, received it. That law was not abrogated or annulled by the treaty, but the very persons who received the estate as heirs received it as heirs *under the law of descent of Maryland.* The treaty only removed from those heirs the badge of alienage that prevented their taking the estate.

§ 133. Could the treaty power do this? The language of the Treaty of 1800 giving the right to Frenchmen to inherit "without being obliged to obtain letters of naturalization" did not mean that under that treaty the naturalization of all Frenchmen coming to America was effected. The question of how far the treaty power may naturalize foreigners is one of much interest and some doubt, and certainly Judge Marshall did not in his opinion in this case, construe those words in any such light, for he says:[1] "That the power of naturalization is exclusively in Congress, does not seem to be, and certainly ought not to be, controverted," and while these words cannot be construed, therefore, as granting naturalization to French subjects, the words clearly import that the conditions upon which the French subject may come to America are different from those of other foreigners. It is merely one of the modes of indicating to the alien who is coming his status when he comes; and when the treaty declares that the citizens of the two countries shall receive estates in that of the other, without the necessity of naturalization, while it may not be operative

[1] p. 269.

to bring the Frenchman into the full fellowship of American citizenship, it does, as Judge Marshall says, so far as the right of inheritance is concerned, give him as complete rights as if he were an American citizen.

§ 134. The question turns on *who is an alien, and what power under our Government can determine his status and his character?* Clearly not the State Government, for all questions affecting aliens, their rights, and their status, are relegated by the Constitution to the Federal Government; and that government, and that alone, can determine what aliens, if any, may come to the country, and who may be excluded, and may, indeed, determine all questions which affect their status as aliens in the United States.

In this case the Maryland law of 1780 declared the Frenchman could not hold lands in fee, unless he was a citizen. At the time this law was enacted Maryland had the power to make him a citizen of Maryland, but when the estate of John Baptiste Chirac vested in his heirs in 1799, while the Maryland law was still on the statute books, the Constitution of the United States had been adopted and in it Maryland, with the other States, had given to the Federal Government the right to create citizenship and Maryland was thereby deprived of the right; and when this action was brought by the French heirs the law of 1780 was still in existence declaring citizenship as a condition for holding real estate in fee in Maryland, but *the right of determining citizenship in Maryland had changed and the Government of the United States alone possessed that power.* Maryland could say that only a citizen could hold her land, but the Government of the United States alone could say what constituted such citizenship; and the Federal Government, through the treaty power, in its agreement with France in the Treaty of 1800, in effect said: "One of the requirements of Frenchmen holding land in Maryland, one of the States of the Union, is citizenship. Citizenship is acquired by naturalization. I cannot naturalize you because, under the Constitution, that rests with Congress, but, (to use Judge Marshall's language) I can place you 'in

precisely the same situation, with respect to lands, as if (they) you had become citizens.'"

Whether the treaty power can, in its dealings with foreigners, go beyond the adjudicated right of removing alienage, is a speculative question merely, but this right is settled by many cases to which reference will be made.

§ 135. The decisions clearly uphold this right as a proper exercise of power under a treaty.

In Fong Yue Ting *v.* United States,[1] Judge Gray, speaking for the Court, says:

"The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective."

And in Nishimura Ekiu *v.* United States,[2] Justice Gray, speaking for the Court (Justice Brewer dissenting) said:

"It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and *upon such conditions* as it may see fit to prescribe. Vattel. Lib. 2, §§ 94, 100; Phillimore (3d ed.) C. 10, § 220. *In the United States this power is vested in the national government,* to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the Constitution has conferred power to regulate commerce with foreign nations."[3]

In the case of *In re* Ah Lung,[4] Field, J., said:

"The immigration of foreigners to the United States *and the conditions upon which they shall be permitted to remain*[5] are appropriate subjects of legislation as well as of treaty stipulations."

[1] 149 U. S. 711, 37 L. ed. 905, 13 S. C. 1016.
[2] 142 U. S. 659, 35 L. ed. 1146, 12 S. C. 336.
[3] Author's italics. [4] 18 Fed. 29. [5] Author's italics.

The same judge in the case of Ho Ah Kow,[1] says:

"That Government (the Federal Government) alone can determine what aliens shall be permitted to land within the United States, and upon what conditions they shall be permitted to remain."

To the same effect is the opinion of Judge Sawyer, in the case of Tiburcio Parrot:[2]

"If the treaty-making power is authorized to determine what foreigners shall be permitted to come into and reside within the country and who shall be excluded, it must have the power to determine and prescribe upon what terms and conditions such as are admitted shall be permitted to remain."

Munger, J., in Bahuaud *v.* Bize,[3] says:

"It is not an open question that the United States has power to make treaties removing the disability of aliens to inherit; and that such treaties are a valid exercise of and within the powers conferred by the Constitution of the United States."

§ 136. Under Article I, § 8, clause 4, of the Constitution, Congress is given power to establish uniform rules of naturalization throughout the United States; that is, Congress may, by law, prescribe how and upon what conditions an alien may become a citizen after he arrives in this country and has become a resident of the country. But, before he comes, Congress cannot reach him or make him a naturalized citizen under the flag of his own country. In this respect, Congress can only act after he becomes a resident. How different under the treaty power that can reach across the seas and affect the alien before he becomes a resident of this country by its international compact! It may wipe out the blight of alienage, though it cannot bestow the full rights of citizenship. It may not be able to grant positive rights, but it may secure the alien against their denial by the change of his status, and then after his arrival, by the power of Congress, the deformity of alienage may be removed

[1] 5 Sawyer, 552; Fed. Cases 6546.
[2] 6 Sawyer, 349.
[3] 105 Fed. 485.

altogether and the foreigner admitted as a son and heir to our inexhaustible heritage, clothed with the high title of American citizenship.

Being the political *nexus* that binds the United States to a foreign country, the treaty power necessarily deals with the question of alienage, and the status of aliens in the country. In this relation the treaty power cannot change our constitutional form of government; it cannot make the Frenchman an American; it cannot change the laws of the States enacted for the regulation of the domestic affairs of the people of each State, but it can say that the laws of a State may not proscribe a Frenchman because he is an alien, or not naturalized, because when we allow him to come to this country the same power that allows his coming may say to him in effect: "You are a foreigner. You are not a native born American. You are not a naturalized American, but, because of the obligation which we feel to France for the part she took in our deliverance from Great Britain, we will give you some privileges not usually accorded to foreigners, and we will clothe you with certain immunities, that you may feel more at home with us," etc. So that, when the domestic law is invoked against such an alien to prevent his inheritance because of his alienage, he has a right to appeal to that power which admitted him to the country, and which removed the badge of alienage from him. In this case, as well as in Hauenstein *v.* Lynham, *infra*, and Geofroy *v.* Riggs, *infra*, there is no discussion of this power under a treaty, but this power under a treaty was held to exist in the cases of Fong Yue Ting *v.* United States, Nishimura Ekiu *v.* United States, and others quoted, *supra*, and in each of the cases of Chirac *v.* Chirac and Geofroy *v.* Riggs, the power of the treaty to remove the badge of alienage in the right of inheritance is accepted without question.

§ 137. Judge Field has well stated the principle in Geofroy *v.* Riggs,[1] when he says:

"As commercial intercourse increases between different countries, the residence of citizens of one country within the

[1] p. 266.

territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement."

The same view is subsequently held by Judge Story, in 1819, in delivering the opinion of the court in Orr *v.* Hodgson,[1] involving the question of inheritance under the Treaty of 1794, between the United States and Great Britain. On page 463 he said:

"If the case were not protected by the treaty of 1783, it might become necessary to consider whether it is aided by the ninth article of the treaty of 1794, which declares, that British subjects, who now hold lands in the United States, shall continue to hold them, according to the nature and tenure of their respective estates and titles therein, and that as to such lands, and the legal remedies incident thereto, neither they, nor their heirs or assigns, *shall be regarded as aliens*." [2]

Justice Baldwin, in Lessee of Pollard's Heirs *v.* Gaius Kibbé,[3] confirms the view:

"The Treaty of 1778 with France stipulated that the subjects of France shall not be reputed aliens; and it was held that it gave them the right to purchase and hold lands in the United States, and in that respect put them on the precise footing as if they had become citizens."

§ 138. It is seen, therefore, that under the treaty power there exists the right to remove the badge of alienage and to clothe the foreigner with the right of sonship to his inheritance before he touches American soil. And though "aliens from the commonwealth of Israel, and strangers from the covenants of promise," [4] the Government of the United States, through this treaty power, may in its wisdom remove the fetters upon alienage and declare that those who are the subjects of its favor may enter the country free from the hindrance of alienage. The magic words "I pronounce you man and wife," are not more

[1] 4 Wheat. 463, 4 L. ed. 613.
[2] Author's italics.
[3] 14 Pet. 412, 10 L. ed. 519.
[4] Ephesians ii, 12.

potent when uttered at the altar in changing the status of a blushing bride and clothing her with marital rights unknown to her before their utterance, than are the provisions of a treaty changing the former status of the alien and clothing him with privileges unknown to him before its adoption.

The marriage ceremony does not change the law of inheritance in the State where the ceremony is performed — that alone can be done by the legislative power — but it places some in the line of inheritance under the State law who were outside of its provisions by changing the status of such persons. Had the bridegroom suddenly died ten minutes before the ceremony, the prospective bride, under the law of the domicile, would have been deprived of the inheritance, which would go to her had the death of the bridegroom occurred ten minutes after the ceremony, instead of ten minutes before, as supposed. The law of the State is the same, the persons are the same, but the status of such persons has been changed.

§ 139. The case of Gonzales *v.* Williams,[1] is of interest. The case involved the question of whether a citizen of Porto Rico after the Spanish Treaty had gone into effect, was to be regarded as an alien under the Immigration Act of March 3, 1891, and the Court in its opinion clearly showed that by the treaty between Spain and the United States, the allegiance of the citizen of Porto Rico was transferred from Spain to the United States, and while not made a citizen by reason of that transfer, yet his status by the treaty as to alienage had been changed. By section seven of the Act it was provided that "The Inhabitants of Porto Rico, who were Spanish subjects on the day the treaty was proclaimed, including Spaniards of the Peninsular who had not elected to preserve their allegiance to the Spanish Crown, were to be deemed citizens of Porto Rico, and they and citizens of the United States residing in Porto Rico were constituted a body politic under the name of The People of Porto Rico."

In delivering the opinion of the court, Chief Justice Fuller said:

[1] 192 U. S. 1, 48 L. ed. 317, 24 S. C. 171.

"We are not required to discuss the power of Congress in the premises; or the contention of Gonzales' counsel that the cession of Porto Rico accomplished the naturalization of its people; . . . That a citizen of Porto Rico, under the act of 1900, is necessarily a citizen of the United States. The question is a narrow one, whether Gonzales was an alien within the meaning of that term as used in the act of 1891."

He further says:

"We think it clear that the act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens or subjects thereof; and that citizens of Porto Rico whose permanent allegiance is due to the United States; who live in the peace of the dominion of the United States; the organic law of whose domicil was enacted by the United States, and is enforced through officials sworn to support the Constitution of the United States, are not 'aliens,' and upon their arrival by water at the ports of our mainland are not 'alien immigrants' within the intent and meaning of the act of 1891."

In this case the Supreme Court has not held that the treaty-making power has the power to create citizens of the inhabitants of Porto Rico, but it has held that without the power to prescribe the limits and conditions upon which an alien may become a citizen, it has the right to say *who are aliens*. It may not make an alien a citizen, but it may say what constitutes an alien who, by the subsequent laws of Congress, may be made a citizen. It may destroy alienage, though it may not create citizenship. And this power seems to be rightfully lodged in the treaty-making power. The exigencies of governments in their various international complications, the obligations arising from national courtesies, and even national assistance, in time of war, notably in the case of France in the days of our Revolution, naturally suggest the propriety of placing in this power the right to acknowledge by reciprocal exchange of privileges, the obligations which our country may feel to another.

§ 140. The effect and object of the Treaty of 1800 involved in Chirac *v.* Chirac, was merely to remove one of the incidents

of alienage, a principle that seems to have been recognized in all cases as a proper exercise of the treaty-making power. The development of our subject does not carry us into the field of discussion referred to by Watson and Willoughby of whether a whole nation of foreigners may be incorporated into American citizenship under the treaty power, or whether this has actually been done in the past by the United States. Watson holds that it has been done.[1] Willoughby, however, doubts whether this has ever been accomplished as completely as claimed by Watson.[2] We are concerned in our discussion not so much with how far the treaty power may go in extending citizenship to a nation of foreigners, but whether the steps so often taken in the history of this power in relieving foreigners of alienage, have been sanctioned by the Courts and are sound in principle. A clear distinction may be seen between the right of what is termed "collective citizenship," that is, the making of a whole nation citizens by bringing them within the influence and under the control of the United States, and the power of Congress to naturalize the individual foreigner. The latter can be done only by conforming to the prescribed conditions of naturalization; the former must be done, if it can be done at all, by the treaty power waiving such requirements and accepting a nation of foreigners *en masse*, because the treaty power, which can legitimately bring under the control of the United States the territory in which they live, must accept them as *quasi* citizens, at least when the territory upon which they live is made subject to the United States;[3] and if it be true, as is claimed by Watson, that under the treaty power a whole nation of foreigners can be naturalized, entitling them to all of the rights of citizenship, surely it must be admitted that a treaty such as the one between France and the United States placing French citizens in America *in one respect* upon the same basis as Ameri-

[1] Watson on the Constitution, Vol. I, 616, 617.

[2] Willoughby on the Constitution, §§ 134, 185–187.

[3] Boyd *v.* Nebraska, 143 U. S. 135, 36 L. ed. 103, 12 S. C. 375; Chinese Exclusion Case, 130 U. S. 581, 32 L. ed. 1068, 9 S. C. 623; Turner *v.* Williams, 194 U. S. 279, 48 L. ed. 979, 24 S. C. 623.

can citizens, was legitimate and constitutional, for if the treaty power may grant all rights of citizenship to a nation of foreigners, it must surely include the power to grant one such right to an individual foreigner.

§ 141. When Judge Marshall says, in Chirac *v.* Chirac, *supra*, that "It (the provision of the treaty under discussion) does away the incapacity of alienage, and places the defendants in error in precisely the same situation, with respect to lands, as if they had become citizens," further endorsement of the correctness of this view is not needed. If the treaty does away with the incapacity of alienage and has the power to do away with it, as Judge Marshall says, the solution of all these cases involving a supposed conflict between a treaty and State laws is easy and simple, and is effected without any demand for the decision of the question whether a treaty or the law of a State, when in conflict, should prevail.

Justice Swayne's construction of Judge Marshall's view of the case of Chirac *v.* Chirac is clearly stated in the following extract from his opinion in Hauenstein *v.* Lynham, *infra:*[1]

"In Chirac *v.* Chirac (2 Wheat. 259) it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, *removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this country.*[2] The State law was hardly adverted to and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in Carneal *v.* Banks (10. Wheat. 181) and with respect to the British treaty of 1794, in Hughes *v.* Edwards (9 Wheat. 489)."

The above quotation from Justice Swayne's opinion is equivalent to the following: "In Chirac *v.* Chirac, 2 Wheat. 259, it was held by this court that a treaty with France gave to her citizens the rights to purchase and hold land in the United States, *by removing* the incapacity of alienage and *by placing* them in precisely the same situation as if they had been citizens of this country."

[1] p. 489. [2] Author's italics.

§ 142. It may be urged that the concession of this power to its full extent in its effect upon alienage would give to the treaty-making power the right to confer upon aliens rights which would subvert our constitutional form of government. A fair consideration of the decisions leads to no such conclusion. It could not be claimed that under this power the alien could be given the right to vote, or to hold office, or to be the recipient of any of those great political rights which pertain to American citizenship. These rights rest in the law-making power alone. The right to open a barroom in America, despite the laws of the States, could not be granted in a treaty, though the reciprocal right be granted the American to do the same in the other contracting country. The decisions seem to extend only to the removal of certain badges of alienage, putting the alien on the same footing thereby with the American citizen as to certain privileges; and while Congress may by law prevent the coming of aliens to America, the treaty-making power may define his status if the bars are let down by Congress and he is allowed to come.

The cases under consideration show most clearly that this has been the ground of their decisions; not that the treaty annuls the laws of the States supposed to be in conflict with it, but that under the laws of the States there was no power to defeat the alien's claim, because of his baptism into a limited sonship by the only power in the government that could bestow such a privilege.

§ 143. It could hardly be held by the most extreme advocate of the unlimited treaty-making power that if the law of Virginia provided that the inheritance of real estate from a party dying intestate should go to his mother, and the law of Great Britain provided that in a like case the inheritance should go to the father, that a treaty between Great Britain and the United States giving the right to the British citizen to inherit real estate in Virginia according *to the laws of succession of Great Britain* and the reciprocal right of the Virginian to inherit real estate in England according to the laws of the residence of the Virginia citizen, would be valid. If such a treaty were valid it

would be a clear example of the power of the treaty to annul a State law, but as we have seen, the cases under discussion are reconciled without resort to the conflict between the law and the treaty: and the heirs in each case took the inheritance under the law of the State, and not against it.

§ 144. In the case of Geofroy *v.* Riggs,[1] the law of Maryland which prevented an alien (a citizen of France) from inheriting real property from a citizen of Maryland, and the law of inheritance of Maryland, that allowed brothers and sisters (and if *dead*, their children) to inherit from a brother dying intestate, were not annulled and wiped off the statute book by the Treaty of February 23, 1853, between the United States and France, which permitted Frenchmen to take by inheritance lands in the District of Columbia controlled by the laws of Maryland, for these laws of Maryland were as virile and controlling after the adoption of the treaty as before. The Treaty of 1800 between France and the United States was the one involved in this case and was quoted in the consideration of the case of Chirac *v.* Chirac, *supra*.

Judge Field, rendering the opinion of the Court in the case of Geofroy *v.* Riggs, *supra*, in speaking of the effect of the treaty, says:

"As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and *the removal of their disability from alienage* to hold, transfer, and inherit property in such cases tends to promote amicable relations. *Such removal* has been within the present century the frequent subject of treaty arrangement."

And he adds, page 272:

"The disability of Frenchmen from alienage in disposing of and inheriting property, real and personal, '*is removed*,'" etc.[2]

How? By the treaty, for the treaty-making power can control, direct, and limit the character and status of aliens. It is not claimed in this case that the treaty annuls and renders

[1] 133 U. S. 270, 33 L. ed. 642, 10 S. C. 295. [2] Author's italics.

void the laws of inheritance of Maryland; it is not claimed that it destroys the right of brothers and sisters to inherit from a brother in the State of Maryland. Maryland alone has the right and power to determine this. Nor is it claimed in the opinion that the treaty annuls the law of Maryland, declaring that no alien can inherit land in the State. The only effect of the treaty in these particulars is to declare that the brother or sister who, under the Maryland law, claims inheritance, is not debarred from inheriting by reason of alienage, because the treaty power of the government, which under the Constitution of the United States can determine the questions arising under alienage and its status, has declared that the Frenchman *is not an alien as to inheritance* in this country.

§ 145. How, it may be asked, can the opinion of Judge Field, in Fox *v.* United States,[1] *supra*, be reconciled with his opinion in this case? The answer seems to be plain. There is no conflict between the two. His statement in Fox *v.* United States that the tenure of real property, its devolution and descent, etc., must remain with the State wherein it is located, is just as sound and valid as the law of the land as if he had never rendered the opinion of the court in Geofroy *v.* Riggs. The principles laid down in Fox *v.* United States were not controverted in Geofroy *v.* Riggs, nor was there any occasion to controvert them. The treaty did not change them, nor did it attempt to change them. It only changed the status of a party by removing his alienage, so that he might take the property as his inheritance *under the law of descent of Maryland.* The alien was not debarred from taking by the law of descent, but by his alienage. If this was removed the law of descent of Maryland gave him the inheritance. So far from the treaty destroying the law of descent, as Butler claims, when he says, "This (treaty) power exists in the national government . . . in regulating the descent of property within . . . the States," it was *that* law that gave the alien his inheritance.

[1] 94 U. S. 315, 24 L. ed. 192. See also McCormick *v.* Sullivant, 10 Wheat. 192–202, 6 L. ed. 300.

§ 146. The case of Hauenstein *v.* Lynham [1] is relied upon constantly as one of the cases settling the question of the supremacy of a treaty over a law of a State. An analysis of this case shows that it was really determined not upon the conflict between a law of Virginia and a treaty, but upon the construction of the treaty.

By a treaty between the Republic of Switzerland and the United States of the 9th of November, 1855, and which was in force at the time of the death of Hauenstein, it was provided in the third clause of the Fifth Article of said treaty:

"But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State or in the canton in which it may be situated, there shall be accorded to the said heir or other successor, such term as the laws of the State or canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated."

The law of Virginia did not permit an alien to inherit lands or sell them except under certain regulations and conditions, which have no relation to the decision of this case.

Hauenstein died in the city of Richmond in 1861. He was a citizen of Switzerland. He had acquired real estate in Virginia and *died unmarried and without issue.* Having no known heirs, there was an inquisition of escheat, and the estate in the hands of Lynham, the escheator, was about to be sold when certain heirs, claiming to be next of kin, citizens of Switzerland, filed their petition for the recovery of the same. The Circuit Court dismissed the petition and the Court of Appeals of Virginia sustained that judgment.

The Sixth Section, Chapter 115, page 557, Code of Virginia, 1860, is as follows:

[1] 100 U. S. 483, 25 L. ed. 628.

"When by any Treaty now in force between the United States and any foreign country, a citizen or subject of such country is allowed to sell real property in this State, such citizen or subject may sell and convey the same, and receive the proceeds thereof within the time *prescribed by such Treaty.*" [1]

The act of Virginia did not apply to Hauenstein's lands as they had been acquired before the passage of the act, and the act applied only to after-acquired lands.

The treaty gave the alien such time for the sale of the real estate as the *law of the State might prescribe.*

The treaty of 1848 between Switzerland and the United States prescribed a term of not less than three years for the claimant to dispose of such property, and Judge Moncure in delivering the opinion of the Court,[2] asks:

"Why was not a similar provision made in the Treaty of November 9, 1855? Obviously because it was intended that the consent and coöperation of the State should be necessary to give effect to that part of the treaty."

As no time was prescribed by the treaty, it was held by the Virginia Court that the escheator must prevail.

The quotation from the treaty above shows that it was intended to meet conditions in the States where aliens were denied the right of inheritance, which was the case in Virginia. The treaty recognized that there were jurisdictions where aliens were not allowed to inherit and it was to adjust such cases on a basis that would be satisfactory to the State in which the inheritance was located, as well as Switzerland, that this provision was put into the treaty. The case clearly presented no conflict between the Virginia law and the treaty, and this is admitted in Judge Moncure's opinion, in delivering the opinion of the Virginia Court of Appeals against the rights of the foreign heirs, as well as by Justice Swayne in delivering the opinion of the Supreme Court of the United States, deciding the case in favor of the foreign heirs. I quote from Judge Moncure: [3]

[1] Author's italics. [2] 28 Grat. 71. [3] 28 Grat. p. 70.

"This case therefore depends entirely on the true construction of the third clause of the fifth article of the said treaty."

He further said; page 72:

"In regard to provisions contained in some of the treaties between the United States and foreign countries, giving to aliens a right to claim land in the States by descent, or the proceeds of the sale thereof, and allowing them a certain term for selling the same, and withdrawing the proceeds of such sale, a question was raised by the revisors of the Code of Virginia in 1849 as to the constitutionality of such provisions, and to avoid a conflict between the two governments, State and federal, the revisors recommended the adoption of two sections in the Code, which were adopted accordingly. See their note to their report, page 587, Chap. 113, p. 18. In 1 Rob. New Pr. pp. 131–133 the same views contained in the note are again presented. While we do not express any opinion on this question in this case, *because it is not necessary to do so*, may we not suppose that the framers of the treaty of 1855 intended to avoid the exercise of at least a doubtful power by omitting such a provision as is contained in the treaty of 1848, giving to the alien claimant a right to sell the real property of a decedent and withdraw the proceeds of sale in a limited period, and by inserting in its stead such a provision on the subject as is contained in the subsequent treaty of 1855?"

Justice Swayne in delivering the opinion of the Court in the Supreme Court of the United States, page 490, says:

"We forbear to pursue the topic further. In the able argument before us, it was insisted upon one side, and not denied on the other, that, if the treaty applies, its efficacy must necessarily be complete. *The only point of contention was one of construction.* There are doubtless limitations of this power as there are of all others arising under such instruments; but this is not the proper occasion to consider the subject. *It is not the habit of this court, in dealing with constitutional questions, to go beyond the limits of what is required by the exigencies of the case in hand.* What we have said is sufficient for the purposes of this opinion." [1]

Judge Moncure held that the discussion of the constitutionality of a treaty giving the right of inheritance in Virginia to

[1] Author's italics.

an alien was not necessary to the decision of the case. Justice Swayne says "The only point of contention was one of construction," and he further emphasizes the point too often overlooked that the Court will not pass upon a constitutional question unless the exigencies of the case require it — unless it be "imperative," as Judge Cooley says.

In the last analysis, the only question in the case was the construction of the words in the treaty as to the time of the sale of lands of aliens who could not inherit in the State, to-wit: "*such term as the law of the State or canton will permit* to sell such property," the Virginia court holding that as Virginia had passed no law indicating the time in which such lands could be sold, the lands could not be sold by the aliens *at all*, and were escheated to the Commonwealth, while Justice Swayne held for the Supreme Court in his opinion "the terms of the limitation imply clearly that *some time* and not that *none* was to be allowed."

§ 147. This case is constantly cited as deciding a conflict between a treaty and a State law in favor of the treaty. Search will be made in vain in its records to show what law of Virginia the treaty conflicted with. It was not Sections 1, 2, and 6 of Chapter 115, Code of Virginia, 1860, for Judge Swayne says, page 485: "Section 2 has no application to the present case, because the declaration which it permits has not been made by the plaintiffs in error, and section 6 has none, because all the real estate of the deceased was acquired before the date of the act." If these sections of Virginia law are eliminated, (for section 1 is eliminated on the same ground that section 2 would be), the only law of Virginia that can be suggested as one conflicting with the treaty was that which denied the right of an alien to inherit real estate. But, how did the treaty conflict with that law? The very language of the treaty shows it to have been made in the interest of persons who under local laws could not inherit. The treaty recognized the validity of the Virginia law denying the right of inheritance because of alienage when it said, page 486: "But in case real estate . . . shall fall to a cit-

izen who on account of his being an alien could not be permitted to hold such property in the State . . . there shall be accorded to the said heir . . . *such term as the law of the State . . . will permit to sell* such property." The treaty, therefore, was made to conform to the law of the State, *not to conflict with it.* So that, on the question of the right of an alien to inherit land in Virginia, there was no conflict between the treaty and the Virginia law, because the treaty recognized if not the validity, at least the existence of such law, and was framed in accordance with such law. Did the treaty conflict with the law of Virginia in the time given the alien who could not inherit land in Virginia to sell the same? The treaty provided that he should have "such term as the laws of the State will permit to sell such property," and it was held that Virginia had provided no term at all, so there was no conflict on this point between the treaty and the Virginia law, because there was no law prescribing the term. There was, therefore, no conflict between a treaty and a law of a State, but it was simply, as Judge Swayne says, a question of construction of the treaty. If the treaty was valid, the only question was what "such term" meant, and Judge Swayne says, page 490, "We have no doubt that this treaty is within the treaty-making power conferred by the Constitution." [1]

§ 148. The case of Fairfax, devisee, *v.* Hunter, lessee,[2] is often cited as an authority of the supremacy of a treaty over the law of a State. It was decided in 1813, and if a Federal question were involved in it, it was practically similar to that we have been discussing in the above cases. If the Virginia law denied the right of an alien to inherit land, the Treaty of 1794 declared that British subjects in this country, in reference to land, might "grant, sell, or devise the same to whom they pleased, in like manner as if they were *natives,* and that neither they nor their heirs or assigns should so far as respects the said lands and the legal remedies thereto, *be considered as aliens.*" [3]

[1] See Ahrens *v.* Ahrens, 144 Iowa, 486, 123 N. W. 164.

[2] 7 Cranch, p. 603, 3 L. ed. 453. [3] Author's italics.

If, under the treaty power, the Federal government had the power to remove the badge of alienage, when Denny Fairfax came to claim his land in Virginia he did not come as an alien, and therefore the law of Virginia did not apply. Judge Story, in speaking of Denny Fairfax's title, page 627, says:

"That possession and seizing continued up to and after the Treaty of 1794, which being the supreme law of the land, confirmed the title to him, his heirs and assigns, and protected him from any forfeiture *by reason of alienage.*"

In the Virginia Law Review for February, 1914, Mr. Robert M. Hughes[1] discussed this case quite fully, and shows conclusively that no federal question was involved in its decision. In concluding his paper, he says:

"On March 20, 1816, Story, J., pronounced the judgment in favor of the validity of the act and the jurisdiction of the court. . . .

"As to the Compromise Act of 1796, on which the case had really turned in the Virginia court, Tucker and Baxter had forcibly argued that the decision being general and the plaintiff not having specially set up his title by pleading or otherwise but having joined in a case agreed there was nothing to show that the case had turned on a federal question. Story disposes of the Compromise Act in a paragraph by saying that he understood it to be a private act, and Johnson does not even mention it. So that in the last analysis the decision of the Virginia court was reversed, though in fact it had not turned on a federal question at all.

"As to this last consideration, the settled doctrine of the Supreme Court now is, that if a case involved both federal and non-federal questions, and the non-federal question is sufficient to sustain the decision, it will not take jurisdiction."[2]

§ 149. The case of *People v. Gerke*,[3] decided in the year 1855, is of special interest in confirming the view presented above.

[1] Author of Hughes' "Admiralty," and "Federal Procedure."

[2] Eustis *v.* Bolles, 150 U. S. 361, 14 S. C. 131; Arkansas So. Ry. Co. *v.* German Nat. Bank, 207 U. S. 270, 28 S. C. 79.

[3] 5 Cal. 381.

August Dick, a citizen of Prussia, died intestate in the city of San Francisco, leaving real estate. The Attorney General of the State undertook proceedings against the absent heirs in an effort to escheat the same to the State of California, and Judge Heydenfeldt of the Supreme Court of that State, delivered the opinion of the court. The language of the treaty between Prussia and the United States entered into in 1828, declared:

"When on the death of any person holding real estate within the territory of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage; such citizen or subject shall be allowed a reasonable time to sell the same and to withdraw the proceeds without molestation."

Under the law of California at the time, an alien could not inherit real estate, and the contest was as to whether the provisions in the treaty just quoted prevailed in giving the property of the decedent to his absent heirs.

In delivering the opinion of the Court, Judge Heydenfeldt said:

"If this was so to the full extent claimed, it might be a sufficient answer to say, that it is one of the results of the compact, and, if the grant be considered too improvident for the safety of the States, the evil can be remedied by the constitution-making power. I think, however, that no such consequence follows as is insisted. The statutes of distribution are not altered or affected. Alienage is the subject of the treaty. Its disability results from political reasons which arose at an early period of the history of civilization, and which the enlightened advancement of modern times and changes in the political and social condition of nations, have rendered without force or consequence.

"The disability to succeed to property is alone removed, the character of the person is made politically to undergo a change, and then the statute of distribution is left to its full effect, unaltered and unimpaired in word or sense. If there is one object more than another which belongs to our political relations, and which ought to be the subject of treaty regulations, it is the extension of this comity which is so highly favored by the liberal spirit of the age, and so conducive in its tendency to the peace and amity of nations."

In most of the cases in the Supreme Court, Ware *v.* Hylton[1] is cited, but it is not quoted except in one case, and that the case of Hauenstein *v.* Lynham.[2] In this case, Justice Swayne quotes an extract from the opinion of Justice Chase, and refers to it *as the opinion of the Court*, when, in fact, there was no opinion of the Court in that case, but all four judges who sat in the case delivered opinions *seriatim*.

§ 150. Many cases in the courts of the States have followed in the same line. A few only will be referred to. In Jackson *v.* Wright,[3] decided 1809, the question arose as to the right of sisters and brothers of a deceased alien to inherit land in the State of New York where the deceased resided, the brothers and sisters being in Ireland, and one sister, not an alien, residing in New York State.

The Treaty of 1794 between Great Britain and the United States provides "It is agreed that British subjects who now hold lands in the territory of the United States and American citizens who now hold lands in the dominion of His Majesty shall continue to hold them according to the nature and tenure of their respective estates and titles therein and may grant, sell or devise the same to whom they please in like manner *as if they were natives* and that neither they nor their heirs or assigns so far as may respect their said land and the local remedies incident thereto, *shall be regarded as aliens*." [4]

The Legislature of New York had passed an act in favor of the sister residing in New York and the court held that this was inoperative as against the treaty. The law of New York forbidding aliens to inherit land was not set aside, but the obstacle in the law to the inheritance by the heirs in Ireland was removed, and removed by the power that had the right to remove it.[5]

§ 151. The case of Opel *v.* Shoup,[6] involved a seeming con-

[1] 3 Dallas, 199, 1 L. ed. 568.
[2] 100 U. S. 483, 25 L. ed. 628.
[3] Johnson Reports, 77.
[4] Author's italics.
[5] See also People *v.* Warren, 13 Misc. N. Y. 614, 34 N. Y. S. 942; Watson *v.* Donnelly, 28 Barber, 650; Bollerman *v.* Blake, 94 N. Y. 624; Baker *v.* Shy, 9 Heisk. 86.
[6] 100 Ia. 419.

flict between the law of Iowa and a treaty. The law of Iowa provided:

"Non-resident aliens are hereby prohibited from acquiring title to, or taking or holding any land or real estate in this State by descent, devise, purchase or otherwise."

The provisions of a Treaty between the United States and the King of Batavia, Germany, concluded in 1845, as follows:

"ARTICLE I. Every kind of *droit d'aubaine, droit de retraite,* and *droit de detraction* or tax on emigration, is hereby and shall remain, abolished between the two contracting parties, their states, citizens, and subjects, respectively.

"ARTICLE II. Where, on the death of any person holding real property within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years to sell the same . . . and to withdraw the proceeds thereof, without molestation, and exempt from all duties of detraction.

"ARTICLE III. The citizens or subjects of each of the contracting parties shall have power to dispose of their (real and) personal property within the states of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said (real and) personal property, and may take possession thereof, either by themselves or by others acting for them."

The provisions of the treaty were sustained. In the opinion of the Court, Given, J. (page 422), said:

"Appellants cite authorities to the effect that the states alone have the right to regulate, by legislation, descents and conveyances of real estate within their borders . . . that treaties made without authority are not valid; that this treaty is in conflict with the laws of Iowa, and is, therefore, of no force or effect. It may be conceded that the states alone have such power; that they alone may declare to what kindred the estate of persons dying intestate shall descend. It must also be conceded that the federal government alone has power to treat with other governments as to rights of the citizens of each within the territory of the other. This treaty does not attempt

to regulate descents of real property in Iowa. It does not declare that, when a son or daughter dies without issue, the estate shall go to the parents. It is left to the state, and Iowa has so provided. This treaty simply declares that, if that parent is disqualified by alienage, as to the citizens of these two governments, this disqualification is removed." [1]

§ 152. The case of Cornet *v.* Winton [2] is cited by Butler, Vol. II, page 45, as an authority sustaining the treaty-making power over State laws. We think no such question was involved in the case. The title asserted by the plaintiff had come from an entry in 1783 which was perfected by a grant from North Carolina in 1800. The land in question was granted to the plaintiff's vendor, "encumbered with the Indian title." [Catron, J., page 444.] By treaty of 1819 between the United States and the Cherokee nation, the land in dispute was reserved to the defendant. Catron, J., says, page 449.

"North Carolina had no right to take it from the Indians for Stuart's (the vendor of the plaintiff) benefit, without their consent; this consent they have not given, and therefore no right to prosecute this action to recover the possession of the land has ever vested in Stuart; hence he must fail in the weakness of his own title."

§ 153. Another case of interest decided by the Supreme Court of California is that of The People *v.* Naglee.[3] This case involved a supposed conflict between a treaty and a law of California, and in delivering the opinion of the Court, Judge Bennett used the following language:

"In determining the boundaries of apparently conflicting powers between the states and general government, the proper question is, not so much what has been, in terms, *reserved* to the states, as what has been, expressly or by necessary implication, *granted* by the people to the national government. . . . But even if the provisions of the statute did clash with the stipulations of that, or of any other treaty, the conclusion

[1] Doehrel *v.* Hillmer, 102 Ia. 171, 71 N. W. 204; Wilcke *v.* Wilcke, 102 Ia. 173, 71 N. W. 201.

[2] 2 Yerger 149 (Tenn.). [3] 1 Cal. 234 and 246.

is not deducible that the treaty must, therefore, stand, and the state law give way. The question in such case would not be solely what is provided for by the treaty, but whether the State retained the power to enact the contested law, or had given up that power to the general government. If the state retains the power, then the president and the senate cannot take it away by a treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty-making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that body, it cannot supersede a state law which enforces or exercises any power of the state not granted away by the Constitution. . . . To hold any other doctrine than this, would, if carried out into its ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective states, or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the states to a foreign nation." [1]

Two of the cases referred to in this chapter were decided by Judge Story: Orr *v.* Hodgson,[2] and Fairfax, devisee *v.* Hunter, lessee.[3] In both of these cases the Treaty of 1794 was involved which declared that British subjects in this country in reference to land might "grant, sell or devise the same to whom they pleased in like manner as if they were *natives*, and that neither they nor their heirs or assigns should so far as respects the said lands and the legal remedies thereto *be considered as aliens*." [4]

As we have indicated, Judge Story decided both of these cases on the ground that the treaty had removed the badge of

[1] It will serve no good purpose to quote the various cases from the States on this subject. They generally follow, Ware *v.* Hylton, Geofroy *v.* Riggs, and Hauenstein *v.* Lynham, *supra*, with the casual statement that these cases decided that a treaty annuls the law of a State in conflict with it. See also American Digest, Dec. Ed. Vol. XIX, p. 417, § 11. Am. Digest, Century Ed. Vol. XLVI, p. 226, § 11.

[2] 4 Wheat. 453, 4 L. ed. 613.

[3] 7 Cranch. 603, 3 L. ed. 453.

[4] Author's italics.

alienage and not on the ground that the treaty annulled the local law of the State.

If Judge Story ever held the view that the tenure of real property, its descent and its devolution could be controlled by any other power than that of the States, it is very certain that at the time he wrote his Commentaries in 1833 he held no such view, for we find the following striking passage in his Commentaries:

"Independent of all other considerations, the fact that the States possess a concurrent power of taxation and *an exclusive power to regulate the descents, devise and distribution of estates, (a power the most formidable to despotism, and the most indispensable in its right exercise to republicanism) will forever give them an influence which will be as commanding as, with reference to the safety of the Union, they could deliberately desire.*" [1] See Story's "Constitution of the United States," Vol. I, 359, 360.

[1] Author's italics.

CHAPTER VII

WARE v. HYLTON.[1] THIS CASE DID NOT DECIDE THAT THE DEFINITIVE TREATY OF PEACE OF 1783 ANNULLED THE LAW OF VIRGINIA OF OCTOBER, 1777

§ 154. This case was one of those involving the right of British creditors to recover their debts against Virginia debtors despite the law of Virginia passed in October, 1777. The action was brought in the United States Circuit Court of Virginia by a subject of Great Britain against two citizens of Virginia, on a bond dated the 7th of July, 1774. A number of States of the Union besides Virginia had passed laws which, it was claimed, had for their object the confiscation of British debts, and the case therefore excited great interest, not only in Virginia, but throughout the whole country. It was tried before Chief Justice Jay, Justice Iredell, and United States District Judge Griffin, in the Circuit Court at Richmond, Virginia, in May, 1793.

Justice Iredell, in a letter to his wife dated Richmond, June 7, 1793, says:

"We have this day given judgment in the great question as to British causes which has been depending so long. The judgment was in favor of the plaintiff, but with the execption of certain sums paid into the treasury. Mr. Griffin and myself concurred. Mr. Jay was for overruling it, etc., etc.

(Signed) JAMES IREDELL."[2]

[1] 3 Dallas, 199, 1 L. ed. 568.

[2] Mr. Pellew, in his life of John Jay (American Statesmen Series), p. 285, states that this case was argued at Richmond in the spring of 1793. Flanders, in his "Lives of the Chief Justices," p. 388, says that Chief Justice Jay held the Circuit Court in Richmond in May, 1793, and that the February Term, 1794, of the Supreme Court, was the last session of that Court attended by him.

The great interest, both national and local, which this case excited brought to it the most distinguished members of the bar as counsel, both in its prosecution and its defence; Wickham, Ronald, Baker, and Stark appeared for the plaintiff, while Patrick Henry, John Marshall, Innes, and Campbell appeared for the defendants. Patrick Henry did not appear in the case when brought to the Supreme Court of the United States, but his argument in the Circuit Court is described by those who heard it as representing the highwater mark of the great orator as a forensic advocate.

§ 155. Having been decided against the British creditor in the lower court, the case was appealed to the Supreme Court of the United States. There Wilcocks and Lewis appeared for the British creditors, while Marshall and Campbell of Virginia appeared for the Virginia debtors. Chief Justice Jay did not sit at the hearing of the cause in the Supreme Court. It was heard before five justices, Chase, Paterson, Iredell, Cushing, and Wilson. Each delivered a separate opinion in the case. Iredell did not sit as a judge in the case,[1] while Chase, Paterson, Cushing, and Wilson concurred in reversing the judgment of the Circuit Court; *but there was no opinion of the Court*, and the opinions of the justices differed widely in their method of approaching the case and the arguments by which they reached their conclusions.

The State of Virginia, in October, 1777, passed an act, the first and third sections of which are alone necessary to be considered.[2] They are as follows:

"1st. Whereas divers persons, subjects of Great Britain, had, during our connection with that kingdom acquired estates, real and personal, within this commonwealth, and had also become entitled to debts to a considerable amount, and some of them had commenced suits for the recovery of such debts before the present troubles had interrupted the administration of justice, which suits were at that time depending and undetermined, and such estates being acquired and debts incurred, under the sanction of the laws and of the connection then sub-

[1] See Note, page 256. [2] Page 247.

sisting, and it not being known that their sovereign hath as yet set the example of confiscating debts and estates under the like circumstances, the public faith, and the law and usages of nations require, that they should not be confiscated on our part, but the safety of the *United States* demands, and the same law and usages of nations will justify, that we should not strengthen the hands of our enemies during the continuance of the present war, by remitting to them the profits or proceeds of such estates, or the interest or principals of such debts.

* * * * * * *

"3rd. And be it further enacted, that it shall and may be lawful for any citizen of this commonwealth, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he shall think fit, into the said loan office, taking thereout a certificate for the same in the name of the creditor, with an endorsement under the hand of the commissioner of the said office expressing the name of the payer, and shall deliver such certificate to the Governor and Council, whose receipt shall discharge him from so much of the debt. And the Governor and Council shall in like manner lay before the General Assembly, once in every year, an account of these certificates, specifying the names of the persons by and for whom they were paid, and shall see to the safe-keeping of the same, subject to the future direction of the legislature."

The Definitive Treaty of Peace between the United States and Great Britain, ratified on the 14th of January, 1784, contained the following:

"It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted." (Fourth Article.)

§ 156. These being the facts of the case, what were the pleadings?

This was an action on a bond. Defendants pleaded payment (which the Court said it was not necessary to consider,) and a second plea setting up the law of Virginia of October, 1777, which the defendants claimed was a bar to the plaintiff's action, they having paid three thousand one hundred and

eleven and one ninth dollars into the loan office of the State and received a certificate for the same under the hand and seal of the Governor of the State. The plea will be found below in full in a note.[1]

[1] "That the plaintiff ought not to have and maintain his action, aforesaid, against them, for three thousand one hundred and eleven and one ninth dollars, equal to nine hundred and thirty-three pounds, fourteen shillings, part of the debt in the declaration mentioned, because they say, that, on the fourth day of July, in the year one thousand seven hundred and seventy-six, they, the said Defendants, became citizens of the state of Virginia, and have ever since remained citizens thereof, and resident therein; and, that the Plaintiff, on the said fourth day of July, in the year 1776, and the said Joseph Farrel were, and from the time of their nativity ever have been, and always since have been, and the plaintiff still is a British subject, owing, yielding and paying allegiance to the King of Great Britain; which said King of Great Britain, and all his subjects, as well the Plaintiff as others, were, on the said fourth day of July, in the year 1776, and so continued until the third of September, in the year 1783, enemies of, and at open war with, the state of Virginia and the United States of America; and, that being so enemies, and at open war as aforesaid, the legislature of the State of Virginia did, at their session begun and held in the city of Williamsburg, on Monday the twentieth day of October, in the year 1777, pass an act, entitled 'an act for sequestering British property, enabling those indebted to British subjects to pay off such debts, and directing the proceedings in suits where such subjects are parties,' whereby it was enacted, 'that it may and shall be lawful for any citizen of this Commonwealth, owing money to a subject of Great Britain to pay the same, or any part thereof, from time to time, as he shall think fit, into the said loan office, taking thereout a certificate for the same, in the name of the creditor, with an endorsement under the hand of the commissioner of the said office, expressing the name of the payer, and shall deliver such certificate to the Governor and council whose receipt shall discharge him from so much of the said debt.' And the Defendants say, that the said Daniel L. Hylton and Co. did on the 26th day of April, in the year 1780, in the County of Henrico, and in the State of Virginia, while the said recited act continued in full force, in pursuance thereof, pay into the loan office of this Commonwealth, on account of the debt in the declaration mentioned, the sum of $3111. ⅓ dollars, equal to 933.14 pounds and shillings, and did take out a certificate for the same, in the name of Farrell and Jones, in the declaration mentioned, as creditors, with an endorsement under the hand of the commissioner of the said office, expressing the name of the payer, which certificate they, the Defendants, then delivered to the Governor and Council who gave a receipt therefor, in conformity

The plaintiff[1] filed a replication to this second plea of the defendants, setting up, First: The Fourth Article of the definitive Treaty of Peace of 1783; and Second: The Constitution of the United States in Article Sixth, declaring that treaties are the supreme law of the land.

To this replication the defendants rejoined, and in their rejoinder claimed that the Fourth Article of the Treaty of Peace could not avail the plaintiff, because Great Britain had broken the treaty in several particulars, and therefore the Fourth Article was not binding on Americans.[2] To this rejoinder, the plaintiff demurred.

§ 157. Under these pleadings it is seen that the act of Virginia, which was claimed to be a confiscation act, was set up by the defendants as the ground for their release from liability to the plaintiff. The second plea concludes: "Whereby the defendants, *by virtue of the said Act of Assembly*, are discharged from so much of the debts," etc. The plaintiff on the other hand, by replication set up the definitive Treaty of Peace, which declared that "*No lawful impediment*" should be raised by debtors of either party against creditors of the other in the collection of debts. The defendants filed a rejoinder to this replication, setting up the fact that the treaty had been broken by Great Britain in several particulars, and therefore was no

to the directions of the said act, in the words and figures following to-wit: "Received into the Council's office, a certificate bearing date the twenty-sixth day of April, 1780, under the hand of the Treasurer, that Daniel L. Hylton and Co. have paid to him, thirty one hundred and eleven and one ninth dollars, to be applied to the credit of their accounts with Farrell and Jones, British subjects. Given under my hand at Richmond, this 30th May, 1780.

"T. JEFFERSON.

"Whereby the Defendants, by virtue of the said act of Assembly, are discharged from so much of the debt in the declaration mentioned, as the said receipt specifies and amounts to, and this they are ready to verify. Wherefore, they pray the judgment of the court, whether the said plaintiff ought to have or maintain his action, aforesaid, against them for the nine hundred and thirty-three pounds and fourteen shillings, part of the debt in the declaration mentioned."

[1] *Id.*, pp. 203, 204. [2] *Id.*, p. 206.

longer binding on Americans. The plaintiff thereupon demurred to the defendants' rejoinder, and on the effect of this demurrer must rest the whole question in the case.

§ 158. The rule is well established that an appellate court in considering a record of this character must review the whole record and give judgment on the demurrer against the party who commits the first fault in the pleadings.[1] If, therefore, the demurrer brings up the validity of all prior pleadings in the case, the first to which the court would be directed would be the declaration. We find in this record no question raised by the court or counsel against the sufficiency of the declaration. The next pleading then to which the demurrer reaches, and whose sufficiency is challenged, is the second plea, which sets up the Virginia Act of October, 1777, as a defense to the claim of the plaintiff. If for any reason, the law of Virginia should be found to be invalid, it should be so declared, and if declared invalid it is evident that there could be no conflict between the treaty and the law, because there was no law.

§ 159. If, on the other hand, the Court should find the law of Virginia valid, then the conflict between that law and the treaty would be made complete by the pleadings. In a word, the plea of the law of Virginia, with the replication setting up the definitive Treaty of Peace were sufficient to make the issue between the law of Virginia and the Treaty of Peace, but if the Court should hold that the law of Virginia was invalid, then of course it was no "lawful impediment" to the collection of debts, and there could be no conflict between it and the Treaty of Peace. The effect of the demurrer to the rejoinder was to *compel* the Court to examine all prior pleadings and if that examination resulted in the Court declaring that the law of Virginia, *for any reason*, was invalid, there could be no conflict between the treaty and such law. Now, the demurrer to the rejoinder having been filed, and since the rule of procedure in such cases compelled the Court to examine each preceding pleading for the purpose of detecting any error, and that error

[1] Burk's "Pleadings and Practice," 351–353.

being first discovered in the second plea by the majority of the Court holding that the Virginia law was invalid, or insufficient, while the decision of the Court was in favor of the plaintiff, it was clearly not so on the ground of the supremacy of the treaty over the Virginia law. For, in the opinions of a majority of the Court that law was invalid, and that law being eliminated from the case as invalid, by the opinions of a majority of the judges, the plaintiff would prevail, because the only plea interposed to bar his recovery had been declared invalid. It matters not on what ground they regarded it as invalid, nor is it of any moment that the reasons assigned for its invalidity may have been different in the different opinions. If the law of Virginia, as set forth in the second plea, and which was relied upon by the defendants as a bar to the action, was no law and invalid or insufficient, the plaintiff was entitled to judgment. The law was no defense, because a majority of the Court held that it was invalid for two reasons. If this be true, the plea was no longer a bar to the plaintiff's action. It went out of the case, and all subsequent pleadings responsive to or growing out of the plea fell with it and nothing remained but the declaration, unobstructed by any plea in its demand for judgment. True, the Fourth Article of the Treaty of Peace was brought into the case in the plaintiff's replication to the second plea, but if this plea went out on the demurrer, the replication went with it, for it was brought into the case for the purpose of answering the defendants' second plea, and if there was no such plea, because invalid, there could be no answer to it, for there was nothing to answer. And so it is plain that if the majority of the Court held the second plea to be invalid, though they decided the case in favor of the plaintiff, they could not have decided it on the ground that the definitive Treaty of Peace of 1783 had annulled the law of Virginia, for they had held there was no law of Virginia to be annulled.

§ 160. It was only necessary for the majority of the Court to decide that the Virginia law was no impediment to the collection of British debts to show that there was no conflict in the

case arising between the treaty and the law of Virginia. The opinions of the justices who decided this case show that on two grounds they held the Act of Virginia of October, 1777, invalid or insufficient to bar a recovery. First: Because *under the law of nations*, Virginia as a sovereign independent State *could not confiscate debts;* and Second: If she had the power to confiscate debts, an examination of the law showed that she did not actually confiscate debts. To bring about a reversal of the judgment of the Circuit Court of the United States in this case, it was necessary that a majority of the justices rendering opinions should concur in that result. Four justices rendered separate opinions, and therefore it required a majority of the four, Chase, Paterson, Cushing, and Wilson, to make a decision. Of these four, three of them held the Virginia law was invalid, for one or *both* of the reasons given above, and if so, the judgment of the Court in favor of the plaintiff *must* have been for another reason than because of the supremacy of the treaty over the law of Virginia, for the law in their opinion had no valid existence.

§ 161. Let us examine the opinions of the justices on these two points. Justice Paterson, after quoting Vattel against the right or propriety of confiscation of debts by nations, adds at page 254:

"The Legislators of *Virginia*, who made the act, which has been pleaded in bar, lay down the doctrine relative to this point, in strong and unequivocable terms. For, they expressly declare, that the law and usages of nations require, that debts should not be confiscated. If the enemy should, in the first instance, direct a confiscation of debts, retaliation might in such case be a proper and justifiable measure. The truth is, that the confiscation of debts is at once unjust and impolitic: it destroys confidence, violates good faith, and injures the interest of commerce; it is also unproductive, and in most cases impracticable."

Further at page 255, he declares:

"I feel no hesitation in declaring, that it has always appeared to me to be incompatible with the principles of justice and policy, that contracts entered into by individuals of different

nations, should be violated by their respective governments in consequence of national quarrels and hostilities."

On this point Justice Cushing, in his opinion, page 282, says:

"What has some force to confirm this construction, (of Article IV of the treaty) is the sense of all *Europe*, that such debts could not be touched by States, without a breach of public faith."

Justice Wilson, page 281, leaves no doubt as to his opinion on this subject, in the following language:

"There are two points involved in the discussion of this power of confiscation: The first arising from the rule prescribed by the law of nations; . . . when the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement. By every nation, whatever is its form of government, the confiscation of debts has long been considered disreputable; and, we know, that not a single confiscation of that kind stained the code of any of the *European* powers, who were engaged in the war, which our revolution produced."

On the same page, by a strong, pregnant negative, which is usually considered equal to an affirmative proposition, he asserts that Virginia had not the power to pass the law of October, 1777.

"If Virginia had a power to pass the law of *October*, 1777, she must be equally empowered to pass a similar law in any future war; for, the powers of Congress were, in fact, abridged by the articles of confederation; and in relation to the present Constitution, she still retains her sovereignty and independence as a State, except in the instances of express delegation to the Federal Government."

He does not thereby say in so many words that Virginia had not the power to pass the law of October, 1777, but he practically denies her power to do so when he says that if the power existed then that it would exist at any time under the present Constitution, which all must admit she could not do now because of the provision that no State shall pass any law impairing the obligation of contracts.

§ 162. But if we admit for the moment that the above justices did not conclusively decide that under the law of Nations Virginia could not confiscate debts, yet these same justices in their opinions held that the law of Virginia, if valid in its enactment, did not actually confiscate debts. Justice Paterson, page 247, says:

"The act (the law of Virginia of October, 1777) does not confiscate debts due to *British* subjects. The preamble reprobates the doctrine as being inconsistent with public faith, and the law and usages of nations. The payments made into the loan office were voluntary and not compulsive; for it was in the option of the debtor to pay or not. The enacting clause will admit of a construction in full consistency with the preamble; for, although the certificates were to be subject to the future direction of the Legislature, yet it was under the expressed declaration, that there should be no confiscation, unless the King of *Great Britain* should set the example; if he should confiscate debts due to the citizens of *Virginia*, then the Legislature of *Virginia* would confiscate debts due to *British* subjects. But, the King of *Great Britain* did not confiscate debts on his part, and the Legislature of *Virginia* have not confiscated debts on their part."

Justice Cushing, page 284, says:

"No implication from the 5th article, can touch the present case, because that speaks only of actual confiscation, and *here was no confiscation.*[1] If we believe the *Virginia* legislators, they say 'We do not confiscate — we will not confiscate debts, unless *Great Britain* sets the example,' which it is not pretended she ever did."

At page 283, he further says:

"Having never confiscated the debt, the State must, in the nature and reason of things, consider itself as answerable to the value."

Justice Wilson makes clear his opinion in the following language at page 281:

"Nor did any authority for the confiscation of debts proceed from Congress (*that body, which clearly possesses the right*

[1] Author's italics.

of confiscation,[1] as an incident of the powers of war and peace) and, therefore, in no instance can the act of confiscation be considered as the act of the nation."

§ 163. The above quotations from the opinions of the Court show that Justice Paterson and Justice Cushing held that there was no lawful impediment to the collection of British debts by the law of Virginia, because that law did not confiscate debts, and Justice Wilson in the above quotation from his opinion agrees that the Virginia act did not confiscate debts, but for a reason different from that given by Justices Paterson and Cushing. He holds that the Virginia Act did not confiscate because the right of confiscation, if it existed at all, existed in Congress. It matters not for what reason the judges held the law of Virginia invalid.

These quotations from the opinions of the justices show that Wilson, Paterson, and Cushing on one or the other of the two grounds mentioned, or both, held that the law of Virginia was invalid or inoperative, and therefore no obstruction to the plaintiff's recovery of judgment.

§ 164. The position of these justices is strongly buttressed by that of Chief Justice Jay in the case of Jones *v.* Walker,[2] a case involving a similar cause of action by a British creditor against a Virginia debtor, with the same pleas, replication, and rejoinder, and demurrer to the rejoinder, as in the case of Ware *v.* Hylton, and which was argued at Richmond, Virginia, in the Circuit Court, by the same counsel who argued the case of Ware *v.* Hylton in that Court. The Chief Justice, page 705, says:

"If the debt justly could be, and really was, confiscated by the act, there is no doubt but that the plaintiff's right became extinguished; but neither the word *confiscate*, nor any words tantamount to it as applied to debts, are to be found in it — nor is it a clear point that debts were even *sequestered* by the act. If they had been, the plaintiff's right to the money, unless barred by the subsequent treaty of peace, would have been perfect after the war."

[1] Author's italics.

[2] 2 Paine's C. C. 705.

The Chief Justice continues, after discussing the Act and the preamble, (pp. 705, 706),

"A preamble cannot annul enacting clauses; but when it evinces the intention of the Legislature and the design of the act, it enables us, in cases of two constructions, to adopt the one most consonant to their intention and design. . . .

"From this preamble, it is plain and manifest, that the Legislature were so far from entertaining or adopting the idea of confiscation, that they do, in express terms, reject it as being contrary to the *public faith* and to the law and usages of nations." [1]

Had Chief Justice Jay been a member of the court when Ware *v.* Hylton was decided in the Supreme Court the weight of his name would have been added to those of Paterson, Cushing, and Wilson in upholding the view that the law of Virginia did not confiscate British debts. The pleadings in the case, as we have seen, not only justified the decision of the case on this ground, but excluded its decision on any other ground. The demurrer by the plaintiff to the defendants' rejoinder made the issue direct.

§ 165. The strongest and most logical opinion delivered in the case was that of Judge Chase, and had his opinion been *the opinion of the court*, the question raised in this discussion would never have been made; for compelled by the pleadings in the case and by the demurrer of the plaintiff to the defendants' rejoinder, he takes up first the question of the right of Virginia to confiscate debts and holds that she unquestionably had the right. Having so decided, he examines the law itself and holds that the law itself was intended to and did confiscate British debts. Holding these two views in his opinion, the demurrer to the second plea had to be overruled, and the plea admitted to be valid, and at once the conflict between the law of Virginia and the treaty under the pleadings became evident. The issue could not be avoided. The pleadings admitted, indeed re-

[1] It is passing strange that this case, decided in 1793 by the Chief Justice of the United States, was not cited by any justice of the Court in the decision of Ware *v.* Hylton, in 1796.

quired the decision of that issue, and he held that the treaty was superior to the law of Virginia and annulled it. His opinion was not the opinion of the Court, but his alone among four.

Not so, however, with Paterson, Cushing, and Wilson, for under their views, the law of Virginia was a nullity, and if so, the second plea was bad and the plaintiff, without resort to the aid of the treaty, was entitled to the judgment, *but not because the treaty was superior to the law of Virginia* in the conflict between the two, because there was no conflict, in their opinions, since they held the State law a nullity.

§ 166. Judge Chase has put the issue clearly, strongly, and irresistibly, page 233, where he says:

"The second point made by the council for the Plaintiff in error was 'if the legislature of *Virginia* had a right to confiscate *British debts*, yet she did *not* exercise that right by the act of the 20th *October*, 1777.' *If this objection is well founded, the Plaintiff in error must have judgment for the money covered by the plea of that law, and the payment under it.*" [1]

Paterson, Cushing, and Wilson held *this objection was well founded.*

Chief Justice Jay also recognizes that the decision of the case was brought down to that single issue when he said in Jones *v.* Walker, page 705,

"If the debt justly could be, and really was, confiscated by the act, there is no doubt but that the plaintiff's right became extinguished, but neither the word 'confiscate' nor any words tantamount to it, as applied to debts are to be found in it."

With these views of the judges it is seen under the pleadings in this case that it was impossible for the court to have rendered a decision on the conflict between a state law and a treaty, for in order to bring about such conflict, it must first have been established there was in existence a valid state law, and when the majority of the court, driven by the pleadings in the case first to determine whether there existed a valid state law, held there was none to conflict with the treaty, there could be no

[1] Author's italics.

conflict because it requires two parties to a conflict, as well as two parties to a contract, and the plaintiff, therefore, the plea being void which set up the law, walked into the possession of his rights without opposition and without invoking the aid of the treaty.

§ 167. The Supreme Court in this decision reversed the Circuit Court and entered judgment for the plaintiff. Since there was no opinion of the court, in order to bring about a reversal, a majority of the court must have concurred in the judgment. As Justice Iredell did not take part in the decision, it required three of the remaining four to bring about a reversal. The four concurred in reversing the judgment, but my object is to show that such reversal was brought about without deciding the question of a conflict between the treaty and the law of Virginia. The pleadings in the case and the rule of law governing such pleadings compelled the court first, to decide whether there was a valid law of the State of Virginia to conflict with the treaty.

Justice Chase, in his opinion, held that the Virginia law was valid, and that it did confiscate debts. So holding, he held there was a conflict between the treaty and that law, and he sustained the supremacy of the treaty. The other three judges on two grounds denied the validity of the law, 1st: that under the law of Nations, Virginia could not confiscate debts, and 2d: that even if she could do so, under the law of Nations, an examination of the law itself showed that it did not confiscate debts, and being null and void or of no effect there was no lawful impediment to the collection of the debt, for, as the Chief Justice said, "If the debt justly could be, and really was, confiscated by the Act, there is no doubt but that the plaintiff's right became extinguished."

§ 168. It may be objected to the above analysis that it is not sound because of the failure to bear in mind that the courts of the country must take judicial notice of the Constitution of the United States and all treaties made under its authority; for while it has been shown in the above analysis of the case

that the Treaty of 1783 does not appear in the pleadings until it appears in the replication of the plaintiff to the second plea, and that therefore the decision of the demurrer to the second plea if sustained would decide the case before the treaty was reached in the pleadings, still it may be urged that since the demurrer to the second plea involved the validity of that plea, that the court in its consideration of the demurrer was obliged to take judicial notice of the treaty. This would seem to be entirely in consonance with sound legal principles, so that when the court takes judicial notice of the treaty, in passing upon the demurrer to the second plea, that treaty with all of its provisions is brought into full play and operation. In the Fourth Article: "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts heretofore contracted."

Several of the judges in this case declared that the words "lawful impediment" meant an impediment *of a law*. The second plea set up the law of Virginia, and if it was this law of Virginia that operated as an impediment to the collection of debts, the question of a conflict between the supremacy of the treaty and that of the law might arise; *but before such a conflict could arise it must appear that there was a law of a State to conflict with the treaty, and that it operated as an "impediment" to the payment of debts.*

So that, whether we regard the treaty as set up in the replication, or as necessary to be considered on the demurrer to the second plea, because the court must take judicial notice of it, the result is the same, for the rule that compels the court, after considering the sufficiency of the declaration to *consider* the validity of the second plea, would compel it to *decide* the validity of that plea. A majority of the court decided against its validity, on two grounds, and therefore, there could be no conflict between the law of Virginia and the treaty and no *lawful impediment* to the collection of debts, whether the treaty was set up in the replication or taken judicial notice of by the court in the consideration of the demurrer.

§ 169. When Judge Chase, in the quotation above made from his opinion, page 233, declares that if Virginia by her Act of October 20th, 1777, had a right to confiscate British debts, *yet did not exercise the right*, "the plaintiff in error must have judgment for the money covered by the plea of that law and the payment under it," he makes the issue clear and unmistakable to depend in no wise on the effect of the treaty, but on the Virginia law itself. He says the plaintiff in error must have judgment for the money covered by the *plea of that law*, and the payment under it. Why? Because Virginia did not exercise the right of confiscation. In his opinion, Judge Chase held that Virginia had a right to confiscate, and that the law did, in fact confiscate, and, therefore, so far as he was concerned, the issue between the treaty and the law was complete; but not so with the other judges, Paterson, Cushing, and Wilson, who held that the Virginia law did not confiscate, and therefore, Judge Chase properly said that if the Virginia law did not confiscate, the interposition of a plea setting up the law was of no avail against the plaintiff's right. Chief Justice Jay, in the quotation from his opinion above, in Jones *v.* Walker, p. 705, clearly sets forth the same view when he says: "If the debt *justly could be*, and really was, confiscated by the Act, there is no doubt but that the plaintiff's rights became extinguished"; "became extinguished" under the provisions of the law! This was the argument presented by Judge Marshall as counsel. The converse of this proposition is equally true, that if the debt was not confiscated by the act the plaintiff's right to a judgment was clear.

§ 170. These views are strengthened by a note of the reporter in the case,[1] who, after stating that Judge Iredell declared from the first that he would take part in the decision only in case of an equal division of opinion among the other judges, and that he read his opinion delivered in the Circuit Court, says:

"Judge Iredell added, that upon consulting his brethren on the bench, they had acquiesced in the propriety of this

[1] 3 Dallas, 256, 1 L. ed. 568.

proceeding. He therefore read those reasons in his place, so far as they respected the same subject of discussion in both courts, which was only as to the *effect of payments into the treasury, every other point in contest in the Circuit Court having been relinquished.*"

This is strongly confirmatory of Chief Justice Jay's view, and that of Judge Chase just referred to, for the whole case, as the reporter says, turned on the effect of payments into the treasury, that is, did they operate as a confiscation of the debt? Did Virginia have the power to confiscate, and if so, did the Virginia law, in its operation, confiscate? The chief question, as the reporter says, raised in the Circuit Court below, was upon the decision of the single issue before the court of the effect of these payments into the treasury of Virginia. How could a conflict between the treaty and the law occur, if the majority of the court held that the payments into the treasury did not operate as confiscations, and that the plaintiff was therefore entitled to judgment for his debt? Every judge in the case practically expressed the opinion that if the law was valid, as it was opposed in its operation to the treaty, that the treaty must prevail; and it is therefore claimed that the expression in their opinions of the superiority of the treaty to the law, *if the law was valid,* (though a majority of the court held it was invalid), makes these opinions binding authority for the proposition that a treaty is superior to all laws of a State in conflict therewith. It is not deemed necessary to discuss the question whether, if the law of Virginia was valid, the treaty in this case was superior to it. The decision of that question can throw no light on the question we are considering. The sole question that we are here concerned about is this: whether the court in expressing their opinions upon a question which was not necessary for the decision of the case, (because a majority held that the Virginia law was invalid or inoperative) can be taken as authority upon the question as if it were necessary to its decision.

§ 171. In the consideration of the demurrer it may be treated as if the plaintiff had demurred to the original plea number

two. Upon the issue made by this demurrer, three questions might arise.

I. Did the State of Virginia have power to confiscate the debt? (as Jay and Chase put it, *supra*);

II. If she did have the power, did she exercise it? (as Jay and Chase put it, *supra*);

III. If she did have the power and exercised it, did the Treaty of 1783 repeal the Virginia act, and the action taken under it?

Jay and Chase said as to III that if Virginia did *not* have the power or did *not* exercise it, the plaintiff was entitled to judgment, and if entitled to judgment how does the treaty appear in the case at all?

These three divisions clearly represent all questions that could arise under the demurrer: Supposing that the court must take judicial notice of the Constitution and laws of the United States and treaties, if I or II are decided in the negative it is useless to consider III, for a proper decision of the case; and if the court decides I or II in the negative its opinion on III would be clearly *dictum*, because not necessary to the decision of the case. If the demurrer to the second plea brought up for consideration only I and II and the court in deciding the case declared that Virginia did have power to confiscate debts, and then held that though she had the power, the act itself did not carry out that power, the decision of the court on I might not be *dictum*, because before the court could consider the question of whether Virginia did exercise the right of confiscation in the act itself, it was peculiarly appropriate, if not necessary, to determine whether she had the power to do so. The two questions so closely associated and growing out of the same law of Virginia, were largely dependent upon each other.

§ 172. The case of Railroad Companies *v.* Schutte,[1] tends to confirm this view in the following quotation from the opinion of the Court:

"As to the Florida Central Company, however, the case is different, and it is claimed not only that the statute did not

[1] 103 U. S. 143, 26 L. ed. 307.

authorize the exchange of the bonds and the creation of the lien, but also that the company did not in its corporate character execute its own bonds or make the exchange.

"As to the first question, we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in the case of this company, as well as the other, the statutory authority was complete. The point was directly made by the pleadings and as directly passed on by the court. Although the bill in the case was finally dismissed because it was not proved that any of the State bonds had been sold, the decision was in no just sense *dictum*. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."

§ 173. In the above case two questions were involved, and properly, before the court.

A. Did the statute authorize the exchange of the bonds and creation of the lien?

B. Did the company in its corporate capacity execute its own bonds or make the exchange?

Now, suppose the court had decided both of these questions in the affirmative, but was confronted by the Constitution of Florida, of which it had to take judicial notice, which declared that no bonds of the State should be exchanged for bonds of corporations of a certain character, describing them, and there was doubt whether this corporation was of the prohibited character, in that case a clear constitutional question would have arisen, and the question of the constitutionality of the statute would have been a proper subject for adjudication by the court. Here would have been three issues, instead of two: A, *supra*, B, *supra*, and C declaring that even if the statute authorized the exchange of the bonds, and the bonds were actually exchanged, was the statute constitutional?

The rule seems to be well settled that when a constitutional question is raised before a court, so averse to setting aside a law of the legislature or a law of Congress are the courts, that they will not resort to it, unless it be absolutely necessary to the decision of the case; but the court in this case, having held under B that none of the State bonds had been sold, though that alone was necessary to the complete decision of the case, held that what was expressed by the court in its opinion on A was not *dictum*. No constitutional question, however, was in the case, but if there had been, as suggested under C, the general rule would have forbidden its decision, for the case could be clearly decided under A and B. If the court had decided A or B in the negative, that is, that there was no authority under the statute to exchange the bonds, or second that the company did not exchange its bonds, and if C had been interposed, either by proper pleading or invoked under the doctrine of judicial notice, would there have been any occasion to decide the constitutional question? The decision of that question could only be necessary if the court had decided A and B in the affirmative, and then the constitutional question would not only be proper but necessary to a correct decision of the case, but having decided A or B as supposed in the negative, there would clearly be no occasion for the decision of the constitutional question.

§ 174. Judge Cooley [1] has well stated the principle, as follows:

"Neither will a court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. 'While courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a coördinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no

[1] Cooley, "Constitutional Limitations," 7th Ed., p. 231.

extra-judicial disquisition is entitled.'[1] In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable."[2]

Justice Brewer, in Chicago etc. Rwy. Co. *v.* Wellman,[3] discussing the question of when the court will pass upon the constitutionality of the acts of a legislature, uses this strong language:

"Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. *It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals.*"[4]

§ 175. In Frees *v.* Ford,[5] where the jurisdiction of the court was questioned on the ground that the act establishing it was unconstitutional, the same act required that the defendant in any action before the court must be a resident of the county in which the suit was brought. There were two questions in the case: One as to the constitutionality of the Act creating the court; and the other the residence of the defendant, and it was held that the defendant was not a resident of the county in which

[1] Hoover *v.* Wood, 9 Ind. 286, 287.

[2] Three of the judges in Ware *v.* Hylton violated this principle, and did discuss, by way of *dictum* the constitutional question arising on the conflict between the Treaty of Peace and the Virginia law.

[3] 143 U. S. 345, 30 L. ed. 176, 12 S. C. 400.

[4] Author's italics. [5] 6 N. Y. 476.

the suit was brought. Delivering the opinion of the court, Johnson, J., said:

"We ought not to pass upon the question of the constitutionality of a statute unless the determination of the point is necessary to the determination of the case. Indeed, we cannot if we would so pass upon it as to render our decision efficient as authority when there is another and clear ground on which our judgment may be supported."

In Martin *v.* The State,[1] McCabe, J., said:

"It is settled law in this court that the constitutionality of a statute will not be determined by this court when the cause in which the determination is sought may be decided and finally disposed of without such decision."

In re McDuffee,[2] McIvor, Chief Justice, said:

"It is a well settled and most salutary rule that a court should never undertake to pass upon the constitutionality of an act of the legislature, a co-ordinate branch of the government, unless it is necessary to a determination of the case in which such a question is presented."

In Weimer *v.* Bunbury,[3] Judge Cooley, discussing this question, says:

"A legislative act should not be declared unconstitutional unless the point is presented in such form as to render its decision imperative."

On this subject, Professor Willoughby[4] says:

"The court will not pass adversely upon the validity of an act of Congress unless it is absolutely necessary for it to do so in order to decide the question at issue. This principle has been so often declared that the citation of authorities is not necessary."

§ 176. If this principle be correct, any discussion of the conflict between the law and the treaty in this case was only a

[1] 143 Ind. 545, 42 N. E. 611.

[2] 43 S. E. 11; 20 S. E. 795. See also Gilreath *v.* Gillieland, 95 Tenn. 385, 32 S. W. 250; Edgell *v.* Conoway, 24 W. Va. 747.

[3] 30 Mich. 217. [4] Willoughby on the Constitution, Vol. I, p. 14.

moot question, for it was not necessary to the decision of the cause, for the demurrer to the second plea being sustained by a majority of the court on the ground that there was *no Virginia law*, that could be interposed against the right of the plaintiff to recovery, there could be no question involving a conflict between the law and the treaty.

§ 177. Again, we are attempting to show that the decision of Ware *v.* Hylton was not upon the conflict between the State law and the treaty. Such a conflict, of course, raises a constitutional question, which the Court will not decide, unless, as Judge Cooley says, it is "*imperative*" to the decision of the cause. A decision of the case on that ground would require the concurrence of at least three judges, for as four judges only sat in the case, three would be necessary to reverse the decision of the lower Court. Of the four judges, Chase, Paterson, Cushing, and Wilson, which of them, we ask, in their opinions held that the Virginia law was a valid law — that it actually confiscated debts, and therefore created a conflict with the treaty? An examination of their opinions will disclose that not one of them, except Judge Chase, held this view. His opinion was clear and explicit on this subject. His opinion was first in the order of delivery. If Judges Paterson, Cushing, and Wilson intended to decide the case on the same ground as Judge Chase, it was simple and perfectly natural for them to have announced their concurrence in his opinion, but it was because they did not agree with his opinion as to the validity of the law of Virginia that they gave their opinions seriatim, in which they joined in the result, namely, a reversal of the case, but for reasons in no wise arising from the conflict between the law and the treaty.

In the case of *Ex parte* Randolph,[1] Chief Justice Marshall, speaking of the decision of a question involving the constitutionality of a law, said:

"No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitution-

[1] 2 Brock. 478, Fed. Cases, 11558.

ality of a legislative act. If they become indispensably necessary to the case, the Court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed."

§ 178. Still another consideration is of weight to show that the constitutional question was not the *ratio decidendi* of the case.

At the time of this decision the full court consisted of six members, the Chief Justice and five associate judges, of which four constituted a majority. Ordinarily three of the four were sufficient to reverse the Circuit Court, but if Judge Marshall is to be followed in the view he expresses in Miln *v.* New York,[1] supposing a constitutional question was involved, a majority of the whole bench must concur on that question. I quote from Willoughby on the Constitution as follows:[2]

"The Supreme Court has held that, ordinarily, it will not hold a law void except by a majority of the full bench. Thus, in 1825, the Court of Appeals of Kentucky refused to follow a decision of the Supreme Court of the United States, which had held a law of Kentucky void as contrary to the federal Constitution, stating as a reason that the decision had not been concurred in by a majority of the entire court. After this occurrence the Supreme Court adopted the rule as stated above. In New York *v.* Miln, decided in 1834, Marshall said: 'The practice of this court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four justices (the court then consisted of seven) concur in the opinion, thus making the decision that of a majority of the whole court. In the present cases four justices do not concur in opinion as to the constitutional questions which have been argued. The court therefore direct these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present.'"

So far from a majority of the whole bench concurring in Judge Chase's opinion, as we have seen, the other three judges who sat

[1] 8 Pet. 120, 8 L. ed. 887. [2] Vol. I, p. 12, § 2.

in the case denied his premises, upon which alone a constitutional question could arise.

If the above rule laid down by Judge Marshall in Miln *v.* New York is accepted as the rule of the court, the case of Ware *v.* Hylton presents a notable exception to it if the case has been properly cited for one hundred and eighteen years as having decided a Constitutional question, for instead of four judges, a majority of the whole bench, deciding it, one only, Justice Chase, has put his decision on that ground.[1]

§ 179. If Ware *v.* Hylton is to be accepted as a controlling authority for the proposition that a treaty is superior to all state laws, it is an interesting fact that the great Chief Justice, who at the time of its argument was counsel for the Virginia debtors, was at the zenith of his powers as a lawyer, commanding the respect and admiration of the whole country for his extraordinary powers, should have argued the case for his clients without discussing the question upon which it is now claimed the case was decided. The brief of his argument left us in the original reports, shows that Judge Marshall rested the case upon a ground simple and clear, and that in no wise involved a conflict between the treaty and the law of Virginia.

§ 180. Yet, how this case has been misquoted! How misconceived! Justice Swayne, in Hauenstein *v.* Lynham,[2] quotes an extract from Justice Chase's opinion in Ware *v.* Hylton and adds apologetically:

"We have quoted from the opinion of Mr. Justice Chase in that case, not because we concur in everything said in the extract, but because it shows the views of a powerful legal mind at that early period, when the debates in the Convention which framed the Constitution must have been fresh in the memory of the leading jurists of the country."

But Justice Swayne refers to it as the *opinion of the court*, when in fact, there was no opinion of the court, but each judge

[1] The judgment of the Court, as seen on page 285, shows that it was rendered "upon the demurrer to the rejoinder of the defendants in error to the replication of the second plea."

[2] 100 U. S. 483, 25 L. ed. 628.

delivered his opinion, giving his individual views. Justice Swayne's mistake in supposing that Justice Chase delivered the opinion of the court seems to be a mistake common to the profession, and shows to what extent the case has been misleading.[1] The authority of the case would indeed be binding if Justice Chase had delivered the opinion of the Court. His opinion was clearly the ablest and most logical of those delivered in the case. He considered first whether Virginia had the right to pass the law of 1777, and held that she did have the right. Next, he considered the question whether having the right to enact it, did the Virginia law confiscate British debts, and he held that it did. The law being valid and its effect being to confiscate a British debt, a clear conflict existed between the treaty and the law, unless you take the view suggested by Judge Marshall. If his premises were correct there was no escape from his conclusion. In the opinion of a majority of the Court, however, as we have seen, his *premises* were not correct.

It seemed to have been the evident intention of the framers of the Constitution to adopt all treaties of the old government without question as to their validity under the new Constitution and make them valid, but the ratification or acceptance of the obligations of the old government in the form of treaties, should in no wise control the construction to be given the treaty-making power under the Constitution of the United States with its many constitutional limitations.

[1] Senator Elihu Root, in delivering his address as President of the American Society of International Law, April 19, 1907, at Washington, D. C., quoted from the opinion of Justice Chase in Ware *v.* Hylton and referred to it as the opinion of the Court. (Proceedings of the American Society of International Law, First Annual Meeting, p. 53.) At the same meeting, in addresses upon the Treaty-making Power under the Constitution, Professor Theodore P. Ion, of the Boston University Law School, referred to Justice Chase's opinion as the opinion of the Court in Ware *v.* Hylton. *Id.*, p. 130. Dean Charles Noble Gregory, of the Law School of George Washington University, also referred to Justice Chase's opinion as the opinion of the Court. *Id.*, p. 155.

§ 181. But there were other considerations undoubtedly quite potential which entered into the decision of Ware *v.* Hylton that cannot be overlooked, for as certain as the human body is affected by conditions of the atmosphere in which it lives, or the vegetable kingdom assumes colorings from the character of the soil from which it draws its life, so surely are courts unconsciously influenced by the political or moral atmosphere by which they are surrounded. The influence of public opinion upon the decisions of the highest courts of the land has been recognized by the Supreme Court itself. In *Ex parte* Milligan,[1] Justice David Davis used the following language:

"The importance of the main question presented by this record cannot be overstated; for it involves the very framework of the government and the fundamental principles of American liberty.

"During the late wicked Rebellion the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment."

In Hepburn *v.* Griswold,[2] Chief Justice Chase recognized the same fact in the following language:

"It is not surprising that amid the tumult of the late civil war, and under the influence of apprehensions for the safety of the Republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted yielded their doubts; many who did not doubt were silent."

[1] 4 Wall. 109, 18 L. ed. 281. [2] 8 Wall. 625, 19 L. ed. 513.

§ 182. The country had just been through seven years of war; the resources of the people had been exhausted thereby. Poverty, debt, and taxation were pressing upon them These conditions found a natural outlet in the attempt to break the bonds that bound them to their British creditors. The passage of repudiation or confiscation acts in most of the States, and every device that human ingenuity could devise, seemed to have been exhausted in their efforts to free themselves from debt at any expense or any cost. Depreciated currency, stay laws, exemption laws and the like, filled the statute books in defiance of their voracious creditors. Before the adoption of the Constitution, Congress felt impelled to call attention, by resolution, to these conditions that threatened the good name of the country at home and abroad. The Constitution, just adopted, forbade any State from impairing the obligation of contracts. The official conscience of the young empire was aroused, and the Judges who sat in the case of Ware *v.* Hylton and gave their decisions show that these conditions were uppermost in their minds, and that they were fully determined to meet the spirit of repudiation that was abroad in the land with the wholesome lesson of courageous honesty.

Hear the language of Justice Paterson:[1]

"Confiscation of debts is considered a disreputable thing among civilized nations of the present day. . . . I feel no hesitation in declaring, that it has always appeared to me to be incompatible with the principles of justice and policy, that contracts entered into by individuals of different nations, should be violated by their respective governments in consequence of national quarrels and hostilities. National differences should not affect private bargains. The confidence, both of an individual and national nature, on which the contracts were formed, ought to be preserved inviolate. Is not this the language of honesty and honor? Does not the sentiment correspond with the principles of justice, and the dictates of the moral sense? In short, is it not the result of right reason and natural equity? . . .

"Contracts entered into in such a state of things, ought to

[1] p. 255.

be sacredly regarded. Inviolability seems to be attached to them. Considering then the usages of civilized nations, and the opinion of modern writers, relative to confiscation, and also the circumstances under which these debts were contracted, we ought to take the expressions of this fourth article in their most extensive sense. We ought to admit of no comment, that will narrow and restrict their operation and import. The construction of a treaty made in favor of such creditors, and for the restoration and enforcement of pre-existing contracts, ought to be liberal and benign. For these reasons, this clause in the treaty deserves the utmost latitude of exposition."

Justices Cushing and Iredell, in their opinions, emphasize the same principles.

§ 183. Such is Ware *v.* Hylton! A case that for one hundred and eighteen years has been cited by statesmen, authors, and writers as having finally determined the question of the supremacy of a treaty over State laws, when, as we have seen, Marshall, the great counsellor, rested his case in the argument on other grounds entirely, and did not discuss that question; when Justice Chase, who delivered the leading opinion in the case, doubted his authority to decide such a question if it was involved in the case; and when the pleadings in the case show, not only that it was not, but that that question could not have been decided, since a majority of the court were of the opinion that the Virginia law was invalid or inoperative.

CHAPTER VIII

The Claim of Supremacy of the Treaty Power over the House of Representatives considered — President Washington's Contest with the House over the Jay Treaty — Presidents from John Adams to McKinley have not followed Washington's Precedent

§ 184. The advocates of the unlimited scope of the treaty-making power rest their argument largely upon the language of Article VI of the Constitution, which declares that treaties are "the supreme law of the land," and without reference to its relation to the other clauses of the Constitution, but considering merely the language of this clause, they assert its supremacy over all else, including the Constitution itself, and at one stroke seek to obliterate the whole scheme of the Constitution with its limitations and prohibitions, and establish this one power, affecting the relations of our country and its people with foreign nations, as the one supreme unlimited power in our system. They deny the limitations as to treaties which they admit apply to laws of Congress, and while conceding that every law must be constitutional, they deny such requirements in a treaty. The executive, the legislative, and the judicial powers of the Constitution, subject to the limitations of the Constitution which creates them, must be exercised within prescribed limits or be set aside by the judiciary whose province it is to preserve within proper bounds every department of the Constitution. The Congress may not exceed its powers granted by the Constitution; the President may not; the Judiciary may not; the States may not; but the treaty-making power, declared to be

the supreme law of the land, it is claimed is practically subject to no limitations in its scope and no restraint in its operations.

§ 185. A treaty between two countries, in its final analysis, is but an agreement by the parties regarding certain subjects. Where such agreements contain prohibitory provisions on both parties, the agreement in those respects is concluded, for such things cannot be done by either party, but if such treaty requires the doing of certain things by the parties to the convention, which things can only be done by some other branch of the government than that to which the making of treaties is assigned, the doing of such things by the co-ordinate branches of the respective governments makes the agreement or treaty *executory* as to such subjects, and the failure of that branch of the government to which is assigned the duty of carrying out such provisions to act may prevent the execution of the treaty. If the department of the government that makes the treaty has, under the Constitution of its country, the power to carry out the executory parts of the contract, no trouble can arise; but if that department that makes the treaty cannot, under the Constitution of its country, carry out the executory parts of such treaty, because such power is conferred upon another branch of the government, its execution may be delayed or hindered; and it is this question which has been the source of many contests in the United States from its earliest history. This question has often arisen in the United States where treaties have been made between the United States and foreign countries which carried appropriations, or which sought to change the revenue laws by reciprocal agreements. Can the treaty power of the United States execute such a treaty of itself? If the President and Senate may make a treaty with a foreign country carrying an appropriation of money, must the House of Representatives carry it out by making the appropriation?

§ 186. On this subject John Randolph Tucker[1] makes the following statement:

[1] Tucker on the Constitution, Vol. II, p. 739.

"Treaty is international compact. The root of the word (*tractare*) indicates negotiation between two or more. In itself treaty is a bargain, not law. 'It has the force of law, but derives it from the obligations of good faith.'[1] No power is given to the President and Senate to effectuate the terms of the treaty by legislation. On the other hand, power is given to Congress by law to carry into execution all the powers vested in other departments, of which the treaty-making power is one. Can the conclusion be reached that the law-making department must then concur in action with the treaty-making power to make the treaty effectual as law to the people, or to execute its terms by needful and proper laws, especially as to those matters which are peculiarly confided to Congress? Can an inference in favor of executive authority be admissible in the face of this expressed delegation of power to Congress to carry the treaty into execution; and can it be held that it is obligatory upon Congress to do all of this, not discretionary, and that Congress must register the will of the President and Senate without power to dissent?"

Judge Cooley says:[2]

"CHECK ON THE TREATY-MAKING POWER. — The full treaty-making power is in the President and Senate; but the House of Representatives has a restraining power upon it in that it may in its discretion at any time refuse to give assent to legislation necessary to give a treaty effect. Many treaties need no such legislation; but when moneys are to be paid by the United States, they can be appropriated by Congress alone; and in some other cases laws are needful. An unconstitutional or manifestly unwise treaty the House of Representatives may possibly refuse to aid; and this, when legislation is needful, would be equivalent to a refusal of the government, through one of its branches, to carry the treaty into effect. This would be an extreme measure, but it is conceivable that a case might arise in which a resort to it would be justified."

§ 187. Has the House the right to withhold its assent to an appropriation contained in a treaty? Or, is it obliged to vote the appropriation? These are questions which have engaged

[1] Mr. Hamilton, The Federalist, No. LXXV.

[2] Cooley, "Principles of Constitutional Law," p. 175.

the attention of American statesmen from the year 1796 to the present day. The question has been by repeated decisions settled in favor of the right of the House to exercise an untrammelled judgment in every case where an appropriation is asked at its hands — whether that appropriation be for the purpose of carrying out a treaty or for other purposes. A recent author on this subject says:[1]

"It is accepted on both sides, nor has it ever been questioned, that a treaty stipulating for an appropriation of money can be fully carried into effect only by an act of Congress."

This statement is certainly misleading, for while it is true that a treaty carrying an appropriation can only be made effective by an act of Congress making the appropriation, the point of difference between the two opposing schools on this subject was this: The one, led by President Washington and Mr. Hamilton, maintained that the House of Representatives practically had no choice or discretion, but was morally bound to vote an appropriation when it was placed in a treaty. The other party, led by Jefferson, claimed that in this matter, as in all matters pertaining to their duties, the House of Representatives was to be controlled by its own judgment as to the propriety or impropriety of granting the appropriation.

§ 188. One of the earliest occasions on which this question was brought into discussion, was upon the ratification of the Jay Treaty in 1796. This treaty carried under its provisions an appropriation of money.

Article I, § 9, Clause 7 of the Constitution provides: "No money shall be drawn from the treasury, but in consequence of appropriations made by law." The House declined to appropriate the money and insisted that before it could be called upon to do so, it was entitled to know all the facts and inspect the papers bearing upon the negotiations, and by resolution passed by a vote of sixty-two to thirty-seven requested the President to send them such documents. President Washing-

[1] Crandall, "Treaties, Their Making and Enforcement," p. 132.

ton declined to accede to their request, and sent a message of much power and dignity to the House, stating his reasons therefor.[1] In reply to President Washington's message the House, by a vote of fifty-seven to thirty-five, passed a resolution which disclaimed on their part any agency in the making of the treaty, but with characteristic boldness proclaimed the doctrine for the first time, that has been adhered to ever since, that where a treaty contains an appropriation that could not be effective without the action of Congress, that their right to deliberate and exercise their judgment as to the propriety of such appropriation could not be taken from them by any power in the Constitution, for the right to appropriate money carries with it, *ex necessitate*, the right to exercise their individual judgments and their own discretion in such matter: nor could the negotiators of a treaty in placing an appropriation in the treaty compel them against their judgment to do what they did not approve. The resolution passed was as follows:

"RESOLVED: It being declared by the second section of the second article of the Constitution that the President shall have power, by and with the advice and consent of the Senate, to made treaties, provided two-thirds of the Senators present concur, the House of Representatives do not claim any agency in making treaties; but that when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress, and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon as in their judgment may be most conducive to the public good."

§ 189. While neither President Washington nor Mr. Hamilton, nor any of those who agreed with them openly maintained the position that the treaty by its own force could make an appropriation it cannot be doubted that in effect their position,

[1] Richardson, "Messages and Papers of the Presidents," Vol. I, p. 194.

if admitted, would have brought about that result; for if the House had no power to object to an appropriation which the President and Senate had incorporated into a treaty, but was compelled under the *vis major* subserviently to adopt that which their judgment did not approve, the Senate and President in effect could make an appropriation without the assent of the House, for there can be no assent to any proposition which is the result of force, and which excludes discretion.

Mr. Butler says the result of this contest between the House of Representatives and President Washington was "a distinct victory for the Executive." [1] It is difficult to see how it could be so regarded. The House claimed no agency in making treaties, but expressly disclaimed it. The debates in the House and the cotemporaneous writings of the day show that on the part of the Executive it was claimed that when an appropriation was put into a treaty the House was bound to grant it. This was the real question in controversy. If they were bound to grant it, the treaty power was supreme over Congress, and this question was definitely and firmly met at the threshold of the contest, and the position of the House maintained by the overwhelming vote of fifty-seven to thirty-five. Had that resolution been defeated by the same vote with which it was carried, then indeed might the claim of victory for the Executive be made.

§ 190. About this time, Jefferson expressed his views in a letter to W. B. Giles,[2] wherein he said:

"Randolph seems to have hit upon the true theory of our Constitution; that when a treaty is made, involving matters confided by the Constitution to the three branches of the Legislature conjointly, the Representatives are as free as the President and Senate were, to consider whether the national interest requires or forbids their giving the forms and force of law to the articles over which they have a power."

[1] Butler, "Treaty-making Power," Vol. I, p. 428.
[2] Ford's "Jefferson," Vol. VII, p. 41.

On March 21, 1796, Jefferson wrote to Monroe, then in France, as follows:[1]

"The British treaty has been formally, at length, laid before Congress. All America is a-tiptoe to see what the House of Representatives will decide on it.

"We conceive the constitutional doctrine to be, that though the President and Senate have the general power of making treaties, yet wherever they include in a treaty matters confided by the Constitution to the three branches of Legislature, an act of legislation will be requisite to confirm these articles, and that the House of Representatives, as one branch of the Legislature, are perfectly free to pass the act or to refuse it, governing themselves by their own judgment whether it is for the good of their constituents to let the treaty go into effect or not. On the precedent now to be set will depend the future construction of our Constitution, and whether the powers of legislation shall be transferred from the President, Senate, and House of Representatives, to the President and Senate, and Piaminigo, or any other Indian, Algerine, or other chief."

§ 191. Mr. Jefferson has recorded in the Anas the results of a consultation between himself, as Secretary of State, and President Washington, which is instructive and interesting on this point:

"April the 9th, 1792. The President had wished to redeem our captives at Algiers, and to make peace with them on paying an annual tribute. The Senate were willing to approve this, but unwilling to have the lower House applied to previously to furnish the money; they wished the President to take the money from the treasury, or open a loan for it. They thought that to consult the Representatives on one occasion, would give them a handle always to claim it, and would let them into a participation of the power of making treaties, which the Constitution had given exclusively to the President and Senate. They said too, that if the particular sum was voted by the Representatives, it would not be a secret. The President had no confidence in the secrecy of the Senate, and did not choose to take money from the treasury or to borrow. But he agreed he would enter into provisional treaties with the Algerines, not to be binding on us till ratified here. I pre-

[1] Jefferson's Works, Vol. IV, p. 134.

pared questions for consultation with the Senate, and added, that the Senate were to be apprized, that on the return of the provisional treaty, and after they should advise the ratification, he would not have the seal put to it till the two Houses should vote the money. He asked me, if the treaty stipulating a sum and ratified by him, with the advice of the Senate, would not be good under the Constitution, and obligatory on the Representatives to furnish the money? I answered it certainly would, and that it would be the duty of the Representatives to raise the money; but that they might decline to do what was their duty, and I thought it might be incautious to commit himself by a ratification with a foreign nation, where he might be left in the lurch in the execution; it was possible too, to conceive a treaty, which it would not be their duty to provide for. He said that he did not like throwing too much into democratic hands, that if they would not do what the Constitution called on them to do, the Government would be at an end, and must *then assume another form.* He stopped here; and I kept silence to see whether he would say anything more in the same line, or add any qualifying expression to soften what he had said; but he did neither.

"I had observed, that wherever the agency of either, or both Houses would be requisite subsequent to a treaty, to carry it into effect, it would be prudent to consult them previously, if the occasion admitted. That thus it was, we were in the habit of consulting the Senate previously, when the occasion permitted, because their subsequent ratification would be necessary. That there was the same reason for consulting the lower House previously, where they were to be called on afterwards, and especially in the case of money, as they held the purse strings, and would be jealous of them. However, he desired me to strike out the intimation that the seal would not be put till both Houses should have voted the money." [1]

§ 192. The question of Mr. Genet's actions being under consideration by President Washington and his Cabinet, and the propriety of the issuance of a proclamation by the President being under consideration, we find the following note of interest.[2]

[1] "The Writings of Thomas Jefferson," by the Thomas Jefferson Memorial Association, Vol. I, p. 305.

[2] "Writings of Thomas Jefferson," by the Thomas Jefferson Memorial Association, Vol. I, p. 406.

"November the 21st, 1793. We met at the President's. The manner of explaining to Congress the intentions of the proclamation, was the matter of debate. Randolph produced his way of stating it. This expressed his views to have been, 1, to keep our citizens quiet; 2, to intimate to foreign nations that it was the President's opinion, that the interests and dispositions of this country were for peace. Hamilton produced his statement, in which he declared his intention to be, to say nothing which could be laid hold of for any purpose; to leave the proclamation to explain itself. He entered pretty fully into all the argumentation of Pacificus; he justified the right of the President to declare his opinion for a *future neutrality*, and that there existed no circumstances to oblige the United States to enter into war on account of the guarantee; and that in agreeing to the proclamation, he meant it to be understood as conveying both those declarations; viz., neutrality, and that the *casus fœderis* on the guarantee did not exist. He admitted the Congress might declare war, notwithstanding these declarations of the President. In like manner, they might declare war in the face of a treaty, and in direct infraction of it. Among other positions laid down by him, this was with great positiveness; that the Constitution having given power to the President and Senate to make treaties, they might make a treaty of neutrality which should take from Congress the right to declare war in that particular case, and that under the form of a treaty they might exercise any powers whatever, even those exclusively given by the Constitution to the House of Representatives. Randolph opposed this position, and seemed to think that where they undertook to do acts by treaty, (as to settle a tariff of duties), which were exclusively given to the Legislature, that an act of the Legislature would be necessary to confirm them, as happens in England, when a treaty interferes with duties established by law. I insisted that in giving to the President and Senate a power to make treaties, the Constitution meant only to authorize them to carry into effect, by way of treaty, any powers they might constitutionally exercise. I was sensible of the weak points in this position, but they were still weaker in the other hypothesis; and if it be impossible to discover a rational measure of authority to have been given by this clause, I would rather suppose that the cases which my hypothesis would leave unprovided, were not thought of by the convention, or if

thought of, could not be agreed on, or were thought of and deemed unnecessary to be invested in the Government. Of this last description, were treaties of neutrality, treaties offensive and defensive, &c. In every event, I would rather construe *so narrowly* as to oblige the *nation to amend*, and thus declare what powers they would agree to yield, than *too broadly*, and indeed, so broadly as to enable the executive and Senate to do things which the Constitution forbids."

§ 193. On the 31st of March, 1796, President Washington wrote to John Jay, ex-Chief Justice, as follows:[1]

"PHILADELPHIA, 31st March, 1796.

"My answer, given yesterday to the House of Representatives' request for papers, will, I expect, set a host of scribblers to work; but I shall proceed steadily on in all the measures which depend on the execution, to carry the British Treaty into effect."

§ 194. Mr. Henry Adams, in his life of Albert Gallatin, recites that when the treaty-making power and the rights of the House of Representatives in the consideration of treaties was under consideration in 1796, Mr. Gallatin on the 10th of March spoke:

"He claimed for the House, not a power to make treaties, but a check upon the treaty-making power when clashing with the special powers expressly vested in Congress by the Constitution; he showed the existence of this check in the British Constitution, and he showed its necessity in our own, for if the treaty-making power is not limited by existing laws, or if it repeals the laws that clash with, or if the Legislature is obliged to repeal the laws so clashing, then the legislative power in fact resides in the President and Senate, and they can, by employing an Indian tribe, pass any law under the color of treaty.

"The argument was irresistible; it was never answered; and, indeed, the mere statement is enough to leave only a sense of surprise that the Federalists should have hazarded themselves on such preposterous ground. Some years later, when the purchase of Alaska brought this subject again before

[1] Correspondence and Pub. Papers of John Jay, Vol. IV, p. 206.

the House on the question of appropriating the purchase money stipulated by the treaty, the administration abandoned the old Federalist position; the right of the House to call for papers, to deliberate on the merits of the treaty, even to refuse appropriations if the treaty was inconsistent with the Constitution or with the established policy of the country, was fully conceded. The administration only made the reasonable claim that if, upon just consideration, a treaty was found to be clearly within the constitutional powers of the Government, and consistent with the national policy, then it was the duty of each co-ordinate branch of the Government to shape its action accordingly."[1]

§ 195. Alexander Hamilton was a strong supporter of the views of the President. Oliver Wolcott, who was Secretary of the Treasury, gave to the President (as did other members of the Cabinet,) at his request, his views in writing on the subject, and after an able discussion involving the obligations of public faith created by a treaty, the power of repeal by an act of Congress, he added this significant postcript.[2]

"It is not intended to assert that treaties can extend to every object of legislation, there is no doubt that the forms of the Constitution and the powers of the different departments and organs of government are superior to the influence of a treaty; the limitation of the power of making treaties may in some respects be difficult, as the exigencies of society cannot be foreseen, but *in respect to matters of mere internal concern, there appears to be nothing upon which the power of making treaties can operate,* in derogation or extension of the power of legislation."[3]

After weeks of discussion of this question, which aroused the country to a high state of interest, the House, on the 30th of April, passed a Resolution by a vote of fifty-one to forty-eight that the appropriation asked for in the treaty should be granted by Congress.

§ 196. It is proposed now to trace the result of this remarkable contest on the part of the House of Representatives assert-

[1] 4th Cong. 1st Session, pp. 464–467.
[2] Crandall, "Treaties, Their Making and Enforcement," pp. 125, 126.
[3] Author's italics.

ing its prerogatives throughout our subsequent history; and to record the instances where the contest has been renewed and the result of such contests; and also to follow the action of the Presidents of the United States on this subject; and it will be instructive to see whether the Presidents, who have followed Washington, in their dealings with Congress in the matter of treaties, have recognized the House of Representatives as one of the co-ordinate branches of the Government to be consulted when a treaty which is under consideration carries an appropriation or makes a change in the revenue laws. If the House has no part or lot in this matter, of course the President need send no message to the *House*, discussing or suggesting matters involved in treaties.

I am induced to trace this history through every administration from Washington to McKinley because an eminent authority has recently declared that all of the Presidents since Washington's time have followed the position he took in his contest with the House of Representatives over the Jay Treaty.

§ 197. In the matter of the Louisiana Purchase, the Treaty with France was concluded April 30th, 1803. Congress was not in session at the time. Prior to this time, Mr. Jefferson, in accordance with his opinion expressed on the Jay Treaty, had asked and secured from Congress an appropriation for the purchase of the land at the mouth of the Mississippi. By this act he secured the appropriation and at the same time the consent of Congress to any treaty which might require an appropriation for the Louisiana Purchase. The treaty was ratified on the 20th of October, following. The former appropriation had not been sufficient, so the President sent a special message to *Congress*, October 17, 1803, with all papers necessary for its consideration, and added:[1]

"Propositions had therefore been authorized for obtaining on fair conditions the sovereignty of New Orleans and of other possessions in that quarter interesting to our quiet to such

[1] Richardson, "Messages and Papers of the Presidents," Vol. I, p. 358.

extent as was deemed practicable, and the provisional appropriation of $2,000,000.00 to be applied and accounted for by the President of the United States, intended as part of the price, was considered as conveying the sanction of Congress to the acquisition proposed. . . . When these shall have received the constitutional sanction of the Senate, they will without delay be communicated to *the Representatives*[1] also for the exercise of their functions as to those conditions which are within the powers vested by the Constitution in Congress."

On the 21st of October, 1803, Mr. Jefferson sent a message to the Senate and *House of Representatives* on the same subject in which he said:[2]

"In my communication to you of the 17th instant I informed you that conventions had been entered into with the Government of France for the cession of Louisiana to the United States. These, with the advice and consent of the Senate, having now been ratified and my ratification exchanged for that of the First Consul of France in due form, they are communicated to you for consideration in your legislative capacity. You will observe that some important conditions can not be carried into execution but with the aid of the Legislature, and that time presses a decision on them without delay."

§ 198. Mr. Jefferson seems to have followed this same principle wherever an appropriation was provided for in a treaty. A treaty having been entered into between the Kaskaskian Indians and the United States, by which their lands were transferred to the United States for a consideration, Mr. Jefferson, in a message to Congress, said:

"As the stipulations in this treaty also involve matters within the competence of both Houses only, it will be laid before Congress as soon as the Senate shall have advised its ratification."[3]

When Florida was acquired under the treaty between Spain and the United States, Congress, by an Act of March 3, 1819,

[1] Author's italics.

[2] Richardson, "Messages and Papers of the Presidents," Vol. I, p. 362.

[3] *Id.*, p. 359.

authorized the President to take possession of Florida, according to the terms of the treaty.

In the purchase of Louisiana, as well as in the purchase of Florida, President Jefferson secured appropriations from Congress before attempting to negotiate the treaties for the purchase in those cases.

§ 199. When the Treaty of Ghent was negotiated in 1815, signed July 3d, but not proclaimed until December 22, 1815, it was found there were certain provisions in the treaty involving duties on articles imported from Great Britain, and also provisions affecting the commerce between that country and America. President Madison sent a message *to Congress* December 23, 1815, recommending "such legislative provisions" as were required to make the treaty effective and Congress passed a bill in conformity with his recommendation. The debates on this question were notable.

During the consideration of this bill, the same questions arose that were considered under the Jay Treaty by the House of Representatives, and the debates took very much the same direction that they had taken on that occasion. The House again asserted its right to consider and deliberate upon the propriety of making appropriations or changing revenue laws that were incorporated in treaties. The Senate resisted this claim and reasserted the doctrine advanced by Hamilton and President Washington that the treaty being supreme and unlimited in its sphere, when it provided for a change in the revenue laws, or provided for an appropriation, that nothing was left for the House of Representatives except mechanically to carry out its provisions. The contest, if possible, was more bitter than that arising under the Jay Treaty, and the final outcome of the matter was the report of a joint Committee of Conference between the House and Senate, which contains the following declaration of principles:[1]

"In the performance of this duty the committee of the House of Representatives are inclined to hope that it will

[1] Annals of Congress, 1815–16, pp. 1018–1023.

sufficiently appear, that there is no irreconcilable difference between the two branches of the Legislature.

"They are persuaded that the House of Representatives does not assert the pretension that no treaty can be made without their assent; nor do they contend that in all cases legislative aid is indispensably necessary, either to give validity to a treaty, or to carry it into execution. On the contrary, they are believed to admit, that to some, nay many treaties, no legislative sanction is required, no legislative aid is necessary.

"On the other hand, the committee are not less satisfied that it is by no means the intention of the Senate to assert the treaty-making power to be in all cases independent of the legislative authority. So far from it, that they are believed to acknowledge the necessity of legislative enactment to carry into execution all treaties which contain stipulations requiring appropriations, or which might bind the nation to lay taxes, to raise armies, to support navies, to grant subsidies, to create States, or to cede territory; if indeed this power exists in the Government at all. In some or all of these cases, and probably in many others, it is conceived to be admitted, that the legislative body must act, in order to give effect and operation to a treaty; and if in any case it be necessary, it may confidently be asserted that there is no difference in principle between the Houses; the difference is only in the application of the principle. For if, as has been stated, the House of Representatives contend that their aid is only in some cases necessary, and if the Senate admit that in some cases it is necessary, the inference is irresistible, that the only question in each case that presents itself is, whether it be one of the cases in which legislative provision is requisite for preserving the national faith, or not."

§ 200. Mr. Calhoun, on the 9th of January, 1816, in the House of Representatives, spoke on the bill to regulate commerce between the United States and Great Britain, according to the Convention of the 3d of July, 1815. The whole speech is well worthy of perusal. I quote the following passage from it.

"Were I of the opposite side, if I, indeed, believed this treaty to be a dead letter 'til it received the sanction of Congress, I would lay the bill on the table and move an inquiry

into the fact, why the treaty has been proclaimed as a law before it received the proper sanction. It is true, the Executive has transmitted a copy of the treaty to the House; but has he sent the negotiation? Has he given any light to show why it should receive the sanction of this body? Do gentlemen mean to say that information is not needed; that though we have the right to pass laws, to give validity to treaties, yet we are bound by a moral obligation to pass such laws? To talk of the right of this House to sanction treaties, and at the same time to assert that it is under a moral obligation not to withhold that sanction, is a solecism. No sound mind that understands the terms, can possibly assent to it. I would caution the House, while it is extending its powers to cases which, I believe, do not belong to it, to take care lest it lose its substantial and undoubted power. I would put it on its guard against the dangerous doctrine, that it can in any case become a mere registering body. Another fact in regard to this treaty. It does not stipulate that a law shall pass to repeal the duties proposed to be repealed by this bill, which would be its proper form, if in the opinion of the negotiators a law was necessary; but it stipulates in positive terms for their repeal without consulting or regarding us." [1]

§ 201. He further said:

"The treaty-making power has many and powerful limits; and it will be found, when I come to discuss what those limits are, that it cannot destroy the constitution, or our personal liberty, or involve us, without the assent of this House, in war, or grant away our money. The limits I propose to this power are not the same, it is true; but they appear to me much more rational and powerful than those which were supposed to present effectual guards against its abuse. Let us now consider what they are.

"The grant of the power to make treaties is couched in the most general terms. The words of the constitution are, that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. In a subsequent part of the constitution, treaties are declared to be the supreme law of the land. Whatever limits are imposed by these general terms ought to be the result of a sound construction of the instrument. There are, apparently, but two restrictions on its exer-

[1] Works of Calhoun, Vol. II, pp. 125, 126.

cise; the one derived from the nature of our government, and the other from that of the power itself. Most certainly all grants of power under the constitution must be construed by that instrument; for, having their existence from it, they must of necessity assume that form which the constitution has imposed. This is acknowledged to be true of the legislative power, and it is doubtless equally so of the power to make treaties. The limits of the former are exactly marked; it was necessary, to prevent collision with similar co-existing State powers. This country is divided into many distinct sovereignties. Exact enumeration on this head is necessary, to prevent the most dangerous consequences. The enumeration of legislative powers in the Constitution has relation, then, not to the treaty-making power, but to the powers of the State. In our relation to the rest of the world the case is reversed. Here the States disappear. Divided within, we present the exterior of undivided sovereignty. The wisdom of the constitution, in this, appears conspicuous. Where enumeration was needed, there we find the powers enumerated and exactly defined; where not, we do not find what would be only vain and pernicious. Whatever, then, concerns our foreign relations; whatever requires the consent of another nation, belongs to the treaty-making power; and can only be regulated by it; and it is competent to regulate all such subjects, provided (and here are its true limits) such regulations are not inconsistent with the Constitution. If so, they are void. No treaty can alter the fabric of our government, nor can it do that which the constitution has expressly forbidden to be done; nor can it do that differently which is directed to be done in a given mode, all other modes being prohibited. For instance, the constitution says, no money 'shall be drawn out of the Treasury but by an appropriation made by law.' Of course no subsidy can be granted without an act of law; and a treaty of alliance could not involve the country in war without the consent of this House. With this limitation, it is easy to explain the case put by my colleague, who said, that according to one limitation, a treaty might have prohibited the introduction of a certain description of persons before the year 1808, notwithstanding the clause in the constitution to the contrary. I will speak plainly on this point: — it was the intention of the constitution that the slave trade should be tolerated till the time mentioned. It covers me with confusion to name it here;

I feel ashamed of such a tolerance, and take a large part of the disgrace, as I represent a part of the Union by whose influence it might be supposed to have been introduced. Though Congress alone is prohibited, by the words of the clause, from suppressing that odious traffic, yet my colleague will admit that it was intended to be a general prohibition on the Government of the Union. I perceive my colleague indicates his dissent. It will be necessary to be more explicit." [1]

Judge Henry St. George Tucker,[2] in a speech in the House at the same time, said:

"But if the legislative authority be necessary, is it true that we are bound to act in a particular way? Is it true that we must pass the laws which the treaty-making power engages we shall pass? Impossible. When our aid is called for, we must have the power to deliberate; if to deliberate, we must have a discretion to pass or to reject; since without it deliberation is a mockery and legislative solemnities a fair subject of derision and contempt."

§ 202. President Monroe, following the precedent laid down by Mr. Jefferson, recognized the right of the House of Representatives to deliberate and act upon appropriations carried in treaties as their judgment might direct. On February 18, 1823, he sent to *both* Houses of Congress the following message: [3]

"The convention of navigation and commerce between the United States of America and His Majesty the King of France and Navarre, concluded and signed at Washington on the 24th of June, 1822, with the first separate article thereto annexed, having been ratified by the two parties, and the ratifications of the same having been duly exchanged, copies of it and of the separate article referred to are now communicated to the two Houses of Congress, to the end that the necessary measures for carrying it into execution on the part of the United States may be adopted by the Legislature."

[1] Works of Calhoun, Vol. II, pp. 131–133, and Annals of Congress, 14th Congress, 1st Sess. 1815–16, pp. 530, 531.

[2] Annals of Congress, 14th Congress, 1st Sess. 1815–16, p. 560.

[3] Richardson, "Messages and Papers of the Presidents," Vol. II, p. 203.

§ 203. President Jackson recognized the same right in the House of Representatives when a treaty between this country and France had been negotiated on the 2d of February, 1832, involving commercial regulations and some modification of duties on wines, in consideration of which there were certain reciprocal stipulations in favor of the United States. In his sixth annual message to Congress, December 1, 1834, he said:[1]

"This treaty was duly ratified in the manner prescribed by the constitutions of both countries, and the ratification was exchanged at the city of Washington on the 2d of February, 1832. On account of its commercial stipulations it was in five days thereafter laid before the Congress of the United States, which proceeded to enact such laws favorable to the commerce of France as were necessary to carry it into full execution," etc.

The next treaty, in order of time, is the Ashburton Treaty in 1842.

"The celebrated Ashburton Treaty for the settlement of the northeastern boundary between Maine and the British possessions in 1842 established the boundary, by which part of the territory claimed by Maine passed to Great Britain, and part of the British territory passed to Maine. In the fifth article of that treaty it was provided that the United States should secure the consent of Maine and Massachusetts, the mother State of Maine, to the adjustment of the boundary, and would pay over to those States the sum of money agreed to be paid by Great Britain. This shows that Secretary Webster recognized the incapacity of the United States to cede by treaty any part of the territory of a State without its consent, and that the treaty-making power was qualified by the Constitutional duty of the United States 'to protect each State against invasion.'"[2]

§ 204. On the 29th of April, 1844, a reciprocity treaty between the German Zollverein and the United States was sent to the Senate. The treaty had been negotiated by Mr. Wheaton.

[1] Richardson, "Messages and Papers of the Presidents," Vol. III, p. 102.

[2] Tucker on the Constitution, Vol. II, p. 731.

President Tyler in his message to the Senate accompanying the treaty used this language:

"In as much as the provisions of the treaty come to some extent in conflict with existing laws, it is my intention, should it receive your approval and ratification, *to communicate a copy of it to the House of Representatives*, in order that *the House* may take such action upon it as it may deem necessary to give efficiency to its provisions."

On the 4th of June, 1844, Rufus Choate, as the Chairman of the Committee of Foreign Relations of the Senate, reported against the ratification of the treaty.[1] He says:

"The convention which has been submitted to the Senate changes duties which have been laid by law. . . . In the judgment of the Committee, the Legislature is the department of government by which commerce should be regulated and laws for revenue be passed."

§ 205. In President Tyler's annual message of December 3, 1844, he refers to the rejection of this treaty and again requests the consideration of the Senate upon it. In February, 1845, the same Committee, through Mr. Archer, submitted a report against its adoption, and the treaty was never ratified.[2]

In a treaty between Great Britain and the United States concluded June 5, 1854, there was provision for "the reciprocal free admission of certain articles, the produce of the British colonies or of the United States, and the right to navigate St. Lawrence River and the canals connecting the Great Lakes with the Atlantic and Lake Michigan."[3]

This treaty likewise provided that it should take effect as soon as *the Congress* of the United States on the one hand, and the Parliament of Great Britain, as well as the *local parliaments* of the British colonies affected, should pass laws carrying it into effect.[4]

[1] For the full Report see Senate Journal, 1st Sess. 28 Congress 1845–46, p. 445. For an abstract of said Report see Chapter XI, p. 371.

[2] Reports of Senate Com. on For. Rel. Vol. VIII, p. 36.

[3] Treaties and Conventions 1889, p. 448.

[4] For other cases of reciprocity treaties containing stipulations that they were not to go into effect until ratified by law, see treaty between

§ 206. President Polk in his efforts to adjust relations between the United States and Mexico as early as August 4, 1846, sent a message to the Senate of the United States containing the following suggestions:

"Should the Mexican Government, in order to accomplish these objects, be willing to cede any portion of their territory to the United States, we ought to pay them a fair equivalent — a just and honorable peace, and not conquest, being our purpose in the prosecution of the war.

"Under these circumstances, and considering the exhausted and distracted condition of the Mexican Republic, it might become necessary in order to restore peace that I should have it in my power to advance a portion of the consideration money for any cession of territory which may be made. The Mexican Government might not be willing to wait for the payment of the whole until the treaty could be ratified by the Senate and an appropriation to carry it into effect be made by Congress, and the necessity for such a delay might defeat the object altogether. I would therefore suggest whether it might not be wise for Congress to appropriate a sum such as they might consider adequate for this purpose, to be paid, if necessary, immediately upon the ratification of the treaty by Mexico. This disbursement would of course be accounted for at the Treasury, not as secret-service money, but like other expenditures.

"Two precedents for such a proceeding exist in our past history, during the Administration of Mr. Jefferson, to which I would call your attention. On the 26th of February, 1803, Congress passed an act appropriating $2,000,000.00 'for the purpose of defraying any extraordinary expenses which may be incurred in the intercourse between the United States and foreign nations,' 'to be applied under the direction of the President of the United States, who shall cause an account of the expenditure thereof to be laid before Congress as soon

Great Britain and U. S. May 8, 1871, Treaties and Conventions 1889, p. 478; treaty with Hawaii, 1875, Treaties and Conventions 1889, p. 546; also for the laws carrying them into effect see 17 Stat. at Large, 482, and 19 Stat. at Large, 200; also reciprocity treaty with Mexico of January, 1883, Treaties and Conventions, 1889, p. 714, which ceased to be operative May 20, 1887, because of failure of legislation to carry it into effect.

as may be'; and on the 13th of February, 1806, an appropriation was made of the same amount and in the same terms. The object in the first case was to enable the President to obtain the cession of Louisiana, and in the second that of the Florida. In neither case was the money actually drawn from the Treasury, and I should hope that the result might be similar in this respect on the present occasion, though the appropriation is deemed expedient as a precautionary measure.

"I refer the whole subject to the Senate in executive session. If they should concur in opinion with me, then I recommend the passage of a law appropriating such a sum *as Congress may deem adequate*, to be used by the Executive, if necessary, for the purpose which I have indicated." [1]

This mode of procedure of providing the appropriation by Congress before the Convention had been agreed upon, was followed when a treaty between Denmark and the United States was entered into on the 11th of April, 1857, wherein it was provided that the money provided for in the treaty should be tendered by the United States before the treaty should take effect, and likewise by an Act of Congress, June 28, 1902, wherein a conditional appropriation was made looking to the building of an inter-ocean canal.

§ 207. It is of interest to remember that the annexation of Texas to the United States was attempted by a treaty, but under the leadership of Mr. Benton, that treaty, on June 8, 1844, was rejected by a vote of thirty-five to sixteen; and on March 1st, 1845, the annexation was accomplished by a joint resolution of Congress; and by joint resolution of December 29th, 1845, Texas became a State of the Union and President Polk in the settlement of the results of the Mexican War followed Mr. Jefferson's example in procuring an appropriation from Congress for carrying out the provisions of a future treaty.

§ 208. On July 6, 1867, President Johnson sent *to Congress* a treaty between Russia and the United States providing for

[1] Richardson, "Messages and Papers of the Presidents," Vol. IV, p. 456. Author's italics.

the purchase of Alaska, and in his message he used this language:

"This instrument provides for a cession of territory to the United States in consideration of the payment of $7,200,000.00 in gold. *The attention of Congress* is invited to the subject of an appropriation for this payment, and also to that of proper legislation for the occupation and government of the territory as a part of the dominions of the United States." [1]

This provoked a warm discussion in the House, which, by a vote of 98 to 49, passed an amendment to the Bill declaring:

"Whereas the subjects thus embraced in the stipulations . . . of said treaties are among the subjects which by the Constitution of the United States are submitted to the power of Congress, and over which Congress has jurisdiction, and it being for such reasons necessary that the consent of Congress shall be given to said stipulations before the same can have full force and effect, . . . be it enacted that the consent of Congress is hereby given to the stipulations of said treaty." [2]

The Senate refused to accept the Bill with this amendment; and as it came from the Conference Committee and was finally passed carrying the appropriation, it simply asserted that the payment of the money under the treaty could not be carried out except by an Act of Congress.

§ 209. Again, "In 1880, January 26th, the House of Representatives passed a resolution declaring that the negotiation by the President and Senate of commercial treaties fixing the rates of duties on foreign goods 'would, in view of the provisions of Section 8, Article 1 of the Constitution of the United States, be an infraction of the Constitution and an invasion of one of the highest prerogatives of the *House of Representatives*.'" [3]

And so, in a reciprocity provision in the Tariff Act of 1897, providing for such reciprocal duties under treaties, it was declared that these could only go into effect when approved by *Congress*.[4]

[1] Author's italics.
[2] House Journal, 40th Congress, 2d Sess. p. 1064.
[3] *Id.*, p. 323.
[4] 30 Stat. at Large, 204.

§ 210. President Washington first resisted the right of the House of Representatives in its claim to participate with the Senate in the making of appropriations carried in treaties. In this he was sustained by his Cabinet and most strongly by Alexander Hamilton. It was the assertion of the absolute supremacy of the treaty power over the power of Congress as granted to it in the Constitution. It was the initial conflict. It was resisted by the House and the result was a practical victory for the House. During the administration of John Adams, Washington's successor, he submitted a message to the Senate and House suggesting the necessity of a treaty with an Indian tribe, and asked an appropriation of the *House* and Senate to carry it out,[1] and since that time, as we have seen, Jefferson recognized the claim of the House and submitted for their consideration treaties carrying appropriations.[2]

Mr. Madison recognized the same principle when he submitted the Ghent Treaty to Congress. Mr. Monroe followed the same precedent.[3]

John Quincy Adams, April 25, 1826, recognized the same principle in a special message to the Senate and *House of Representatives* when he sent to them the Treaty with the Creek Nation of Indians and said:

"The Treaty and supplementary article now ratified will require the aid of the Legislature for carrying them into effect."[4]

On May 19th, 1828, he recognized the same principle in reference to carrying out certain provisions of the Treaty of Ghent.[5]

§ 211. President Andrew Jackson in his message to the Senate and *House of Representatives*, December 1st, 1834, recognized this principle in its application to the reciprocity treaty with France.[6]

[1] Richardson, "Messages and Papers of the Presidents," Vol. I, p. 261.
[2] See *ante*, p. 214.
[3] See *ante*, p. 219.
[4] Richardson, "Messages and Papers of the Presidents," Vol. II, p. 345.
[5] *Id.*, p. 403.
[6] *Id.*, Vol. III, p. 102.

Martin Van Buren adopted the same principle in a message to the Senate and *House of Representatives* March 9th, 1840, involving a reciprocity treaty with Spain.[1] He recognized this principle again in a letter to R. M. T. Hunter, Speaker of the House of Representatives, in matters involving the Ashburton Treaty,[2] and again he recognized the same principle in reference to carrying out provisions of a Convention with the Mexican Republic, April 15, 1840.[3]

John Tyler recognized the necessity of like action in a message to the Senate April 29, 1845,[4] and indorsed the same principle in his message to the Senate and *House of Representatives* on December 3, 1844.[5]

James K. Polk, July 6, 1848, in a message to the Senate and *House of Representatives* indorsed the same principle in the following language:

"I communicate for the information of Congress the accompanying documents and correspondence relating to the negotiation and ratification of the treaty (with Mexico). Before the treaty can be fully executed on the part of the United States legislation will be required. It will be proper to make the necessary appropriations for the payment of the $12,000,000.00 stipulated by the twelfth article to be paid to Mexico in four equal annual installments," etc., etc.[6]

§ 212. President Zachary Taylor on February 13, 1850, sent to the House of Representatives, a message in response to a resolution of the House asking for certain information, and also

"If not incompatible with the public interest, all treaties not heretofore published which may have been negotiated with any of the States of Central America by any person acting by authority from the late administration or under the auspices of the present executive."[7]

[1] Richardson, "Messages and Papers of the Presidents," Vol. III, p. 578.
[2] *Id.*, p. 588.
[3] *Id.*, p. 590.
[4] *Id.*, Vol. IV, p. 314.
[5] *Id.*, Vol. IV, p. 339.
[6] *Id.*, Vol. IV, p. 588.
[7] *Id.*, Vol. V, p. 32.

In his message he did not decline the request of the House because it had no part in the consideration of treaties, but replied:

"The information called for by this Resolution will be cheerfully communicated to *the House* as soon as it shall be found compatible with the public interest." [1]

On March 4th, 1850, he also sent a message to the Senate and *House* containing a copy of a correspondence between the Department of State and the British Minister at Washington relating to tariff duties on British productions, "which seem to require the consideration of the legislative rather than the executive branch of the Government." [2]

§ 213. Millard Fillmore recognized this principle December 29th, 1851, in a message to the Senate and *House of Representatives* asking for an appropriation to carry out the provisions of the Treaty of Guadalupe Hidalgo.[3] Again he indorsed this principle June 14, 1852, in a message to the Senate and *House of Representatives* involving the claim of indemnity by Spain for the death of a Spanish citizen in New Orleans.[4]

Franklin Pierce recognized the claim of the House of Representatives on this question and on February 7th, 1855, sent a message to the Senate and *House of Representatives* asking for their action on a treaty between the United States and the Chippewa Indians, which carried an appropriation.[5] President Pierce again followed this precedent by sending to the Senate and *House of Representatives* a message involving the interests of certain Indian tribes on May 16, 1856,[6] and again by a message to the Senate and *House of Representatives* July 24, 1856.[7]

§ 214. President James Buchanan adopted the same principle in recognizing the claim of the House of Representatives in a message to the Senate and *House of Representatives* De-

[1] Richardson, "Messages and Papers of the Presidents," Vol. V, p. 32.

[2] *Id.*, p. 33. [3] *Id.*, p. 141. [4] *Id.*, p. 152.
[5] *Id.*, p. 302. [6] *Id.*, p. 374. [7] *Id.*, p. 379.

cember 10, 1858, involving the treaty between the United States and the Kingdom of Siam,[1] and again he indorsed this principle March 16, 1860, in a message to the Senate and *House of Representatives* asking their aid in the adoption of such legislation as was necessary to carry into effect certain stipulations of a treaty between the Republic of Paraguay and the United States.[2]

On the 12th of February, 1862, President Lincoln sent to the Senate *and House* a message and with it a copy of a special treaty between the United States and his Majesty the King of Hanover for the abolition of the Stade dues, etc., in which he used this language:

"I therefore recommend that seasonable provision be made to enable the Executive to carry this stipulation into effect."[3]

And on the 10th of June, 1862, he also sent to the Senate *and House* a copy of a treaty between the United States and Great Britain looking to the suppression of the African Slave Trade, in which he used this language:

"It is desirable that such legislation as may be necessary to carry the treaty into effect should be enacted as soon as may comport with the convenience of *Congress*."[4]

§ 215. On July 6th, 1867, Andrew Johnson sent to the Senate and *House* a treaty between the United States and Russia looking to "a cession of territory to the United States in consideration of the payment of $7,200,000.00 in gold," and he added:

"The attention of *Congress* is invited to the subject of an appropriation for this payment."[5]

President Grant on the 8th of March, 1870, sent to the Senate and *House of Representatives*, a message in the following language:

"Herewith I have the honor to transmit a communication from the Secretary of the Interior, relative to the obligation

[1] Richardson, "Messages and Papers of the Presidents," Vol. V, p. 530.
[2] *Id.*, Vol. V, 583.
[3] *Id.*, Vol. VI, p. 64.
[4] *Id.*, Vol. VI, p. 80.
[5] *Id.*, Vol. VI, p. 524.

of *Congress* to make the necessary appropriations to carry out the Indian Treaties made by what is known as the Peace Commission of 1867." [1]

He also sent a message to the Senate and *House of Representatives* in reference to the matter of fisheries involved in the Treaty of Washington of May 8th, 1871, between the United States and Great Britain. He refers to the fact that he had called attention to this matter in his message of December, 1871, by recommending the legislation necessary on the part of the United States, and adds:

"The near approach of the end of the session induces me again to earnestly call your attention to the importance of this legislation on the part of *Congress*." [2]

§ 216. On the 1st day of July, 1873, President Grant by a proclamation set forth and recognized that the legislation required by the Treaty of Washington on the part of Great Britain, as well as of the United States, had been enacted, and Hamilton Fish and Edward Thornton, representatives of the two countries, declared under their signs and seals that "the Articles 18–25 inclusive, and Article 30 of the Treaty between her Britannic Majesty and the United States of America of the 8th of May, 1871, *will take effect* on the first day of July, next." [3]

President Grant also sent a message to the Senate and *House* as of June 20th, 1876, relative to an extradition treaty between the United States and Great Britain.[4]

On the 9th day of September, 1876, President Grant also made proclamation of a Convention between his Majesty the King of the Hawaiian Islands and the United States of America affecting the revenue of the United States which had been concluded between the two countries, and "that the necessary legislation has been passed to carry the same into effect" by each of the high contracting parties.[5]

[1] Richardson, "Messages and Papers of the Presidents," Vol. VII, p. 51.
[2] *Id.*, Vol. VII, p. 210.
[3] *Id.*, p. 226.
[4] *Id.*, p. 370.
[5] *Id.*, pp. 394, 395.

§ 217. On the 17th of May, 1878, President Hayes sent a message to the Senate and *House of Representatives* concerning the deliberations of the Fishery Commission appointed under the provisions of the Treaty of Washington. In his message he said:

"The commission announced the result of its deliberations on the 23rd day of November last year, and an appropriation at the present session of Congress will be necessary to enable the Government to make the payment provided for in the treaty.

"I respectfully submit to the consideration of Congress the record of the transaction as presented upon the papers, and recommend an appropriation of the necessary sum, with such discretion to the executive government in regard to its payment as in the wisdom of Congress the public interests may seem to require." [1]

See also a message of President Hayes to the Senate and *House* as of March 1st, 1880.[2]

President Arthur on the 19th of January, 1883, sent a message to the Senate and *House* looking to the payment by Congress to the Cherokee Indians for certain lands, as provided for in the Treaty of July 19th, 1866.[3]

The necessity for the action of Congress in carrying out the provisions of treaties is shown by President Arthur in sundry messages to the Senate and House asking for legislation to carry out the provisions of Indian Treaties. One of these messages was sent on April 12, 1882, to the Senate and *House*.[4]

President Cleveland, on the 21st of May, 1886, sent to the Senate and *House* a message requesting their aid for legislation "to carry into effect the provisions of Article II of the treaty between the United States and China of November 17, 1880." [5]

Reference may also be had to a message to the same effect to the Senate and *House* of April 6th, 1886, asking for

[1] Richardson, "Messages and Papers of the Presidents," Vol. VII, p. 485.

[2] *Id.*, pp. 584, 585.

[3] *Id.*, Vol. VIII, p. 152.

[4] *Id.*, p. 93.

[5] *Id.*, p. 401.

additional legislation to carry into effect the Treaty with China.[1]

§ 218. On the 16th of January, 1890, President Harrison sent to the Senate and *the House*, the following message:[2]

"I transmit herewith a report from the Secretary of State in relation to the claim of the Government of Sweden and Norway, under the treaty between the United States and that Government of July 4, 1827, for the benefit of the lower rate of tonnage dues under the shipping acts of 1884 and 1886.

"I recommend the immediate adoption by *Congress* of the necessary legislation to enable this Government to apply in the case of Sweden and Norway the same rule in respect to the levying of tonnage dues under the treaty of 1827 as was claimed and secured by this Government under the same instrument in 1828."

On the 9th of January, 1895, President Cleveland sent to the Senate *and House* a message relating to the lease of an uninhabited island to Great Britain by the Hawaiian government, since our treaty with the government provided that it should not "lease or otherwise dispose of or create any lien upon any port, harbor or other territory in his dominion," etc., as long as said treaty remained in force. President Cleveland said:

"At the request of the Hawaiian government this subject is laid before Congress for its determination upon the question of so modifying the treaty above recited as to permit the proposed treaty."[3]

§ 219. After this historical review of the action of the Presidents of the United States from John Adams down to McKinley, in which they recognize the right of the House of Representatives to deliberate upon and consider all treaties which carry appropriations or propose a change in the revenue laws, it is quite surprising to find that Mr. Burr in his "Treaty-making

[1] Richardson, "Messages and Papers of the Presidents," Vol. VIII, pp. 390, 391. On Feby. 1st, 1887, President Cleveland sent to the House a message in response to their request for a copy of the proposed treaty between the Hawaiian Islands and the United States.

[2] *Id.*, Vol. IX, p. 59.

[3] *Id.*, Vol. IX, p. 559.

Power of the United States," etc.[1] after a discussion of this question, says: "*The Presidents of the United States have uniformly supported the view of Washington.*" President Washington, when requested by the House of Representatives to send them the documents and all correspondence connected with the Jay Treaty, if compatible with the public interest, which treaty carried an appropriation, declined to accede to their request. His refusal was on the ground that when a treaty was properly enacted by the President and Senate it was the supreme law of the land, and that the House had no discretion in the matter, but was morally obliged to pass a law carrying into effect the appropriation. We have shown, *supra*, from the messages of the Presidents, that every President from John Adams to McKinley has *sent to the House*, as well as to the Senate, one or more messages calling attention to the necessity of legislation by Congress to carry out the provisions of some treaty, either by appropriating money, or by changing some revenue law. Does this record consist with the statement of Mr. Burr that "the Presidents of the United States have uniformly supported the view of Washington"? On the contrary, does not the action of the Presidents as above recited, constitute a triumphant vindication of the position of the House, and does it not constitute the strongest possible refutation of the claim that a treaty can override a co-ordinate branch of the Government, to which is committed, under the Constitution, the exclusive power of appropriation, the regulation of commerce, and the power of taxation?

As one of the proofs of his statements, Mr. Burr adds the fact that President Grant, in 1877, vetoed certain resolutions of Congress directing the Secretary of State to convey to certain Republics the good wishes of Congress, his veto being on the ground that Congress had no power to conduct correspondence

[1] The Crowned Essay for which the Henry M. Phillips prize of $2000.00 was awarded on April 20, 1912, by the American Philosophical Society. Proceedings of the American Philosophical Society, August-September, 1912, p. 292.

with other sovereignties. It is difficult to see any connection between the subject we are discussing and President Grant's veto of such a resolution. President Grant's veto of the resolution was most salutary in showing that one department of the government could not intrude upon the rights of another department, the precise view we are seeking to enforce in reference to the treaty-making power in its attempt to invade the domain of Congress.

§ 220. This subject has been discussed, as we have seen, from our early history in the House of Representatives where that body has maintained with uniform persistency that the powers conferred upon it by the Constitution cannot be taken from it by the treaty-making power. In the Forty-first Congress a report maintaining the rights of the House in this respect was made to that body, signed by Hooper, Allison, Voorhees, and others.

After a careful and accurate review of this subject by a recent author,[1] he concludes his discussion as follows:

"From this historical review it appears that whatever may be the *ipso facto* effect of treaty stipulations, entered into by the President and Senate, upon prior inconsistent revenue laws, not only has the House uniformly insisted upon, but the Senate has acquiesced in, their execution by Congress; that in case of proposed extensive modifications a clause has been inserted in the treaty by which its operation is expressly made dependent upon the action of Congress; and that in the recent Cuban Treaty such a clause was inserted on the initiative of the Senate."

§ 221. The conclusion of Mr. Charles Henry Butler on this subject, after its full discussion by him, is as follows:

"It must be recognized, therefore, that, while the treaty-making power of the United States is undoubtedly vested in the Executive subject to ratification by two-thirds of the Senate, it is still within the power of Congress — that is, a majority of both Houses of that body — to control the ultimate effect of all treaty stipulations which in any way conflict with

[1] Crandall, "Treaties, Their Making and Enforcement," p. 145.

any existing laws of the United States, or which require legislation to make them effectual, or which require the appropriation of money to fulfil them." [1]

And further he says:

"The position taken by the House of Representatives that, while it disclaims any right to participate in the actual making of a treaty, it must unite with the Senate in enacting Congressional legislation to carry those stipulations which are not self-operative into effect, has finally been definitely accepted by all the departments of the Federal Government."

§ 222. Attorney General Miller has well stated the true principle in the following language: [2]

"If the treaty-making power, in all treaties whose execution require the exercise of powers committed to Congress, should uniformly provide in the treaties for their proper submission to Congress before they should be effective, consequences might be avoided which may jeopardize the credit of the nation. Under the British constitution, with reference to this subject, the jurisdiction of Parliament is thus stated in I Todd's Parliamentary Government in England, page 610:

"'The constitutional power appertaining to Parliament in respect to treaties is limited. It does not require their formal sanction or ratification by Parliament as a condition to their validity. The proper jurisdiction of Parliament in such matters may be thus defined: First: It is right to give or withhold its sanction to those parts of a treaty that require a legislative enactment to give it force and effect; as, for example, when it provides for an alteration in the criminal or municipal law, or proposes to change existing tariffs or commercial regulations. . . . If a treaty requires legislative action in order to carry it out, it should be subjected to the fullest discussion in Parliament, and especially in the House of Commons, with a view to enable the Government to promote effectually the important interests at stake in their proposed alterations in the foreign policy of the Nation.'"

[1] Butler, "Treaty-making Power Under the Constitution," Vol. I, § 311. Vol. II, § 363, p. 65. See also § 372.

[2] Opinions of Attorneys General, Vol. XIX (1887–90), p. 278.

§ 223. Mr. Blaine in his "Twenty Years in Congress," Vol. II, pp. 337, 338, speaking of the rights of the House under the treaty-making power, says:

"The issue between the Senate and the House now adjusted by a compromise, is an old one agitated at different periods ever since the controversy over the Jay Treaty, in 1794–1795. It is simply whether the House is bound to vote for an appropriation to carry out a treaty constitutionally made by the President and the Senate, without judging for itself whether, on the merits of the treaty, the appropriation should be made. . . . Though the constitutional principle involved may be considered as not settled beyond a fair difference of opinion, there has undoubtedly been a great advance, since the controversy between the two branches in 1794, in favor of the rights of the House, when an appropriation of money is asked to carry out a treaty. The change has been so great indeed that the House would not now in any case consider itself under a constitutional obligation to appropriate money in support of a treaty, the provisions of which it did not approve. It is therefore practically true that all such treaties must pass under the judgment of the House as well as under that of the Senate and the President."

§ 224. The statement of Messrs. Blaine, Crandall, and Charles Henry Butler, *supra*, can leave no doubt as to what has been the final decision of this great question. It has been deemed proper, however, to consider it in its historical detail, because it lies at the very foundation of the question which we are discussing in these pages.

President Washington, Alexander Hamilton, and those who subscribed to their views, maintained during the contest in the House over the appropriation carried by the Jay Treaty, that when that treaty was agreed to by the two contracting parties, ratified by the Senate of the United States and an exchange of ratifications had, that the House of Representatives had no discretion in voting the appropriation, but was bound as a slave to the chariot wheel of this great power; that the rights and duties of the House of Representatives as laid down in the Constitution were suspended or eliminated in a servile obedience to its

dictates: that while the duty of the representative in Congress to the people that he represented required his best judgment and full consideration on all appropriations that might come before him: and while he alone was to be the judge of the expediency or the justice of making such appropriations, that in the matter of treaties and their provisions, this discretion and judgment was transferred from the representative to the Senate and President, although the Constitution had confided it to him.

Of course, the most strained construction of the Constitution could not admit of such a claim, and in the triumph of the House of Representatives from 1796 down to the present century in the assertion and reassertion of its constitutional prerogatives, it has finally forced from those who contested their position the admission that when an appropriation is carried in a treaty or the revenue laws are to be changed by its provisions, that neither can be attained without the consent of the House of Representatives, to whom the Constitution has confided a share in the determination of each: and though President Washington with great dignity and force insisted that the House of Representatives had no part or lot in this matter, the historical review which we have made shows that every President of the United States, from John Adams down to McKinley, except William Henry Harrison, who died within a month after his inauguration, has followed the path blazed out by the House of Representatives in 1796, in the assertion of their rights in the adoption of the Jay Treaty, by sending to the Senate and *the House of Representatives* treaties, which either carried appropriations or effected changes in the revenue laws of the land, for their consideration and action.

The result of this struggle is far-reaching, for if the claim of the treaty power to "unlimited" supremacy has been disproven in *this one case*, we have a right to apply the maxim, *Falsus in uno, falsus in omnibus.*

§ 225. This doctrine has received judicial sanction in two decided causes in the following language:

"A treaty is the supreme law of the land in respect of such matters only as the treaty-making power, without the aid of Congress, can carry into effect. Where a treaty stipulates for the payment of money for which an appropriation is required, it is not operative in the sense of the Constitution. Every foreign Government may be presumed to know that, so far as the treaty stipulates to pay money the legislative sanction is required." [1]

"Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political not the judicial department; and the legislature must execute the contract before it can become a rule for the Court." [2]

[1] Turner *v.* American Baptist Missionary Union, 5 McLean, 347, Fed. Cases 14251.

[2] Foster *v.* Neilson, 2 Peters, 121, 7 L. ed. 368. President Washington closed his reply to the request of the House as follows: "As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty . . . a just regard to the Constitution and to the duty of my office, under all the circumstances of the case, forbids a compliance with your request."

CHAPTER IX

The Treaty Power in its Obligations to Foreigners. Views of Secretaries Webster, Evarts, Blaine, Bayard, and others

§ 226. One of the most fruitful sources of criticism of the treaty-making power is found in the supposed lack of protection afforded by it to foreigners who come to our shores.

The destruction of property and the loss of life of Italians, Chinamen, and Spaniards from mob violence, and the disavowal by our government, as asserted by many persons, of any liability therefor, though bound by treaty to afford such persons protection, has given rise to quite a prevalent feeling that our diplomacy has lacked frankness, and that while we secure the protection of American citizens abroad in foreign countries by treaty, we repudiate our own obligation to provide the same for the alien or stranger. Indeed, the supposed failure of our government to protect the lives and property of foreigners where they have been lost or destroyed through mob violence in city or State, and the denial of liability for such losses, has been the cause of much criticism at home and abroad.

§ 227. The statement is often heard that by treaties we bind ourselves to protect the rights and persons of foreigners, in return for the same privileges to our citizens by foreign countries, and yet if the lives or property of foreigners are lost through the failure of States or municipalities over which the Federal Government has no control in police matters, that we are not liable to such persons or their representatives and that we have secured the protection of our citizens by reciprocal agreement in treaties which we knew we could not on our part fulfil. It is

therefore argued that the treaty power, which is declared supreme by the Constitution, should in fact be supreme, and when we agree, by solemn compact with a foreign country to protect the property and citizens of that country in return for the like protection to our citizens, that all lines which mark the division between State and Federal powers, or municipal and Federal powers, upon which the whole framework of our government is formed, should be obliterated and every power, jurisdiction, and right, whether State, municipal, or local, should be merged into the one supreme unlimited treaty power, that the faith of the nation may be redeemed; for, as is argued, it is undoubtedly true among nations, as among individuals, that the plighted faith of the one is as important and should be as sacred as that of the other. If the charge of bad faith on the part of the United States in making or carrying out her treaties in the failure to protect foreigners can be sustained, we should hasten to right the wrong and place the government upon unquestioned grounds, beyond reproach, and above any suspicion of unfaithfulness to our engagements.

§ 228. The cases which have brought this subject to the public attention in the last seventy years have arisen chiefly out of mobs which have overthrown local authority and, aroused by uncontrolled passions, have caused the death of foreigners and the destruction of property. These cases we will consider in detail, for they illustrate an important phase of our subject. For the present, it is sufficient to say that such eminent statesmen as Mr. Webster, Mr. Marcy, Mr. Evarts, Mr. Frelinghuysen, Mr. Bayard, and Mr. Blaine, who have occupied the position of Secretary of State under the Government of the United States, have all given their opinions that where a foreigner loses his life or property by reason of the outbreak of a mob which the local authorities of a municipality are unable to prevent or control, or the authorities of a State, when called upon, in the exercise of all of the police powers incident thereto, are powerless to restrain, that the United States government is not guilty of a breach of a treaty faith pledging protection

and safety to the inhabitants of a foreign country who might be residents of our country.

§ 229. One of the first cases that arose on this subject was in 1851 when a mob in New Orleans, infuriated by a report that a number of Americans had been executed in Havana, while others had been banished to the mines in Cuba, visited the Spanish Consul's office, and demolished the building in which it was situated. As is often the case with mobs, the innocent as well as the guilty suffered, and among them were Americans as well as Spaniards. The Spanish Minister at once made demand upon the American government for indemnity for the Spaniards who lost their lives and property and also demanded that the Government make amends officially for the insult to the Spanish Consul and the Spanish flag. The treaty between the United States and Spain at that time guaranteed reciprocally the protection and safety of the citizens of the respective countries who might be residing in that of the other.

Mr. Webster was fortunately Secretary of State at the time under President Fillmore. His acknowledged ability as a constitutional and international lawyer and his well-known bias (if his mature convictions may be so styled) on constitutional construction, make his position in the case of great interest in the consideration of this question. No one was better acquainted with the history and development of our constitutional system than Mr. Webster, and while but little is found in his writings or speeches wherein he gave expression to his views on the extent of the treaty-making power, it is well known that the trend of his convictions was in the direction of strengthening at every point the demands of the Federal Government. He recognized, of course, that there was a distinction between the claims of the Spanish government in respect to the rights of the consul and those Spaniards who lost their lives at the hands of the mob. He admitted that reparation should be made by the United States for the insult which had been made to the official representative of the Spanish government, but

as to the others, who had lost their lives at the hands of the mob, he planted himself immovably upon this proposition, *that if they received the same care and protection, the same rights and privileges under the law, which American citizens received, they had no cause for complaint,* and that in fact they had an additional advantage over the American citizen because he could only sue in the State courts of Louisiana those who were guilty of violence, while the Spaniards had the right to sue in the United States court for the same cause.

§ 230. The chief point of interest in Mr. Webster's position was that he recognized that the guarantee and promise made in the treaty was made *subject to the powers and limitations of the Federal government* that had enacted the treaty, and that under our system of government with its division of powers, the safety and protection of all citizens in a municipality are secured, first by that organization itself, and should that fail in its ability to control the fury of a mob, it possesses the right to demand from the State in which it is located, under fixed Constitutional regulations, its aid and assistance. The guarantee of protection and safety to Spaniards within the United States was given only to the extent of the powers of the government; and since the United States would have had no cause to complain of similar treatment to its own citizens within the Spanish kingdom whose protection was secured *to the full extent of the powers of the Spanish government,* there could be no ground of complaint in the application of this principle to the Spaniards within our own dominion. The governments with whom treaties may be made are of varied characters embracing monarchies, constitutional monarchies, limited monarchies, as well as republics, and when they contract it is with the well-established principle of the law of Nations that they contract and must contract only to the extent of the powers which they possess. Nor, can the plea be made that conventions of this character may be more favorable to our country than another because the form of government in the one may be different from that in the other contracting country, for the well-known maxim

applies to all: *Qui cum alio contrahit vel est, aut debet esse, non ignarus ejus conditionis.*

§ 231. Mr. Webster's reply to Mr. Calderon, the Spanish Minister, November 13, 1851, is a model of diplomatic frankness.

"DEPARTMENT OF STATE

"WASHINGTON, November 13, 1851.

"The undersigned, Secretary of State of the United States, has the honor to acknowledge the receipt of the note of Señor Don A. Calderon de la Barca, Envoy Extraordinary and Minister Plenipotentiary of her Catholic Majesty, of the 14th of last month, upon the subject of the excesses committed at New Orleans upon the house of the Spanish consul, and also on the property of certain individuals, subjects of her Catholic Majesty.

* * * * * * *

"The undersigned has now to say, that the Executive Government of the United States regards these outrages not only as unjustifiable, but as disgraceful acts, and a flagrant breach of duty and propriety; and that it disapproves them as seriously, and regrets them as deeply, as either Mr. Calderon or his government can possibly do. The Spanish consul was in this country discharging official duties, and protected not only by the principles of public and national law, but also by the express stipulations of treaties; and the undersigned is directed to give to Mr. Calderon, to be communicated to his government, the President's assurance that these events have caused him great pain; and that he thinks a proper acknowledgment is due to her Catholic Majesty's government. But the outrage, nevertheless, was one perpetrated by a mob, composed of irresponsible persons, the names of none of whom are known to this government; nor, so far as the government is informed, to its officers or agents, in New Orleans. And the undersigned is happy to assure Mr. Calderon, that neither any officer or agent of the government of the United States, high or low, nor any officer of the State of Louisiana, high or low, or of the municipal government of the city of New Orleans, took any part in the proceeding, so far as appears, or gave it any degree of countenance whatever. On the contrary, all these officers and agents, according to the authentic accounts of the mayor

and district attorney, did all which the suddenness of the occasion would allow to prevent it.

* * * * * * *

"Mr. Calderon expresses the opinion that not only ought indemnification to be made to Mr. Laborde, her Catholic Majesty's consul, for injury and loss of property, but that reparation is due also from the government of the United States to those Spaniards residing in New Orleans whose property was injured or destroyed by the mob, and intimates that such reparation had been verbally promised to him. The undersigned sincerely regrets that any misapprehension should have grown up out of any conversation between Mr. Calderon and officers of this government on this unfortunate and unpleasant affair; but, while this government has manifested a willingness and determination to perform every duty which one friendly nation has a right to expect from another, in cases of this kind, it supposes that the rights of the Spanish consul, a public officer residing here under the protection of the United States Government, are quite different from those of the Spanish subjects who have come into the country to mingle with our own citizens, and here to pursue their private business and objects. The former may claim special indemnity; the latter are entitled to such protection as is afforded to our own citizens.

"While, therefore, the losses of individuals, private Spanish subjects, are greatly to be regretted, yet it is understood that many American citizens suffered equal losses from the same cause. And these private individuals, subjects of her Catholic Majesty, coming voluntarily to reside in the United States, have certainly no cause of complaint, if they are protected by the same law and the same administration of law as native-born citizens of this country. They have, in fact, some advantages over citizens of the State in which they happen to be, inasmuch as they are enabled, until they become citizens themselves, to prosecute for any injuries done to their persons or property in the courts of the United States, or the State courts, at their election. The President is of opinion, as already stated, that for obvious reasons the case of the consul is different, and that the government of the United States should provide for Mr. Laborde a just indemnity; and a recommendation to that effect will be laid before Congress at an early period of its approaching session. This is all which it is in his power to do. The case may be a new one; but the President, being of opinion

that Mr. Laborde ought to be indemnified, has not thought it necessary to search for precedents.

"In conclusion, the undersigned has to say, that if Mr. Laborde shall return to his post, or any other consul for New Orleans shall be appointed by her Catholic Majesty's Government, the officers of this government, resident in that city, will be instructed to receive and treat him with courtesy, and with a national salute to the flag of his ship, if he shall arrive in a Spanish vessel, as a demonstration of respect, such as may signify to him, and to his government, the sense entertained by the government of the United States of the gross injustice done to his predecessor by a lawless mob, as well as the indignity and insult offered by it to a foreign State, with which the United States are, and wish ever to remain, on terms of the most respectful and pacific intercourse.

"The undersigned avails himself of this occasion to offer to Mr. Calderon renewed assurances of his most distinguished consideration.[1]

"DANIEL WEBSTER.

"To Señor Don A. CALDERON DE LA BARCA, &c., &c., &c."

§ 232. In 1891 a number of Italians were killed by a mob in New Orleans. The chief of police of the city of New Orleans had been murdered and his death had been charged to the Mafia. A number of Italians had been arrested, tried, and acquitted of the charge of having murdered the chief of the police. After their acquittal, public sentiment was so aroused that a mob broke out, stormed the jail and killed the Italians. A grand jury summoned to examine into the death of the Italians, refused to bring in indictments against any of the parties engaged in the mob. The treaty between the United States and Italy, proclaimed November 23, 1871, guaranteed to the citizens of either nation in the territory of the other "the most constant protection and security of their persons and property," and that "they should enjoy in this respect, the same rights and privileges as are or shall be guaranteed to the natives on their submitting themselves to the conditions imposed upon the natives."

[1] Executive Documents, 1st Sess. 32d Congress, 2, pt. 1, 1851–1852, pp. 62–65.

One of the Italians sued in the Federal court at New Orleans and recovered a verdict for $5,000.00. The Circuit Court of Appeals reversed this decision on the ground that there was no statute making municipal corporations liable to pay for property destroyed by mobs and at common law no action lies against a municipality for an injury to a person which results in death.

Mr. Blaine was Secretary of State at this time. Baron Fava was the Italian Minister to the United States. He at once made demand through the Secretary of State on the government of the United States for indemnity.

The relations between Italy and the United States by reason of this incident became so strained that Baron Fava withdrew from his position at Washington and diplomatic relations between the countries were suspended for a while.

§ 233. The following is an extract from a note sent on April 14, 1891, by James G. Blaine, then Secretary of State, to the Marquis Imperiali, the Italian Minister to the United States, in reference to this incident:[1]

"If it shall result that the case can be prosecuted only in the State courts of Louisiana, and the usual judicial investigation and procedure under the criminal law is not resorted to, it will then be the duty of the United States to consider whether some other form of redress may be asked. It is understood that the State grand jury is now investigating the affair, and, while it is possible that the jury may fail to present indictments, the United States cannot assume that such will be the case.

"The United States did not by the treaty with Italy become the insurer of the lives or property of Italian subjects resident within our territory. No Government is able, however high its civilization, however vigilant its police supervision, however severe its criminal code, and however prompt and inflexible its criminal administration, to secure its own citizens against violence promoted by individual malice or by sudden popular tumult. The foreign resident must be content in such cases to share the same redress that is offered *by the law to the citizen,*[2]

[1] Foreign Relations of the United States, 1891, p. 685.

[2] Author's italics.

and has no just cause of complaint or right to ask the interposition of his country if the courts are equally open to him for the redress of his injuries. The treaty, in the first, second, third, and, notably, in the twenty-third articles, clearly limits the rights guaranteed to the citizens of the contracting powers in the territory of each to equal treatment and to free access to the courts of justice. Foreign residents are not made a favored class. It is not believed that Italy would desire a more stringent construction of her duty under the treaty. Where the injury inflicted upon a foreign resident is not the act of the Government or of its officers, but of an individual or of a mob, it is *believed that no claim for indemnity can justly be made,*[1] unless it shall be made to appear that the public authorities charged with the peace of the community have connived at the unlawful act, or, having timely notice of the threatened danger, have been guilty of such gross negligence in taking the necessary precautions as to amount to connivance.

"If, therefore, it should appear that among those killed by the mob at New Orleans there were some Italian subjects who were resident or domiciled in that city, agreeably to our treaty with Italy, and not in violation of our immigration laws, and who were abiding in the peace of the United States and obeying the laws thereof and of the State of Louisiana, and that the public officers charged with the duty of protecting life and property in that city connived at the work of the mob, or upon proper notice or information of the threatened danger, failed to take any steps for the preservation of the public peace and afterwards to bring the guilty to trial, the President would, under such circumstances, feel that a case was established that should be submitted to *the consideration of Congress with a view to the relief of the families* [1] of the Italian subjects who had lost their lives by lawless violence."

Mr. Blaine's note being transmitted to his government called forth the following cable reply from the Marquis Rudini to the Marquis Imperiali, which was received at the State Department May 4, 1891 : [2]

"I have now before me a note addressed to you by Secretary Blaine April 14. Its perusal produces a most painful impression upon me. I will not stop to lay stress upon the

[1] Author's italics.

[2] Foreign Relations of the United States, 1891, p. 712.

lack of conformity with diplomatic usages displayed in making use, as Mr. Blaine did not hesitate to do, of a portion of a telegram of mine communicated to him in strict confidence, in order to get rid of a question clearly defined in our official documents, which alone possess a diplomatic value. Nor will I stop to point out the reference in this telegram of mine of March 24 that the words 'punishment of the guilty' in the brevity of telegraphic language actually signified only that prosecution ought to be commenced, in order that the individuals recognized as guilty should not escape punishment.

"Far above all astute arguments remains the fact that henceforth the Federal Government declares itself conscious of what we have constantly asked, and yet it does not grant our legitimate demands.

"Mr. Blaine is right when he makes the payment of indemnity to the families of the victims dependent upon proof of the violation of the treaty; but we shrink from thinking that he considers that the fact of such violation still needs proof. Italian subjects acquitted by American juries were massacred in prisons of the State without measures being taken to defend them.

"What other proof does the Federal Government expect of a violation of a treaty wherein constant protection and security of subjects of the contracting parties is expressly stipulated?

"We have placed on evidence that we have never asked anything else but the opening of regular proceedings. In regard to this, Baron Fava's first note, dated March 15, contained even the formula of the telegram addressed on the same day by Mr. Blaine, under the order of President Harrison, to the Governor of Louisiana. Now, however, in the note of April 14, Mr. Blaine is silent on the subject which is, for us, the main point of controversy.

"We are under the sad necessity of concluding that what to every other government would be the accomplishment of simple duty is impossible to the Federal Government. It is time to break off the bootless controversy. Public opinion, the sovereign judge, will know how to indicate an equitable solution of this grave problem.

"We have affirmed, and we again affirm, our right. Let the Federal Government reflect upon its side if it is expedient to leave to the mercy of each State of the Union, irresponsible to foreign countries, the efficiency of treaties pledging its faith and honor to entire nations.

"The present dispatch is addressed to you exclusively, not to the Federal Government.

"Your duties henceforth are solely restricted to dealing with current business." [1]

Mr. Blaine in his note followed the line laid down by Mr. Webster, and assumes that where the foreigner receives the same protection under the law as the American citizen, that the obligations of the treaty have been fulfilled, and in the closing paragraph of his note he points out with distinctness and clearness the relations of the States and municipalities to the Federal government.

A tender of a substantial offering in money to the Italian government a year after this occurrence for the benefit of the families of the murdered men, served to reinstate the cordial feeling between the countries. The tender was made by Mr. Blaine in a letter exhibiting great tact on his part and while denying liability on the part of the United States, he offered it as a matter of grace.

§ 234. In November, 1880, a mob broke out in the city of Denver and committed serious injuries upon the persons of certain Chinese and destroyed a large amount of their property. The Chinese government made a prompt demand upon the government of the United States asking that the guilty persons be punished, and also for compensation for the property destroyed. Mr. Evarts was Secretary of State at the time.

On the 10th of November, 1880, the Chinese Minister, Chen Lan Pin, addressed a note to Mr. Evarts calling his attention to the results of the mob, and used the following language: [2]

"As you kindly promised an investigation of the matter, I will ask that the Government of the United States extend its protection to the Chinese in Denver, and see that the guilty persons are arrested and punished, and it would seem to be just that the owners of the property wantonly destroyed shall in some way be compensated for their losses.

[1] Foreign Relations of the U. S. 1891, p. 685.
[2] Foreign Relations, 1881–2, p. 318.

"The Chinese in Denver went there under treaty stipulations and engaged in labor and trade, but now unfortunately they are subjected to such persecutions that they cannot peacefully labor, and the destruction of their property has interrupted the prosecution of their business. How this unhappy condition of affairs shall be amended, the Chinese be protected and such occurrences prevented in the future, the general government and the local authorities must decide.

"Accept, sir, the renewed assurances of my high consideration.

"CHEN LAN PIN."

To this note Mr. Evarts replied on the 30th of December, 1880, from which I quote the following:[1]

"Sir: I have the honor to acknowledge the receipt of your note of the 10th of November last, in relation to the recent unfortunate occurrences at Denver, Colo., by which certain Chinese residents of that city suffered very serious injuries in their persons and property, were subjected to wanton and undeserved outrage, and one of their number killed. . . . You express, in your note, the desire that this government shall extend protection to the Chinese in Denver, and see that the guilty persons are arrested and punished; and you add that 'It would seem to be just that the owners of the property wantonly destroyed shall, in some way, be compensated for their losses.'

"It affords me pleasure to assure you that not only in Denver, but in every other part of the United States, the protection of this government will always be, as it always has been, freely and fully given to the natives of China resident in the country, in the same manner and to the same extent *as it is afforded to our own citizens.*[2] As to the arrest and punishment of the guilty persons who composed the mob at Denver, I need only remind you that the powers of direct intervention on the part *of this government are limited by the Constitution of the United States.*[3] Under the limitations of that instrument, the Government of the Federal Union cannot interfere in regard to the administration or execution of the municipal laws of a State of the Union, except under circumstances expressly provided for in the Constitution. Such instances are confined to the case of a State whose power is found inadequate to the enforce-

[1] Foreign Relations, pp. 319, 320. [2] Author's italics. [3] *Id.*

ment of its municipal laws and the maintenance of its sovereign authority; and even then the Federal authority can only be brought into operation in the particular State in response to a formal request from the proper political authority of the State. It will thus be perceived that so far as the arrest and punishment of the guilty parties may be concerned, it is a matter which, in the present aspect of the case, belongs exclusively to the government and authorities of the State of Colorado. In this connection, it is satisfactory to be able to note, with approval, the conduct of the public authorities of Colorado, and of the people of Denver, on the unfortunate occurrence in question. . . . Under circumstances of this nature when the government has put forth every legitimate effort to suppress a mob that threatens or attacks alike the safety and security of its own citizens and the foreign residents within its borders, I know of no principle of national obligation, and there certainly is none arising from treaty stipulations which renders it incumbent on the Government of the United States to make indemnity to the Chinese residents of Denver, who in common with citizens of the United States, at the time residents in that city, suffered losses from the operations of the mob. Whatever remedies may be afforded to the citizens of Colorado or to the citizens of the United States from other States of the Union resident in Colorado for losses resulting from that occurrence, are equally open to the Chinese residents of Denver who may have suffered from the lawlessness of the mob. This is all that the principles of international law and the usages of national comity demand. . . .

"In communicating to you the views of this government in the premises, I have pleasure in adding the assurance that it will upon every occasion, so far as it properly can, give its continued attention to every just and proper solicitude of the Chinese Government in behalf of its subjects established here under the hospitality of our treaties.

"Accept, sir, the renewed assurances of my distinguished consideration.

"WM. M. EVARTS."

§ 235. To the above note the Chinese Minister on January 21, 1881, sent a lengthy reply, from which I extract the following:[1]

[1] Foreign Relations, 1881, pp. 321–323.

"As regards the arrest and punishment of the persons guilty of destroying life and property, it is stated in your note that 'the brutal and lawless composed such mob.' It is clear that these guilty persons are detested throughout the country, and ought to be punished severely in order to give a warning against similar recurrences. But I regret to learn from your note that the powers of direct intervention on the part of the United States Government are limited by the Constitution.

"It appears to me that treaties as well as the Constitution are the supreme law of this land. The Chinese residents who were subjected to the wanton outrage of the mob, came to this country under the right of treaties between China and the general Government of the United States, and not with Colorado or any individual State.

"Thus the case under consideration should be a question of intercourse between China and the United States, and different from that to be dealt with under the ordinary internal administration of a State. It was with this view that I had in my last note requested you to cause this case to be examined. But I fail to learn from your note the number of the guilty persons that have been arrested, and how they have been punished or dealt with, and how the general Government of the United States has exercised, or intends to exercise its powers in executing the treaty obligations to protect the Chinese. Indeed I cannot see where these residents should seek for protection.

"As regards the indemnity of losses of property, I noted from your dispatch that:

"Such incidents are peculiar to no country, and as the local authorities brought into requisition all the means at their command for the suppression of the mob, you know of no principle which renders it incumbent on the Government of the United States to make indemnity to the Chinese residents.

"It is therefore manifest, whether the indemnity shall be made or not, depends upon whether the local authorities had brought into requisition all the means for the suppression of the mob. According to the report of the investigation, I learn that the Chinese residents of Denver have been made a special object of hatred, violence, and bitter persecution of the lawless mob, which is quite different from the sudden attack of a band of depredators directed against the whole community of the place, involving (as you have intimated) for the moment

the lives and property of all alike; . . . I beg to call your attention to the following verdict of the coroner's jury:

"'The evidence shows that the said mob could have been suppressed by the regular force had they fearlessly arrested the ringleaders; but which, owing to the disorganized condition of the police force of the city and the incompetency and inefficiency of its government by the proper authority and the failure of the county authorities to render the necessary aid and assistance required in such emergencies, the mob assumed such proportions as culminated in the destruction of human life and the disgrace of the city in not affording protection to life and property.'

"This verdict shows clearly that the local authorities had not brought into requisition all the means for the suppression of the mob. The treaty between China and the United States says:

"'ARTICLE I. There shall be, as there has always been, peace and friendship between the United States of America and the Taching Empire and their people respectively. They shall not insult or oppress each other, etc.'

"The Chinese residents came to this country under the right of the treaty, and were peaceably pursuing their calling. In this present case there was no other cause for the murderous outrage than the hatred of the mob which brought on them the loss of life and property. The local officials failed to render necessary, timely, and proper protection to the innocent sufferers at the beginning and greater part of the outbreak, nor have they since exerted their utmost in the recovery of the plundered goods and making reparations for their losses. I do not see that this can be considered as full protection according to the treaty stipulations. . . .

"Accept, sir, etc.

"CHEN LAN PIN."

§ 236. Mr. Blaine, who had succeeded Mr. Evarts as Secretary of State, on March 25th, 1881, in the same case concurred in the opinion of Mr. Evarts and replied to Minister Chen Lan Pin in part as follows:[1]

"SIR: Referring to your note of the 10th of November last, and my predecessor's reply thereto of the 30th of December

[1] Foreign Relations, 1881, pp. 335–337.

following, on the subject of the riot on the 31st of last October, at Denver, Colo., I have now the honor to acknowledge the receipt by the Department, of your notes of the 21st of January and 25th of February, respectively, in relation to the same matter.

"I note with satisfaction the expressions of appreciation of the disposition of this government toward that of China and the subjects of China resident in the United States, which you so frankly avow. I must express my regret, however, that the views so clearly expressed by my predecessor in regard to the question of liability of this government to make pecuniary indemnity to the Chinese sufferers by the occurrences at Denver, failed to commend themselves to your enlightened judgment. . . .

"You observe with reference to these views, 'that it appears to you that treaties as well as the Constitution, are the supreme law of this land.' 'The Chinese residents,' you add, 'who were subjected to the wanton outrage of the mob came to this country under the right of treaties between China and the General Government of the United States,' and quoting from the verdict of the coroner's jury at the inquest over the body of the unfortunate Sing Lee, you proceed to say that 'this verdict shows clearly that the local authorities had not brought into requisition all the means for the suppression of the mob.' Invoking in support of these views the treaty of June, 1858, between the United States and China, you partially quote the provisions of the first article, the entire text of which is as follows:

"'There shall be, as there have always been, peace and friendship between the United States of America and the Ta Tsing Empire, and between their people respectively. They shall not insult or oppress each other for any trifling cause, so as to produce an estrangement between them; and if any other nation should act unjustly or oppressively, the United States will exert their good offices on being informed of the case, to bring about an amicable arrangement of the question, thus showing their friendly feelings.'

"In submitting for your consideration such remarks as these observations in your note seem to demand, I first bring to your notice the provisions of the first paragraphs of Article XI of the same treaty. It says:

"'All citizens of the United States of America in China, peaceably attending to their affairs, being placed on a common

footing of amity and good will with the subjects of China, shall receive and enjoy for themselves and everything appertaining to them, the protection of the local authorities of government, who shall defend them from all insult or injury of any sort. If their dwellings or property be threatened or attacked by mobs, incendiaries, or other violent or lawless persons, the local officers, on requisition of the consul, shall immediately dispatch a military force to disperse the rioters, apprehend the guilty individuals and punish them with the utmost rigor of the law.'

"You will perceive that neither in this article, nor in any other part of the same treaty is there any provision reciprocal with this with regard to subjects of China resident in the United States, and the reason for this must at once be obvious to your superior intelligence. No treaty stipulations are necessary to enable subjects of China to come to this country, to take up their residence here and pursue any lawful business or calling in common with the citizens or subjects of every country in the world, who may choose to make their home in this republic. The subjects of China, in respect to their rights and security of person and property are placed under the protection of the laws of the United States in manner and measure equal to that extended to native citizens of this country, and that the Chinese residents of Denver at the time of the unfortunate occurrences now in question, were in the enjoyment of this common protection of the law, is shown by the report of the Chinese consul, Mr. Bee, to you, a copy of which accompanies your note. . . .

"Your observations to the effect that treaties form a part of the *supreme law of the land equally with the Constitution of the United States, is evidently based on a misconception of the true nature of the Constitution.*[1] That instrument, together with all laws which are made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, are the supreme law of the land. Such is the language of the Constitution, but it must be observed that the treaty no less than the statute law, must be made in conformity with the Constitution, and were a provision in either a treaty or a law found to contravene the principles of the Constitution, such provision must give way to the superior force of the Constitution, which is the organic law of the re-

[1] Author's italics.

public, binding alike on the government and the nation. It is under this interpretation of the Constitution that foreigners, no less than citizens, find their best guarantee for that security and protection in their persons and property which it is the aim and desire of the Government of the United States to extend to all alike."

No stronger view than this has ever been presented by any statesman of the proper limitations of the treaty-making power.

§ 237. In 1878, Tunstall, a British subject, was killed in New Mexico by a sheriff's posse. To the demand of the British government upon our government for restitution, Mr. Evarts and Mr. Frelinghuysen made reply. The correspondence was long drawn out when on June 1, 1885, Mr. Bayard, then Secretary of State, replied to the demand of the British government as follows: [1]

"MR. BAYARD TO MR. WEST

"DEPARTMENT OF STATE,

"WASHINGTON, June 1, 1885.

"SIR:

"I have had the honor to receive your note of the 28th April, last, and have given due consideration to the request therein presented that the pending claim of Mr. J. P. Tunstall, a British subject, for indemnity from the Government of the United States by reason of the murder of his son, John H. Tunstall, in 1878, in the Territory of New Mexico, should have examination and decision at my hands.

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"John H. Tunstall, a British subject, domiciled in Lincoln County, in the Territory of New Mexico, where he carried on business as a ranch proprietor, is alleged to have been the partner of one Alexander A. McSween, against whose property writs of attachment had issued in a local suit. The sheriff of Lincoln County, Mr. Brady, sent his deputy sheriff, Mr. Matthews, to Mr. Tunstall's ranch to attach certain stock and horses there as coming under the decree of the court. Mr. Tunstall appears to have admitted the service of the writ, and informed the deputy sheriff that he could attach the stock and leave a person in charge thereof until the courts should adjudicate the ownership as between Mr. McSween and Mr.

[1] Foreign Relations of the United States, 1885, pp. 450–459.

Tunstall. The deputy sheriff did not in fact then attach the property found at Tunstall's ranch, and departed, as would appear, for the purpose of assembling a numerous posse, with which he returned to the ranch. Mr. Tunstall meanwhile had collected the stock and horses, and with them quitted the ranch, going in the direction of the county-town, Lincoln. The deputy sheriff deputized one W. Morton, with eighteen men of the posse, to follow Mr. Tunstall, with orders to seize the horses. After a pursuit of some 30 miles, Morton and his party overtook Mr. Tunstall and the horses. What then occurred has not been developed by judicial proofs, but it is alleged on the part of Her Majesty's Government that Morton's party opened fire, that Mr. Tunstall abandoned the horses and sought safety in flight, and that he fell when he had ridden about 100 yards away, shot by two bullets in the head and breast.

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"Upon this statement of facts, for which we are dependent in great part on the report of the special agent of the Department of Justice, who further alleges that the members of the pursuing party were at personal enmity with Mr. Tunstall, Her Majesty's Government claims, in brief, that the sheriff of Lincoln County, New Mexico, acting through his deputy, and he in turn through the subdeputized leader of the pursuing party, Morton, is accountable for a murder committed in the execution of a process of law, and that the father of the murdered man, having a pecuniary interest in the life of his son, based on the business operations carried on by him, has a right to recover indemnity from the Government of the United States, whose agent the sheriff is asserted to have been. The actual presentment of this claim for indemnity is thus made in Sir Edward Thornton's note of June 23, 1880:

"'It appears that Mr. J. P. Tunstall has it not in his power to recover damages from the Territorial Government of New Mexico by proceedings at law or otherwise. A citizen of the United States would in a similar case probably appeal to Congress; but this remedy is not open to an alien. Earl Granville has therefore instructed me to present to the Government of the United States a claim on behalf of the father, Mr. J. P. Tunstall, for such compensation as upon examination of the injury and losses sustained may be found to meet the justice of the case.'

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"With the correspondence between Sir Edward Thornton, and my predecessors in office touching the position of Her Majesty's Government that this Government is liable for lawless acts committed by individuals charged with the execution of legal process within the United States, you are of course familiar. You will recall the suggestion made to yourself by Mr. Frelinghuysen, January 30, 1882, to refer the Tunstall claim, under authorization of Congress, to the Court of Claims or other judicial resort, and the rejection of that suggestion by Her Majesty's Government, because the proposed adjudication would not be based on a prior admission of the liability of the United States in the premises subject to the facts being established after judicial inquiry. You will also recall your communication to Mr. Frelinghuysen, under date of June 30, 1882, of Earl Granville's intimation of 'the hope of Her Majesty's Government that the Government of the United States will be able to meet their views in this long pending case, and to suggest some other mode of disposing of it.'

"With that intimation discussion of the matter came to a halt, and I can readily understand the inability of my predecessor 'to suggest any other mode of disposing of it.' In fact, I can quite confidently surmise Mr. Frelinghuysen's conviction that, in suggesting the domestic submission of the merits of the case to a quasi-judicial resort, including in such submission the fundamental question of national liability, the executive had strained to the uttermost any possible conception of its discretion in the premises. For such a forum, being necessarily of domestic institution and possessing no international jurisdiction or power to enforce its conclusions, could only be properly regarded as an advisory body, entitled to respect by reason of its evident moral competency and impartiality, and the submission thereto of the point at issue could only be deemed a voluntary and temporary delegation of a function of decision inherent in the national sovereignty.

"It is not necessary, in giving a final answer to the questions presented by Her Majesty's Government in this case, to recapitulate the positions taken by Mr. Evarts in his note to Sir Edward Thornton of March 7, 1881. Waiving, in the present discussion, the positions so taken, the first question that meets us on the examination of the claim is as to the liability of the Government of the United States for the debts or torts of officers of a Territory organized under Congressional

legislation. That the United States Government is not so liable has been more than once held by courts in the United States.

"The very question, however, of such liability was adjudicated by the Joint Commission appointed under the convention of February 8, 1853, for the adjustment of claims then unsettled preferred by citizens of the United States against Great Britain, and by subjects of Great Britain against the United States. The commissioners met in London, on September 15, 1853, and chose Mr. Bates, of London as umpire. Among the claims presented was one by British subjects, based on bonds issued by the Territory of Florida before the admission of Florida as a State.

"The case was argued on behalf of the claimants by Messrs. Holt, Cairns, and Hannen, who afterwards acquired great eminence on the bench, and by Mr. Thomas as agent and counsel for the United States. The claim was based on the assumption that, as Congress could remodel or veto Territorial legislation, the Government of the United States was liable for the conduct of Florida creating indebtedness to a subject of Great Britain. Mr. Bates, however, as umpire, dismissed this position summarily, saying:

"'The first ground of claim [that above stated] need hardly be treated seriously; it might as well be contended that the British Government is responsible for Canada's debentures, because all the acts passed by the Canadian Parliament require the sanction of the home government before they become laws.' [1]

"If the British contention in the present case be good, then the British Government would be liable, not only for the debts of Canada, but for the torts of all the officers of Canada.

"Such a position, it is now submitted, is not merely in conflict with the political basis on which rests the colonial system of Great Britain, but, the case being reversed, is in like conflict with the Constitution of the United States. On Great Britain, in fact, the doctrine of the liability of the sovereign for the torts or debts of dependencies over which he has a general restrictive control would operate far more seriously than on the United States, since it would make Her Majesty's Government liable for the misconduct of local officials, not merely in Canada, but in India, in Australia, in South Africa, and in Egypt.

[1] Proceedings of the Joint Commission, Washington, 1855.

"But it is not desired to rest our resistance to this claim exclusively on the above position. Appealing to principles acknowledged in common in England and in the United States, it is, in addition, maintained that in countries subject to the English common law, where there is the opportunity given of a prompt trial by a jury of the vicinage, damages inflicted on foreigners on the soil of such countries must be redressed through the instrumentality of courts of justice, and are not the subject of diplomatic intervention by the sovereign of the injured party.

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"As showing the strictness with which this distinction is maintained may be mentioned the case of Mr. Henry George, a citizen of the United States, distinguished as a man of letters, and as a lecturer, who traveled in Ireland in 1882. Mr. George, as was afterwards fully shown and conceded, was in no way concerned in any seditious or other illegal proceedings against the peace of Great Britain, and there was no evidence produced, either at the time or since, which suggested the faintest *prima facie* case to justify arrest. He was, however, arrested at Loughrea on August 8, 1882, without warrant, by governmental subordinates, his baggage searched, his letters and papers ransacked, and his person treated with indignity. He was discharged, on the ground that there was no case against him, and proceeded on his journey, occupied in part in visiting the antiquities and other interesting features of the country. Two days afterwards at Athenry, a few miles distant from Loughrea, when about entering on the train for Galway he was again arrested, his baggage again searched, his papers again inspected, while he was kept until midnight a close prisoner by the same magistrate who had examined and discharged him at Loughrea. He was again discharged for the same reason that no case existed against him, although this should have been as fully known by the magistrate at the time of the second imprisonment as at the time of the first discharge.

"The question of the amount of pecuniary compensation to which Mr. George would have been entitled in a court of justice is not now material. So far as concerns the principle, it makes no matter whether the injury inflicted on him touched his life, or merely his liberty and the sanctity of his property for a few hours. And, so far as concerns this principle, it is

worthy of notice, in this relation, how clearly the question of liability is defined by Mr. Frelinghuysen in his instruction to Mr. Lowell, of October 3, 1882.

"'While citizens of the United States traveling or resident abroad are subject to the reasonable laws of the country in which they may be sojourning, it is, nevertheless, their right to be spared such indignity and mortification as the conduct of the officers at Loughrea and Athenry seems to have visited upon Mr. George. . . . As you have already addressed a note to Lord Granville on this subject, a reply will probably soon be received by you. It is trusted that the tenor of that reply may prove satisfactory to this Government, *and also relieve Mr. George from any reproach the arrests are calculated unjustly to cast upon him.*'

"It will be observed that there is here no claim whatever for pecuniary compensation to Mr. George. That claim, it is tacitly assumed, is to be remitted to British courts of justice. The request is for explanation to the Government of the United States and exoneration of Mr. George from 'reproach.' Yet the arrest of Mr. George, and that of other 'suspects' under the recent crimes act, was not, it must be remembered, in the course of the English common law. There was apparently no responsible prosecutor, there was no hearing in which witnesses could be met face to face, and consequently, under the cover of a legislative enactment for the time being, the sufferer was denied all opportunity to establish the possible malice of the allegation which led to his arrest, or to identify the secret accuser who could therefore with impunity wound his sensibilities and subject him to serious distress and suffering. Had there been a commitment, it would not have been in view of a speedy jury trial. Under these circumstances, the case would not have fallen under the rule announced above, that where a foreigner claiming to be injured has redress by an appeal to the courts in the processes of the English common law, a diplomatic demand for indemnity will not be granted by the Government of the country in which the injury is claimed to have been received, yet, even in the case of Mr. George and other citizens of the United States put recently without probable cause under summary arrest in Ireland, we hear of no demand made by the Government of the United States for pecuniary compensation.

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"It is impossible to study, in particular, the annals of English jurisprudence without being struck with the delicate and honorable conscientiousness with which the rights of foreigners in this relation have been maintained. If, in such cases before the English tribunals, there has been any appeal to generosity and sympathy, this has not been in favor of the subject against the foreigner. Nor has it made any difference that the party sued by the foreigner was an officer of the Government.

"Numerous cases of this kind where the plaintiff was a foreigner and the defendant an officer by whom he was assaulted, or falsely imprisoned, or maliciously prosecuted, are reported in the English books, and in no one of these cases can it be alleged that justice was not meted to the foreign plaintiff as freely as if he had been a British subject. It is with some pride, also, that it may be declared by this Department that throughout the United States the same impartial justice is administered. Even beyond this, in its scrupulous protection of the rights of foreigners, has our peculiar jurisprudence gone. A citizen of one of our States, injured in such State by a person resident therein, is, in ordinary cases, limited to the State courts for redress. A foreigner suing in such State is given the election between the State courts and the district courts of the United States.

"The practical result of this fair dealing is even more marked in this country than in England. There are reported in our books multitudes of cases in which local officers of justice have been sued by foreigners in our courts for false imprisonment or for malicious prosecution or for assault, and this must needs be the case in communities like ours, in which a large proportion of the population consists of foreigners unfamiliar with our laws.

"In not one of these cases, however, has it ever been maintained that the foreign plaintiff had not at least the same privileges awarded to him as he would have had if he had been a native citizen, nor can the most jealous scrutiny of the proceedings show in a single case any misstatement of law to his disfavor. The first instance, in fact, in which, instead of an appeal to the courts thus open, diplomatic intervention through a sovereign is urged, is that which we now have to discuss.

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"That when the courts of justice are open to a foreigner in a State, the Federal Executive will not take cognizance of his complaint, was maintained by Mr. Evarts and Mr. Blaine, on December 30, 1880, and March 25, 1881, when declining to

accept for the Executive jurisdiction over a claim for damages to certain Chinese inflicted by a mob in Colorado in November, 1880. (United States Foreign Relations, 1881, pp. 319, 335.) The same position was taken by Mr. Webster in his note of November 13, 1851, to Mr. Calderon de la Barca, who made claim for damages sustained by the Spanish consul and Spanish citizens from a mob in New Orleans, in the preceding month. It was agreed that reparation should be made to the consul, on the ground of his public character. It was otherwise, Mr. Webster maintained, as to Spanish citizens. 'Private individuals,' he said, 'subjects of Her Catholic Majesty coming voluntarily to reside in the United States, have certainly no cause of complaint, if they are protected by the same law and the same administration of the law as native-born citizens of this country.' And, resting in like manner on the position that the Executive cannot, within its constitutional function, invade the functions of the judiciary, this conclusion applies as fully to a Territory as it does to a State, and was reached by Mr. Butler, Attorney-General during Mr. Van Buren's administration, in a letter to the President, dated July 5, 1837. (Opinions of the Attorneys-General, III, 253.)

"The principle is therefore to be regarded as adjudicated and established by the highest international and domestic authority in accordance with the enunciation above given.

"It is interesting to observe that in England the same demarkation between executive and judicial functions has been preserved under circumstances not unlike the deplorable case now brought before us. In 1780, in a riot directed, in a large measure, against foreigners of the Roman Catholic faith, the property and persons of such foreigners were subjected to atrocious outrages, yet no instance is reported of appeals by the sovereigns of these foreigners to the British Crown for remuneration. The various riots which, during Lord Liverpool's administration, were incited for the purpose of driving off foreign citizens and destroying their machinery, were not followed, as far as we can learn, by any diplomatic action for the pecuniary remuneration of the parties injured; though we are informed, from the records of the courts, of prosecutions by which, in the ordinary course of justice, the perpetrators of those wrongs were punished.

"And in 1850, the distinction before us was enunciated by the British Government under circumstances of peculiar in-

terest. On September 4 of that year, General Haynau, an Austrian officer, who, whatever may have been his severity as a commander in the civil war in which Austria had been engaged, was nevertheless a distinguished representative of a country with which Great Britain was then at peace, visited, with two of his aids, the brewery of Messrs. Barclay, Perkins & Co., then one of the famous objects in London, which strangers were accustomed to inspect. General Haynau was charged with no indecorum in his visit. It became known, however, to the porters and other workmen, who he was, and he was subjected to what Lord Palmerston, in his note in reply to Baron Koller's demand of investigation, admits to have been 'outrageous violence and insult.' (Viscount Palmerston to Baron Koller, September 14, 1850, British and Foreign State Papers, XLII, 389.)

"To the demand of the Austrian minister for executive intervention, however, the answer was, 'that no proceedings can be taken in this case which are not in accordance with the ordinary administration of law.' If a civil suit was to be brought, it was intimated General Haynau must bring it; if a criminal prosecution for assault was to be instituted General Haynau must appear as prosecutor; and as General Haynau did not desire to take such a responsibility, no redress at all was given. The case was an extreme one. The attack had no color of excuse. The party attacked was an aged man, at the time defenseless, an eminent servant of the Austrian Crown, who, if any person not a foreign ambassador could properly appeal for diplomatic intervention, could make such an appeal. The outrage was offered in such a shape as to make it an offense against the Austrian sovereign under whose orders General Haynau had acted in the matters which had provoked the indignation of the workmen at the brewery. Yet, even in this extreme case, the British Government laid down, and laid down properly, the rule that for injuries inflicted on a foreigner on English soil, redress must be sought, not from the executive, but from the courts. And this rule is not affected by the circumstance that it does not appear that any agents of the civil authority, whether in the exercise at the time of civil functions or not, were participants in the acts of outrage complained of, for those acts could not have been deemed in any case to have fallen within the scope of their agency.

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"The propositions hereinbefore stated are abundantly sustained by an eminent English publicist, as highly esteemed in this country as in England, whose recent decease is so greatly mourned. 'The state,' says Sir R. Phillimore (International Law, II, 4), 'must be satisfied that its citizen has exhausted the means of legal redress offered by the tribunals of the country in which he has been injured. If these tribunals are unable or unwilling to entertain and adjudicate upon his grievance the ground for interference is fairly laid.

"'But it behooves the interfering state to take the utmost care, first, that the commission of the wrong be clearly established; secondly, that the denial of the local tribunals to decide the question at issue be no less clearly established. It is only after these propositions have been irrefragably proved, that the state of a foreigner can demand reparation at the hands of the Government of his country.'

"This position is thus affirmed by Chief Justice Waite in the case of New Hampshire *v.* Louisiana.[1]

"'There is no principle of international law which makes it the duty of one nation to assume the collection of the claims of its citizens against another nation, if the citizens themselves have ample means of redress without the intervention of their Government. Indeed, Sir Robert Phillimore says, in his Commentaries on International Law, Vol. II, 2d ed., page 12: "As a general rule, the proposition of Martens seems to be correct, that the foreigner can only claim to be put on the same footing as the native creditor of the state."'

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"After a full review of all the facts and circumstances of the case, I am constrained to inform you that this Government cannot admit any liability as attaching to it in the premises, either directly toward the representatives of the murdered man or internationally toward Her Majesty's Government demanding in their behalf.

"I have, &c.,

"T. F. BAYARD."

§ 238. In 1885 at Rock Springs, in Wyoming Territory, a mob perpetrated great outrages upon Chinese subjects. In response to the demand of the Chinese government for in-

[1] 108 U. S. 90, 27 L. ed. 656, 2 S. C. 176.

demnity and protection to its citizens, Mr. Bayard replied as follows[1]: —

"DEPARTMENT OF STATE,

"WASHINGTON, February 18, 1886.

"SIR:

"I have the honor to acknowledge the receipt of the very interesting and important communication which you addressed to me on the 30th of November last touching the treatment of Chinese subjects in the United States.

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"You and your Government are so well aware of the sincerity with which this Government professes its desire and intention to carry out in the fullest good faith all obligations springing from international comity, and inspired by the especial amity which finds expression in the several treaties between the United States and China, that it may, perhaps, be superfluous for me to reiterate assurances of our sorrow and abhorrence caused by the lawless and cruel outrages of which so many of your countrymen were unhappily made the victims in September last at Rock Springs, in the Territory of Wyoming, and which have been fully and truthfully recited in your note and in the accompanying documents.

"Let me assure you, however, that I but speak the voice of honest and true American citizens throughout this country, and of the Government, founded on their will, when I denounce with feeling and indignation the bloody outrages and shocking wrongs which were there inflicted upon a body of your countrymen. There is nothing to extenuate such offenses against humanity and law, and not the least of the outrages upon the good name of the law was the wretched travesty of the forms of justice by a certain local officer acting as coroner, and pretending to give a legal account of the manner in which the victims met their death.

"It appears from your statements and the reports transmitted in support thereof — the accuracy of which I do not question — that twenty-eight of your countrymen were killed outright at Rock Springs, fifteen were wounded, and many more driven from their homes, while the property of Chinese subjects to the value of upwards of $147,000 was either destroyed or pillaged by the rioters.

[1] Foreign Relations of the United States, 1886, p. 158.

"My sense of humanity is no less aroused than yours to strong feelings of indignation and commiseration; but, besides this common sentiment, I feel with equal poignancy deep mortification that such a blot should have been cast upon the record of our Government of laws.

"To aid in weighing the responsibility for these occurrences and to attain a clearer comprehension of the wrong, its origin, its progress, and its proper remedies, I will ask your attention to a few of the main admitted facts, as stated by yourself and as disclosed by the investigation, in which, as you justly say, your official agents were importantly assisted by the presence of officers of the United States Army specially assigned for that purpose.

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"An examination of the treaty stipulations becomes, therefore, most important towards an understanding of this question as stated by you. I am, of course, not unaware that your argument is essentially *ad hominem;* that it appeals to the sense of justice and fair play innate in the human breast; that it alleges that the Golden Rule 'to do to others as they would have others do to them' is recited approvingly in Article XXIX of the treaty of 1858 between the two nations; and that it advances the assumption that 'if the view' heretofore taken in an analogous case, 'as to the obligation of the United States to make indemnity for injuries to private individuals from mob violence, should be insisted upon and adhered to by' the United States, '*China should in due reciprocity and international comity accept and practice the same principle.*' But, before this *ad hominem* argument can be duly weighed, we must know where the conventional argument actually places us, and the measure of protection and redress they actually and necessarily contemplate in the respective countries.

"The conventional stipulations between the United States and China, to which you have referred, are, as you state, and as appears from their face, in no wise reciprocal. Under the respective system and nature of the two Governments they could not have been made reciprocal, nor were they intended to be so. The frankness which animates your note will, I think, lead you to agree with me, after considering the very different organizations and policies of the Governments of our respective countries which find frequent recognition in the terms of the sundry treaties between them, that the privileges

and immunities of Chinese subjects now within the jurisdiction of the United States are vastly greater than ever were or are extended to American citizens who, under the restrictions of the treaties, are allowed to reside and transact business in China.

"The several treaties of 1844, 1858, 1868, and 1880 are acts *in pari materia*, and no subsequent one of them abrogates those which are prior in date. There have been successive modifications, extensions, or substitutions as to special subjects, but always in express revival and renewal of pre-existing treaties; and, unless abrogated in express terms or repealed impliedly by the adoption of new and inconsistent features, they all remain in force. Upon those premises, and passing all the personal and residential stipulations in review, we find restrictions expressly recognized throughout all the treaties which prove the inability to provide reciprocity, *by reason of the totally variant basis on which the administrative functions and powers of the two countries are conducted.*[1]

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"The treaty of 1880 is absolutely unilateral. It conveys no hint of reciprocity. Its second article gives to Chinese teachers, students, merchants, and those actuated by motives of curiosity, and also to the Chinese laborers *then* (1880) in the United States, the right to 'go and come of their own free will and accord,' and, in addition to this, the same treatment as the citizens or subjects of the most favored nation. I refrain from asking you to point out to me any responsive position in any of our treaties with China which guarantees to American teachers, students, merchants, curiosity-seekers, and laborers the right to 'go and come of their own free will and accord' throughout the length and breadth of China, 'without regard to the feelings of the people' in the localities whither they may resort. I likewise refrain from invoking the *argumentum ad hominem*, as you have done, and from inquiring whether, in thus restricting the resort and residence of aliens, China has 'done as she would be done by.' I am content to assume that these restrictions are of the nature of the case, and that China has sought to confine her duty in respect of aliens within such limits as might be convenient and practicable for its exercise, but always granting no more privilege than she chooses to grant, and conceding none whatever as of right,

[1] Author's italics.

but only as matter of convention. And (although the point is not directly allied to the subject-matter) you will permit me to remark that I find a pertinent illustration of the subjection of all privileges of alien sojourn in China to the mere volition of its Government, rather than to principles of international usage or comity, in the very narrow rights of visit and sojourn accorded by treaties even to the minister of the United States in the Chinese capital.

"Passing from the question of reciprocity, whether in its sentimental or contractual aspects, to the question of the actual guarantee stipulated by the United States to Chinese of all classes, including laborers within their jurisdiction, and of the responsibilities of this Government in the matter, we find that in the treaty of 1868, by its sixth article, the United States for the first time established, as a treaty right, the theretofore consuetudinary privilege of emigration of Chinese to this country. That article says:

"'Chinese subjects, visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation.'

"This is renewed, with definition and limitation of the particular classes of Chinese to which it is applicable, in the second article of the treaty of 1880.

"What is the substantial and full intent and meaning of these provisions as laid down in 1868, and again with special definition in 1880?

"What 'most favored nation' is to be taken as a test and for the purpose of comparing the rights of its citizens or subjects in the United States with those of China?

"To constitute a special favor between nations it must exist in virtue of treaty or law, and be extended in terms to a particular nation as a nation. Applying this test, the citizens or subjects of no nation (unless it be those of China) have any special favor in the way of personal treatment shown them in the United States. All are treated alike, the subjects of the most powerful nations equally with others. An Englishman, a Frenchman, a German, a Russian, is neither more nor less favored than one of any other nationality.

"Tried by this test, will it be denied that the public and local laws throughout the United States make no distinction or discrimination unfavorable to any man by reason of his Chinese

nationality, except only those Federal laws regulating, limiting and suspending Chinese immigration which have been enacted in conformity with the express provisions of the treaty of 1880?

"What are the duties of the Government of the United States under that treaty towards Chinese subjects within their jurisdiction?

"The Chinese subjects now in the United States are certainly accorded all the rights, privileges, immunities, and exemptions which pertain to the citizens and subjects of the most favored nation, as is provided in the second article of the treaty. They are suffered to travel at will all over the United States, to engage in any lawful occupation, and to reside in any quarter which they may select, and there is no avenue to public justice or protection for their lives, their commercial contracts, or their property in any of its forms which is not equally open to them as to the citizens of our own country.

"The same laws are administered by the same tribunals to Chinese subjects as to American citizens, save in one respect, wherein the Chinese alien is the most favored, since he has the right of option in selecting either a State or a Federal tribunal for the trial of his rights, which, in many cases is denied for residential causes to our own citizens; and he may even at will remove his cause from a State to a Federal court.

"Thus, I find in the public press the announcement that Wing Hing, on behalf of himself and others, Chinese subjects, has lately brought suit in the United States circuit court to recover $132,000 from the city of Eureka, Humboldt County, California, for loss of property by the action of a mob in February of last year. A citizen of that State would have been compelled to resort to a State tribunal, without appeal beyond the jurisdiction of the State, whereas the Chinese plaintiff in question can carry his case on appeal to the Supreme Court at Washington, thus divesting his rights from all adverse chance of local prejudice.

"I think you will thus recognize, in the same frank spirit as animates your note, that none of the protection intended by the law of our own citizens is withheld from your countrymen, but that on the contrary, they possess noteworthy advantages in the choice of forum or the removal of their cause, of which many of our citizens are deprived.

"The provision of an organized and in some cases privileged

forum excludes the idea of direct recourse by the alien to other means of obtaining justice or redress. Your note argues that direct recourse to administrative or executive settlement is open to citizens of the United States in China, and instances are cited to show this. Surely, this rather proves that to the alien in China no such judicial forum is secured as to aliens in the United States.

"The extraterritorial tribunals established for their own citizens or subjects by all the powers in treaty relations with China are, in principle and from the reason of the thing, incompetent to adjudicate questions touching the liability of China to aliens. In default of Chinese tribunals admittedly competent to take cognizance of the causes of foreigners, what alternative remains besides denial of justice or resort to diplomatic settlement?

"The system of government which prevails in the United States, and which their public written Constitution had made well known to the Government of China at the time of our entering into treaties with that country, creates several departments, distinct in function, yet all tending to secure justice and to maintain law and order. These three distributive divisions of the sovereign powers of the American people are entirely independent of each other, and the fundamental principle of their several action is the non-interference of their respective functions. Thus, the duty of the Executive is to carry into force the laws enacted by the legislature, and his only warrant of authority to act in any case must be found in the Constitution, or in the laws passed in pursuance thereof by the coordinate legislative branch.

"To the judicial branch is committed the administration of remedies for all wrongs, and its courts are open, with every aid they can devise, to secure publicity and impartiality in the administration of justice to every human being found within their jurisdiction. Providing thus a remedy for all individuals, whether many or few, rich or poor, and of whatever age, sex, race, or nationality, the question of liability for reparation or indemnity for losses to individuals, occurring in any way, must be settled by the judgments of the judicial branch, unless the act complained of has been committed under official authority in pursuance of governmental orders to that end.

"The Government of the United States recognizes in the fullest sense the honorable obligation of its treaty stipulations, the duties of international amity, and the potentiality of jus-

tice and equity, not trammeled by technical rulings nor limited by statute. But among such obligations are not the reparation of injuries or the satisfaction by indemnity of wrongs inflicted by individuals upon other individuals in violation of the law of the land.

"Such remedies must be pursued in the proper quarter and through the avenues of justice marked out for the reparation of such wrongs.

"The doctrine of the non-liability of the United States for the acts of individuals committed in violation of its laws is clear as to acts of its own citizens, and *a fortiori* in respect of aliens who abuse the privilege accorded them of residence in our midst by breaking the public peace and infringing upon the rights of others, and it has been correctly and authoritatively laid down by my predecessors in office, to whose declarations in that behalf your note refers. To that doctrine the course of this Government furnishes no exception. And in this connection I venture to say that you labor under a misapprehension in citing as an exception the action of the United States, in 1850, in respect of the violence committed upon the Spanish consulate at New Orleans by a mob of irresponsible persons unknown to the Government, and with which no officer or agent of the United States was allied.

"Nothing can be clearer than the enunciation of the doctrine of Government non-liability on that occasion. While denouncing such outrages as disgraceful and in criminal violation of law and order, it was emphatically denied that the acts in question created any obligation on the part of the United States, arising out of the good faith of nations toward each other, for the losses thus occasioned by and to individuals. Neither is there a parity between the Spanish incident of 1850 and the recent riot and massacre of the Chinese at Rock Springs. The essential feature of the first is wholly wanting in the second. The emblem of Spanish nationality had suffered an affront in a city of the United States. The special immunity attaching to the Spanish consular representative had been impaired and he subjected to personal indignity. The incident occurred at a time when the Spanish Government had just shown its regard for and good will toward the United States in pardoning certain American citizens who had participated in a hostile invasion of Cuba, and had incurred the condemnation of the authorities of that country. Recognizing the merciful action

of the Queen of Spain in this regard, and as a responsive act of generosity and friendship tending toward good relationship, the President, while expressly denying the principle of national liability, recommended to Congress the appropriation of certain moneys to be paid to private individuals on account of the damages caused by riots at New Orleans and Key West, and to the Spanish consul at New Orleans a special indemnity as an official of Spain.

* * * * * * *

"Reverting, however, to your appeal of November 30, which I understand to be a direct application to the sense of equity and justice of the United States for relief for the unfortunate victims of the carnage and excesses of the mob at Rock Springs, I am compelled to state most distinctly that I should fail in my duty as representing the well-founded principles upon which rests the relation of this Government to its citizens, as well as to those who are not its citizens and yet are permitted to come and go freely within its jurisdiction, did I not deny emphatically all liability to indemnify individuals, of whatever race or country, for loss growing out of violations of our public law, and declare with equal emphasis that just and ample opportunity is given to all who suffer wrong and seek reparation through the channels of justice as conducted by the judicial branch of our Government.

"Yet I am frank to say that the circumstances of the case now under consideration contain features which I am disposed to believe may induce the President to recommend to the Congress, not as under obligation of treaty or principle of international law, but solely from a sentiment of generosity and pity to an innocent and unfortunate body of men, subjects of a friendly power, who, being peaceably employed within our jurisdiction, were so shockingly outraged; that in view of the gross and shameful failure of the police authorities at Rock Springs, in Wyoming Territory, to keep the peace, or even to attempt to keep the peace, or to make proper efforts to uphold the law, or punish the criminals, or make compensation for the loss of property pillaged or destroyed, it may reasonably be a subject for the benevolent consideration of Congress whether, with the distinct understanding that no precedent is thereby created, or liability for want of proper enforcement of police jurisdiction in the Territories, they will not, *ex gratia*, grant pecuniary relief to the sufferers in the case now before

us to the extent of the value of the property of which they were so outrageously deprived, to the grave discredit of republican institutions.

* * * * * * *

"Accept, &c.,

"T. F. BAYARD."

The able and elaborate opinions of Secretary Bayard in the above cases have been quoted quite fully because of the broad treatment, and the exceptional thoroughness with which the subject has been treated by him. They must appeal to the thoughtful minds of the country, coming from one whose statesmanship and patriotism were of the highest type.

§ 239. The case of the "Caroline" is one of great interest. While the case did not involve treaty rights, it illustrates so strikingly the relations of the States to the Federal government that it is deemed worthy of notice here. In 1838 a rebellion broke out in Canada. A number of the rebels, having obtained arms, seized an island at Niagara within American territory and fired shots into Canada, and having secured a steamer called the "Caroline," were preparing to cross over and invade Canada. An English force was hastily gathered and seized the "Caroline" in American waters at her moorings and sent her adrift down the Falls of Niagara. Among the English forces was a man named McLeod, who was arrested in the State of New York upon the charge of the murder of one Durfee, who was killed when the "Caroline" was seized by the British forces.

The British Minister at Washington demanded McLeod's release. He was in the custody of the New York State authorities and was under indictment to be tried for murder. The correspondence of Mr. Webster, who was then Secretary of State, with Mr. Fox, the British Minister, and with Mr. Crittenden, the Attorney General of the United States, gives very fully the position taken by the United States government.

"MR. WEBSTER TO MR. FOX" [1]

"DEPARTMENT OF STATE, WASHINGTON, April 24, 1841.

"The undersigned, Secretary of State of the United States, has the honor to inform Mr. Fox, envoy extraordinary and minister plenipotentiary of her Britannic Majesty, that his note of the 12th of March was received and laid before the President.

"Circumstances well known to Mr. Fox have necessarily delayed for some days the consideration of that note.

"The undersigned has the honor now to say, that it has been fully considered, and that he has been directed by the President to address to Mr. Fox the following reply.

"Mr. Fox informs the government of the United States that he is instructed to make known to it that the government of her Majesty entirely approve the course pursued by him in his correspondence with Mr. Forsyth in December last, and the language adopted by him on that occasion; and that that government have instructed him 'again to demand from the government of the United States, formally, in the name of the British government, the immediate release of Mr. Alexander McLeod;' that 'the grounds upon which the British government make this demand upon the government of the United States are these: that the transaction on account of which Mr. McLeod has been arrested, and is to be put upon trial, was a transaction of a public character, planned and executed by persons duly empowered by her Majesty's colonial authorities to take any steps and to do any acts which might be necessary for the defense of her Majesty's territories, and for the protection of her Majesty's subjects; and that, consequently, those subjects of her Majesty who engaged in that transaction were performing an act of public duty, for which they can not be made personally and individually answerable to the laws and tribunals of any foreign country.'

* * * * * * *

"In his note to Mr. Fox of the 26th of December last, Mr. Forsyth, the Secretary of State of the United States, observes, that 'if the destruction of the "Caroline" was a public act of persons in her Majesty's service, obeying the order of their superior authorities, this fact has not been before communi-

[1] Webster's Diplomatic and Official Papers, pp. 123–133.

cated to the government of the United States by a person authorized to make the admission; and it will be for the court which has taken cognizance of the offense with which Mr. McLeod is charged to decide upon its validity when legally established before it.' And he adds, 'the President deems this to be a proper occasion to remind the government of her Britannic Majesty, that the case of the "Caroline" has been long since brought to the attention of her Majesty's principal Secretary of State for Foreign Affairs, who up to this day has not communicated its decision thereupon. It is hoped that the government of her Majesty will perceive the importance of no longer leaving the government of the United States uninformed of its views and intentions upon a subject which has naturally produced much exasperation, and which has led to such grave consequences.'

"The communication of the fact that the destruction of the 'Caroline' was an act of public force by the British authorities, being formally made to the government of the United States by Mr. Fox's note, the case assumes a decided aspect.

"The government of the United States entertains no doubt that, after this avowal of the transaction as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law and the general usage of civilized states, to be holden personally responsible in the ordinary tribunals of law for their participation in it.

* * * * * * *

"The indictment against McLeod is pending in a State court; but his rights, whatever they may be, are no less safe, it is to be presumed, than if he were holden to answer in one of the courts of this government.

"He demands immunity from personal responsibility by virtue of the law of nations, and that law in civilized states is to be respected in all courts. None is either so high or so low as to escape from its authority in cases to which its rules and principles apply.

* * * * * * *

"It is understood that the indictment has been removed into the Supreme Court of the State by the proper proceeding for that purpose, and that it is now competent for McLeod, by

the ordinary process of *habeas corpus*, to bring his case for hearing before that tribunal.

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"The undersigned trusts that when her Britannic Majesty's government shall present the grounds, at length, on which they justify the local authorities of Canada in attacking and destroying the 'Caroline,' they will consider that the laws of the United States are such as the undersigned has now represented them, and that the government of the United States has always manifested a sincere disposition to see those laws effectually and impartially administered. If there have been cases in which individuals, justly obnoxious to punishment, have escaped, this is no more than happens in regard to other laws.

"Under these circumstances, and under those immediately connected with the transaction itself, it will be for her Majesty's government to show upon what state of facts and what rules of national law the destruction of the 'Caroline' is to be defended. It will be for that government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the 'Caroline' was impracticable, or would have been unavailing. It must be shown that daylight could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this the government of the United States can not believe to have existed.

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§ 240. "DANIEL WEBSTER TO HON. JOHN J. CRITTENDEN, *Attorney-general of the United States.*[1]

"March 15, 1841.

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"All that is intended to be said at present is, that since the attack on the 'Caroline' is avowed as a national act, which may justify reprisals, or even general war, if the government of the United States, in the judgment which it shall form of the transaction and of its own duty, should see fit so to decide, yet that it raises a question entirely public and political; a question between independent nations, and that individuals concerned in it can not be arrested and tried before the ordinary tribunals, as for the violation of municipal law. If the attack on the 'Caroline' was unjustifiable, as this government has asserted, the law which has been violated is the law of nations; and the redress which is to be sought is the redress authorized, in such cases, by the provisions of that code.

"You are well aware that the President has no power to arrest the proceeding in the civil and criminal courts of the State of New York. If this indictment were pending in one of the courts of the United States, I am directed to say that the President, upon receipt of Mr. Fox's last communication, would have immediately directed a *nolle prosequi* to be entered.

"Whether, in this case, the Governor of New York have that power, or, if he have, whether he would feel it his duty to exercise it, are points upon which we are not informed.

"It is understood that McLeod is holden also on civil process, sued out against him by the owner of the 'Caroline.' We suppose it very clear that the executive of the State can not interfere with such process; and, indeed, if such process were pending in the courts of the United States, the President could not arrest it. In such, and many analogous cases, the party prosecuted or sued must avail himself of his exemption or defense by judicial proceedings, either in the court into which he is called, or in some other court. But whether the process be criminal or civil, the fact of having acted under public authority, and in obedience to the orders of lawful superiors, must be regarded as a valid defense; otherwise individuals would be holden responsible for injuries resulting from the acts of government, and even from the operations of public war."

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[1] Webster's Diplomatic and Official Papers, pp. 135–136.

§ 241. No case has arisen in our diplomatic history involving more delicate points than this case of the "Caroline," and it was fortunate indeed that the United States government was represented by Mr. Webster at the time, in the office of Secretary of State.

If McLeod killed Durfee, acting under the orders of his government as an act of war on the part of his government, as Mr. Webster well said, he may have offended the law, but what law? Not the municipal law of New York, but the law of Nations. If he had offended the municipal law he was answerable to that law for his offense. If he offended the law of Nations, he was answerable to the political powers of the Federal government, but Mr. Webster was informed by Mr. Fox, the British Minister, that McLeod's act "was a transaction of a public character, planned and executed by persons duly empowered by her Majesty's colonial authority to take any steps . . . which might be necessary for the defense of her Majesty's territories," etc., which if done with due regard to certain well-established limitations, Mr. Webster recognized was a valid defense to the charge made against McLeod.

If McLeod had been in the custody of the Federal government Mr. Webster might have effected his release, but he recognized that he was powerless to demand his release at the hands of the State of New York. True, the courts of New York when McLeod was brought to trial were bound to recognize the principles of international law, and the defense suggested by Mr. Fox, if made before the courts of New York, would have been as available to McLeod as if made before the courts of the United States.

When Mr. Webster found McLeod's act was "authorized and undertaken by the British authorities," and that "individuals concerned in it ought not, by the principles of public law and the general usage of civilized states, to be holden responsible in the ordinary tribunals of law for their participation in it," he found himself unable to advise any remedy, except by endorsing the position of Mr. Forsyth, who says, "It will be for

the court which has taken cognizance of the offense with which Mr. McLeod is charged to decide upon its validity when legally established before it."

The British government's position was valid when proven. The court of New York had taken cognizance of the offense. McLeod was before it and before that tribunal his defense that he was acting under the authority of his government had to be made, but neither the President nor Mr. Webster nor any power in the government could compel the State of New York to act in any other manner in the premises than that laid down by the Constitution of the United States and the Constitution and laws of New York. The comity existing between the States and the Federal government permitted Mr. Webster to send his officer to the trial, not to participate in it, but to watch its proceedings. The trial was had and McLeod was acquitted, not, it seems, on the ground asserted by the British government, but because he proved an alibi.

Had McLeod been indicted in a Federal Court it would seem doubtful whether the British Government could have objected to the suggestion of Mr. Forsyth that McLeod's defense should be proven before such court. If so, the fact that the agency of our Government in the ascertainment of the truthfulness of his defense was a State rather than Federal Court, should not have been the subject of criticism by the British Government. Mr. Webster only asked that the defense claimed by McLeod should be proven by the agency established by our Government for the ascertainment of such facts. The State Court happened, at that time, to be such agency. When proven it was completely sufficient to bar any further action, and no court, State or Federal, upon such proof would have proceeded further in the prosecution. To assume that it would have done so is to impeach the integrity of the courts.

§ 242. The limitation of the treaty-making power under the government of the United States is well seen in the cases considered in this chapter. It is impossible to imagine that such eminent statesmen as Mr. Marcy, Mr. Webster, Mr. Evarts,

Mr. Frelinghuysen, Mr. Bayard, and Mr. Blaine could have refused to exercise every power within the legitimate control of the government to carry out in good faith our agreements with foreign nations. Their failure to attempt to do through the Federal government that which was seemingly agreed to be done in treaties can be accounted for only on the ground expressed by them, that when the Federal government guaranteed by treaty protection to foreigners, it was the protection which our form of government contemplated and allowed. If this was different from that accorded American citizens by a foreign government it was only because the form of that government was different from ours. These statesmen believed that when the foreigner received that degree of protection and care in our country which our Constitution and laws accord to our own citizens that no higher measure of protection could be accorded them, and that no government should be expected, under any form of treaty, to do more for foreigners who visited their shores than it would do for the protection of their own citizens.

No government is expected, when it binds itself to do a certain thing, to exceed its legitimate powers in so doing, and every government contracting with another does so with the implied understanding that it must contract only to the extent of its powers. Nor is it true, as claimed by many, that the United States government, by its treaties, secures safety and protection for its citizens abroad, while it denies the same to foreigners in our country; for we have no right to complain of the treatment of our citizens in any foreign country who have accorded to them the same rights of protection and safety which the citizens of such country receive from their own government. This is the essential test, and this is the test applied by Mr. Webster and those who followed him in dealing with foreign nations.

§ 243. A notable instance of this was developed in England in 1850, when General Haynau, a distinguished Austrian officer whose country was at peace with Great Britain, visited a brewery in the city of London. General Haynau had been charged with

great cruelty in Hungary. The workmen about the brewery discovering who he was, attacked him and severely used him. A demand was made upon the British government for reparation, and Lord Palmerston declared that "No proceedings can be taken in this case that are not in accordance with ordinary administration of law," intimating that a civil action against individuals or the municipality of London, which was the redress open to English subjects under like conditions, was all that could be obtained by this distinguished foreigner.

§ 244. The views of Mr. Webster, Mr. Evarts, Mr. Bayard, and Mr. Blaine also emphasize with a force that cannot be doubted their recognition of the limitations upon the treaty-making powers of the United States. If this power existed in its "unlimited" claim, surely the government of the United States, without regard to the division of powers existing in our government in the State and the municipality, could have enforced the language of treaties directly and specifically without relegating foreigners to any intermediary or any local power for a redress of their wrongs.

§ 245. President Harrison, in his message to Congress in December, 1891, recommended legislation on the part of Congress to enforce the treaty rights of foreigners. This has been followed by several of the Presidents since his day, but no action has been taken on the subject. It would seem that there could be no doubt of the power of Congress to enforce by appropriate legislation the constitutional treaties entered into by the United States with foreign countries. Indeed, the power conferred on Congress in Article I, § 8, to define and punish offenses against the law of Nations, would seem ample to justify such action by Congress. Such laws might tend to relieve the Government of the United States of the untenable charge that it is unable to discharge its international obligations, but that they would serve any practical purpose, except in rare cases, may well be doubted. I think it may be safely conjectured that the failure of Congress to act in this matter is due to the uncertainty in the minds of many of the limitations on the treaty-making

power. The representatives of the people of the several States are unwilling to confer additional power upon Congress which may be used to enforce treaties which embrace subjects which they believe cannot properly be made the subject of treaties. If the limitations on the treaty-making power were made clear and decisive by the Courts, there can be no doubt that the hesitancy on the part of Congress to act in this matter would be relieved, but it is not at all certain that until such results have been obtained and the whole subject made clear in the matter of the treaty power, that any action will be taken by Congress which may involve the people of the country in additional struggles with this power.

President Harrison in his message referred to, says:

"It would, I believe, be entirely competent for Congress to make offences against the treaty rights of foreigners domiciled in the United States cognizable in the Federal Courts. This has not, however, been done, and the Federal officers and Courts have no power in such cases to interfere either for the protection of a foreign citizen or for the punishment of his slayers."

This is true, but it may be asked why should an additional tribunal be provided to mete out punishment to the offender when the law that he has offended is generally the law of the State? It may be answered that perhaps the State authorities will not prosecute him, or will, from negligence or inaction, fail to prosecute him as he ought to be. Since the States in this respect are, in effect, the agents of the Federal Government, if they fail to do their duty the Government is in no worse position than if one of its own courts should fail to do its duty in this regard. It would seem that where the States, therefore, whose duty it is to prosecute the offender, fail to do so, the Government of the United States must answer for it through diplomatic channels just as if the authorities of the United States, if a United States Court had jurisdiction of the case, should fail to prosecute the offender with diligence. While as a question of constitutional power, therefore, it is seen there may be no objection to Congress taking such action, it may be

doubted whether it would accomplish what would be expected from such a course, except in occasional instances, and it is doubtful whether Congress will take such action until the question of the limitations upon the treaty power are more explicitly declared in the decisions of the Courts.

CHAPTER X

The Relation of the Treaty-Making Power to the Police Power of the States

§ 246. This division of our subject is as follows:

Personal and property rights of every kind and description may be the subject of treaties. Whenever the control or protection of such rights is, under the Constitution, confided to any department of the government [1] or *to a State*, such department or *the State*, as the Constitutional repository of such rights, cannot be ousted of their jurisdiction and have the same transferred to the treaty-making power.

The guarantee of certain personal and civil rights to the citizens of the United States and the prohibition on the United States to deny others to the people, as set forth in the Constitution, and in the Amendments thereto, has been discussed elsewhere.

This branch of our subject, however, is more limited, and we are now to consider in addition to the rights specifically secured in the Constitution and the Amendments, those rights which may pertain to the citizen as a citizen of a State. And this touches upon the dual status of citizenship, which pertains to every citizen in the State; a status unknown in many countries, and which to those who are unacquainted with our system of government is difficult to comprehend, for every citizen of the United States is entitled to the protection of the Federal Government in all matters which pertain to his citizenship of the United States, and every citizen of a State in the United States

[1] Rights confided to the various departments of the government have been considered in Chapter V.

is entitled to like protection of all rights which pertain to him as a citizen of such State.

§ 247. The one man owes allegiance to two powers, the Government of the United States, and the Government of his State, for he is a citizen of each. In the discharge of duties pertaining to the government of the United States or in the transaction of business which pertains to the government of the United States, wherever in fact his actions touch a right or duty which comes to him from the government of the United States, he is exercising rights or duties as a citizen of the United States. And so where he is performing a duty that comes to him as a citizen of the State and not of the United States, or is engaged in any business which does not touch the government of the United States in any respect, but which is controlled and derived from the State itself, in such capacity he is acting as a citizen of the State and as such entitled to the protection of the State. If a man goes into the Federal Court to practice law, he goes as a citizen of the United States; if he goes into the State Court to practice law he goes as a citizen of the State.[1] The recognition of this dual citizenship is merely a recognition of the division of the powers of government in the United States. In the Slaughter House Cases,[2] the Court defined the rights of a citizen of the United States as follows: "Those which owe their existence to the Federal Government, its national character, its Constitution, or its laws." Chief Justice Waite in United States *v.* Cruikshank[3] says:

"We have in our political system of the United States the government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance and whose rights it must protect. The same person may be at the same time a citizen of the United States and a citizen of the State, but his rights of citizenship under one of these governments will be different from those he has under the other."

[1] Bradwell *v.* State, 16 Wallace, 130, 21 L. ed. 442.
[2] 16 Wallace, 36, 21 L. ed. 394. [3] 92 U. S. 542, 23 L. ed. 588.

§ 248. What rights, then, peculiarly belong to the citizen as a citizen of the State? The Tenth Amendment to the Constitution fixes these: "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 reserved powers, or the rights flowing from them, are those with which the citizen of the State is clothed, and which he, as such citizen, has the right to enjoy under the control of the State. Among these reserved powers may be included the police power of the State. The Tenth Amendment does not create powers, it merely protects certain powers from aggression by the Federal Government. If the Tenth Amendment had never been adopted, it would still be true that the police powers of the State would exist, for they are inherent powers in every State that cannot be surrendered, and so these reserved powers often include the original, inherent police powers of the State. Judge Cooley has well stated the principle:[1]

"In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual States, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the States. All that the Federal authority can do is to see that the States do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the federal Constitution."

And he adds:

"But while the general authority of the State is fully recognized, it is easy to see that the power might be so employed as to interfere with the jurisdiction of the general government; and some of the most serious questions regarding the police of the States concern the cases in which authority has been conferred upon Congress. In those cases it has sometimes been claimed that the ordinary police jurisdiction is by necessary

[1] "Constitutional Limitations," 831 (Seventh Edition).

implication excluded, and that, if it were not so, the State would be found operating within the sphere of the national powers, and establishing regulations which would either abridge the rights which the national Constitution undertakes to render absolute, or burden the privileges which are conferred by law of Congress, and which therefore cannot properly be subject to the interference or control of any other authority. But any accurate statement of the theory upon which the police power rests will render it apparent that a proper exercise of it by the State cannot come in conflict with the provisions of the Constitution of the United States. If the power extends only to a just regulation of rights with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the State, and its exercise for the regulation of the property and actions of its citizens, cannot well constitute an invasion of national jurisdiction, or afford a basis for an appeal to the protection of the national authorities."

§ 249. Writers upon the Constitution and judges of our Courts show great reluctance in attempting a definition of the police power of the State. And it is only therefore from the opinions of the judges that we are enabled by the doctrine of comparison and exclusion to get a satisfactory view of this power. In these opinions we find many of the attributes of this power, but no definition of it, and without defining its limitations, we find many things it can do and much that it cannot do. The police power of a State may be said to be that unlimited, inalienable, inherent power in every State to protect the health, the safety, and the morals of the people, and to preserve and protect its own autonomy at all times. Once admit the existence of a State with its essential duties and obligations and any one of such essential duties or obligations becomes a proper subject for the application of the police power. The police power of a State is the power of self-preservation; its defensive weapon against destruction. It inheres in all those functions and powers whose exercise is necessary to the existence of a State. The distinction between *necessary* and *essential*, and *appropriate* powers and functions, must be observed The

latter may not be included in the police power, the former must be. A watch, though lacking a proper regulator, or part of its case, or some other part of its mechanism, is none the less a watch; but if the mainspring be gone, its function as a watch is destroyed, for it can no longer be considered a "going concern." The lack of a regulator undoubtedly affects the accurate measurement of time, but the absence of the mainspring makes any measurement of time impossible. In other words, the purpose for which the watch is made is gone. The regulator as a part of its mechanism is indeed eminently appropriate but not essential to its existence as a watch, for the same watch may keep time even if it be not accurate time, but without the mainspring *no* time can be kept. And, so, wherever the duty or obligation of the State embraces a subject that constitutes one of the essential and necessary attributes of the State, to this subject the police power attaches. If the subject be one that appropriately, but not essentially, inheres in the State, to this the police power may not necessarily attach.

§ 250. In Beer Co. *v.* Massachusetts,[1] Justice Bradley holds that the police power of the State cannot be surrendered by any act of the Legislature. He says:

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

This was the unanimous opinion of the Court carrying with it the sanction of such names as Chief Justice Waite, and

[1] 97 U. S. 32, 33, 24 L. ed. 989.

Justices Clifford, Miller, Strong, Hunt, Swayne, Field, and Harlan.

Judge Cooley again says:[1]

"It has also been intimated in a very able opinion that the police power of the State could not be alienated even by express grant. And this opinion is supported by those cases where it has been held that licenses to make use of property in certain modes may be revoked by the State, notwithstanding they may be connected with grants and based upon a consideration. . . . It would seem, therefore, to be the prevailing opinion, and one based upon sound reason, that the State cannot barter away, or in any manner abridge or weaken, any of those essential powers which are inherent in all governments, and the existence of which in full vigor is important to the well-being of organized society; and that any contracts to that end are void upon general principles, and cannot be saved from invalidity by the provision of the national Constitution now under consideration."

§ 251. Adopting Judge Cooley's views, *supra*, Chief Justice Waite delivered the opinion of the Court in Stone *v.* Mississippi.[2] The case involved a charter granted by the Legislature of Mississippi in 1867 to a Lottery Company for twenty-five years in consideration of a stipulated sum and annual payments, etc. In 1868 the State of Mississippi adopted a Constitution which prohibited lotteries within the State. The question therefore was whether the charter granted by the legislature was such a contract binding upon the State that the subsequent Constitution adopted by the State could not destroy. Chief Justice Waite said in his opinion:

"Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the State and the people of the State in that way. All agree that the legislature cannot bargain away the police power of a State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can cur-

[1] "Constitutional Limitations," 399, 400 (Seventh edition).

[2] 101 U. S. 817, 25 L. ed. 1079.

tail the power of its successors to make such laws as they may deem proper in matter of police. . . . Metropolitan Board of Excise *v.* Barrie, 34 N. Y. 657; Boyd *v.* Alabama, 94 U. S. 645. Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. Beer Company *v.* Massachusetts, 97 U. S. 25; Patterson *v.* Kentucky, 97 U. S. 501. Neither can it be denied that lotteries are proper subjects for the exercise of this power."

And he further said:

"The question is therefore directly presented, whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. Beer Company *v.* Massachusetts *supra.*"

The Chief Justice, when commenting on Chief Justice Marshall's opinion in the Dartmouth College Case wherein he said, "That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed," continued:

"The present case, we think, comes within this limitation. We have held, not, however, without strong opposition at times, that this clause protected a corporation in its charter exemptions from taxation. While taxation is in general necessary for the support of government, it is not part of

the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular. But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.' They may create corporations and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality. The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. . . . Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will."

There was no dissent in this case, and the opinion of the Chief Justice, therefore, is enforced by the sanction of the whole

court, composed of Justices Clifford, Miller, Strong, Hunt, Swayne, Field, Bradley, and Harlan. [1]

§ 252. Two notable cases have contributed much to a proper understanding of this power, in one of which Chief Justice Shaw, and in the other Chief Justice Redfield, rendered the opinion. Chief Justice Shaw said: [1]

"The police power is that power vested in the legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances either with penalties, or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same. It is easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well ordered governments, and where its fitness is so obvious that all well regulated minds will regard it as reasonable."

§ 253. Chief Justice Redfield, in Thorpe *v.* Rutland & Burlington R. R. Co.,[2] delivering the opinion of the Court, said:

"The case resolves itself into the narrow question of the right of the legislature, by general statute to require all railways, whether now in operation, or hereafter to be chartered, or built, to fence their roads upon both sides, and provide sufficient cattle-guards at all farm and road-crossings, under penalty of paying all damage caused by their neglect to comply with such requirements. . . . We think the power of the legislature to control existing railways in this respect, may be found in the general control over the police of the country, which resides in the law-making power in all free States, and which is, by the fifth article of the bill of rights of this State, expressly declared to reside perpetually and inalienably in the legislature, which is, perhaps, no more than the enunciation of a general principle applicable to all free States, and which cannot, therefore be violated so as to deprive the legislature of the power, even by express grant to any mere public or private corporation. And when the regulation of the police of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given

[1] Commonwealth *v.* Alger, 7 Cushing, 85. [2] 27 Vt. 140.

to railroads to be carried into effect by their by-laws and other regulations, it is, of course, always, in all such cases, subject to the superior control of the legislature. That is a responsibility which legislatures cannot divest themselves of, if they would. So far as railroads are concerned, this police power which resides primarily and ultimately in the legislature, is twofold: 1. The police of the roads, which, in the absence of legislative control, the corporations themselves exercise over their operatives, and to some extent over all who do business with them, or come upon their grounds, through their general statutes, and by their officers. We apprehend there can be no manner of doubt that the legislature may, if they deem the public good requires it, of which they are to judge, and in all doubtful cases their judgment is final, require the several railroads in the State to establish and maintain the same kind of police which is now observed upon some of the more important roads in the country for their own security, or even such a police as is found upon the English railways, and those upon the continent of Europe. No one ever questioned the right of the Connecticut legislature to require trains upon all of their railroads to come to a stand before passing draws in bridges; or of the Massachusetts legislature to require the same thing before passing another railroad. And by parity of reasoning may all railways be required so to conduct themselves, as to other persons, natural or corporate, as not unreasonably to injure them or their property. And if the business of railways is especially dangerous, they may be required to bear the expense of erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances. There would be no end of illustrations upon this subject. . . . It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety beams in case of the breaking of axletrees, the number of brakemen upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be. Hegeman *v.* Western Railway Co. 16 Barb. 353.

"2. There is also the general police power of the State, by

which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State, of the perfect right, in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm, that the right to do the same in regard to railways should be made a serious question."

And the court proceeded to consider the various cases in which the right of the legislature to regulate matters of private concern with reference to the general public good had been sanctioned or sustained by judicial decisions, and quote, as pertinent to the general question of what laws are prohibited on the ground of impairing the obligation of contracts, the language of Chief Justice Marshall in Dartmouth College *v.* Woodward,[1] that,

"The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed."

§ 254. Another very striking case is that of the Commonwealth *v.* Vrooman,[2] in the opinion of which the following language was used in speaking of the police power:

"It is inherent in all forms of government. Its exercise may be limited by the frame or constitution of a particular government, but its natural limitations, in the absence of a written constitution, are found in the situation and necessities of the State, and these must be judged of in the first instance by the government itself. It corresponds to the right of self-preservation in the individual. When the dangers that threaten the State come from without, the right of self-preservation is exercised in gathering armies and the means of public defense. When the dangers arise within the State, self-preservation requires their suppression. This is accomplished by the exercise of the police power which deals with all forms of disorder, and provides for the public welfare, and the protection of citizens against the violence and fraudulent conduct of each other."

[1] 4 Wheat. 518, 629, 4 L. ed. 629. [2] 164 Pa. 306, 30 Atl. 217.

§ 255. In the City of New York *v.* Miln,[1] the question was whether an act of the State of New York which inflicted a penalty upon the master of a vessel arriving from a foreign port who neglected to report an account of his passengers was a regulation of commerce or of police. Justice Barbour, in delivering the opinion of the court, uses this language:

"But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive.

"We are aware, that it is at all times difficult to define any subject with proper precision and accuracy; if this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering.

"If we were to attempt it, we should say that every law came within this description which concerned the welfare of the whole people of a State, or any individual within it; whether it related to their rights, or their duties; whether it respected them as men, or as citizens of the State; whether in their public or private relations; whether it related to the rights of persons or of property, of the whole people of a State, or of any individual within it; and whose operation was within the territorial limits of the State, and upon the persons and things within its jurisdiction."

[1] 11 Peters, 139, 9 L. ed. 648.

§ 256. The application of these principles to certain prohibitions under the Constitution is of interest. Article I, § 19, clause 1, of the Constitution, reads:

"No State shall . . . pass any law impairing the obligation of contracts."

This provision, on its face, seems clear and unlimited. The word "any" would seem to make the prohibition absolute. There is no limitation on the word "contracts" so that it would seem to include all.

In the Dartmouth College case [1] it was held that New Hampshire succeeded to the royal prerogative and was bound by the royal compact in its charter, and that that charter constituted a contract which could not be impaired by any subsequent act of the legislature of the State.

But in the cases cited above, Beer Co. *v.* Massachusetts, Boyd *v.* Alabama, and Stone *v.* Mississippi, a limitation is put upon this clause in its seeming simplicity, and in those cases the courts held that an unheralded power, of unknown parentage, *nullius filius* in the political world, known as the police power of a State had its application. The courts did not hold that this power could be asserted successfully to annul this clear constitutional provision; they did not claim it could override the Constitution if in conflict with it, this was not necessary, but they held that when this provision said "No State shall pass any law impairing the obligations of contracts," they must with due regard for the States, recognize their essential attributes without which they would not exist as States. It was not held that the police power annulled this provision of the Constitution, but that this provision, properly construed in its relation to the essential powers and duties of the State, simply recognized those duties as inhering in the State, because the States could not exist as States without them. And so, they held that the duty and obligation resting on the States in the preservation of the health, safety, and morals of the

[1] 4 Wheat. 463, 4 L. ed. 629.

people as one of its essential and necessary attributes could not be and was not surrendered, and that every charter or contract made by a State, even for a consideration, is subject to annulment and repeal by this power under these obligations.

In brief, the Constitutional provision does not apply where the police power of the State is necessary for the protection of the people; and this is done without conflict simply by recognizing the States as clothed with those attributes and powers, without which no State can exist, and which are essential to its existence. Indeed, the construction given this provision of the Constitution by the courts in effect makes it read "No State shall pass any law impairing the obligation of contracts," *except such laws as are necessary for the protection of the health, morals, etc., of the people:* for since the protection of the health, morals, etc., of a people is one of the essential duties of the State, it can neither by contract nor concession of any kind, whether for value or without, divest itself of this obligation. To do so would be to abdicate; to part with it would be State suicide; impossible under the decision in Texas *v.* White [1] that declares our government to be "an indestructible union composed of *indestructible States*"; and which was reaffirmed in Collector *v.* Day.[2] "Without them (the States) the general government itself would disappear from the family of nations." [3]

§ 257. The same principle has been applied in the construction of liquor legislation. The State cannot be divested of its police power in its duty to the people for it pertains to every species of property within its domain and subject to its jurisdiction; and so, if a package of liquor (prohibited by a State from manufacture or sale within its borders) while in commerce and under Congressional control (and which therefore has not become subject to the control of the State) comes within the territorial confines of a State, so long as it continues as an article of commerce it is beyond the reach of the police power for it has never as yet become a part of the property of the State

[1] 7 Wall. 700, 19 L. ed. 227. [2] 11 Wall. 125, 20 L. ed. 122.
[3] Lane *v.* Oregon, 7 Wall. 76, 19 L. ed. 101.

to which such power could attach. But, once let commerce in the article cease and the commerce-power take its hands off of it and it drops into the mass of the property of the State and the police power at once attaches. While in commerce it may be *in* but not *of* the State, and until it becomes a part of the property of the State the police power of the State does not attach to it.[1]

§ 258. Another striking illustration of this power is seen when the Federal government grants licenses to manufacture or sell liquor to a citizen of a State, which State has by constitutional prohibition or legislative enactment denied the right within its boundaries. Here we have the permission of the Federal government to do an act which is prohibited in the jurisdiction to which the license applies. Such license is valueless in its power to force upon an unwilling community that which the State has decided would be detrimental to the health and morality of the people. The manufacture and sale of liquor cannot be accomplished without such Federal license, but it cannot be done with it if the State under its police power denies the right.[2]

§ 259. Laws affecting and regulating ports of entry in the powers given to harbor masters to designate suitable places for the anchoring of vessels, regulation of wharfs, etc., have been the subject of adjudication by the courts. It is easily seen that such laws passed by a State to control the harbors of their ports wherein the commerce of the world may come, do in a measure affect commerce; but not every State law that affects commerce is unconstitutional. If enacted in good faith for local purposes (though they affect interstate commerce) with no purpose of impinging on rights controlled by Congress and are "*bona fide* appropriate" to the end in view they are held valid.[3]

[1] Leisey *v.* Harding, 135 U. S. 100, 34 L. ed. 128, 10 S. C. 681; Bowman *v.* Rwy. 125 U. S. 465, 31 L. ed. 700, 8 S. C. 689.

[2] License Cases, 5 Wall. 462, 18 L. ed. 497; Heff *v.* U. S. 197 U. S. 505, 49 L. ed. 848, 25 S. C. 512.

[3] Cooley, "Constitutional Limitations," 7 Ed. 855.

Judge Field, in County of Mobile *v.* Kimball,[1] has well stated the doctrine:

"Of the class of subjects local in their nature, or intended as merely aids to commerce, which are best provided for by special regulations, may be mentioned harbor pilotage, buoys and beacons to guide mariners to the proper channel in which to direct their vessels."

§ 260. Quarantine laws and inspection laws have also been approved under the police power of the State. They necessarily affect commerce in one sense, but not so in the sense contemplated by the Constitution. When the State at its boundary meets an article of commerce which seeks admission to its territory, with the demand for inspection, commerce, it is true, is stopped: the inspection is for the purpose of determining whether there may or may not be disease or contagion in the article, which is sought to be introduced. If the inspection discloses such disease or contagion, the article cannot enter, but commerce is not stopped by this proceeding, but disease and contagion are. The object of such laws is therefore to aid commerce, not to impede it; to expedite lawful commerce, and to prevent commerce from being used as a vehicle of disease and death. The police law of the State cannot then be considered as excluding rightful commerce, but only as excluding disease and impurity against which the police power of the State is directed in the protection of the people of the State.[2]

§ 261. We have sought above to draw the distinction between necessary and essential, and appropriate powers of a State in its relation to the police power, for many powers confessedly appropriate in their exercise by a State may yet not be regarded as powers absolutely essential to its autonomy. Justice Bradley

[1] 100 U. S. 696, 697, 25 L. ed. 761.

[2] Missouri, K. & T. R. R. Co. *v.* Haber, 169 U. S. 613, 42 L. ed. 878, 18 S. C. 488; Smith *v.* R. R. 181 U. S. 248, 45 L. ed. 847, 21 S. C. 603; and especially Rasmussen *v.* Idaho, 181 U. S. 200, 45 L. ed. 814, 21 S. C. 557.

in giving the opinion of the court in Crutcher *v.* Kentucky [1] says:

"But the main argument in support of the decision of the Court of Appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the State. But it does not follow that everything which the legislature of a State may deem essential for the good order of society and the well-being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce. . . . There are undoubtedly many things *which in their nature are so deleterious or injurious to the lives and health of the people as to lose all benefit of protection as articles or things of commerce,* or to be able to claim it only in a modified way. *Such things are properly subject to the police power of the State.*[2] Chief Justice Marshall, in Brown *v.* Maryland, 12 Wheat. 419, 443, instances gunpowder as clearly subject to the exercise of the police power in regard to its removal and the place of its storage; and he adds: 'The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a State.'"

And further, at page 61, he says:

"But whilst it is only such things as are *clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of Congress,*[2] yet when that power, or some other exclusive power of the Federal Government, is not in question, the police power of the State extends to almost everything within its borders."

And further:

"It is also within the undoubted province of the State legislation to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns: with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of

[1] 141 U. S. 59, 35 L. ed. 649, 11 S. C. 851.
[2] Author's italics.

people may be endangered, *even though such regulations affect to some extent the operations of interstate commerce.*" [1]

This opinion has the endorsement, by concurrence, of Justices Field, Harlan, Lamar, Blatchford, and Brewer. Chief Justice Fuller and Justice Gray dissented, and Justice Brown did not sit in the case.

§ 261*a*. In the case of Railroad Co. *v.* Husen,[2] Justice Strong says:

"While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property, within its borders; while it may prevent persons and animals suffering under contagious or infectious disease, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State, *beyond what is absolutely necessary for its self-protection.*[1] It may not, under cover of exerting its police powers, substantially prohibit either foreign or interstate commerce."

And further, at page 473, he says:

"*The police power of the State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise.*" [1]

Judge Strong, in this case, clearly recognizes the fact that, while the police power cannot be used for self protection beyond what is absolutely necessary for the preservation of the State, as a State, yet up to that point it is subject to no diminution of power. This was the unanimous opinion of the Court composed of Chief Justice Waite, Justices Clifford, Miller, Hunt, Field, Swayne, Bradley, and Harlan.

§ 262. The case of Railroad *v.* Fuller[3] is of interest in showing how far the police regulations of a State may affect interstate traffic. A statute of Iowa declared:

"In the month of September, annually, each railroad company shall fix its rates of fare for passengers, of freights for

[1] Author's italics. [2] 95 U. S. 472, 24 L. ed. 508.
[3] 17 Wall. 560, 21 L. ed. 710.

transportation of timber, wood and coal per ton, cord, or thousand feet, per mile, also its fare and freight per mile, for transportation of merchandise and articles of the first, second and third and fourth grades of freight. And on the first day of October following shall put up at all the stations and depots on its road a printed copy of such fare and freight, and cause a copy to remain posted during the year."

For neglect to do so a fine was imposed. The railroad undertook to transport for Fuller certain goods covered by the law of Iowa, from Chicago to the State of Iowa, and charged him in excess of the rates posted in the local depots of Iowa. The Court held that the railroad was liable to Fuller, though it claimed that the act of Iowa was an interference with interstate commerce and therefore null and void. It is true that the statute of Iowa operated on interstate commerce, but it was designed in good faith to protect the citizens of that State from imposition by the railroads in intrastate commerce. That was its chief concern, but still it was not limited to that and did embrace interstate commerce, and yet it was held to be a valid law in the exercise of the police power of the State in the protection of its citizens. Justice Swayne's opinion was the unanimous opinion of the court composed of Justices Clifford, Miller, Field, Bradley, Davis, Strong, and Hunt.

§ 263. The case of Plumley *v.* Massachusetts [1] involved the validity of a statute of Massachusetts passed "to prevent deception in the manufacture and sale of imitation butter," the question being whether such act contravened the commerce clause of the Constitution. Judge Harlan, in giving the opinion of the court, said:

"If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from

[1] 155 U. S. 472, 39 L. ed. 223, 15 S. C. 154.

one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States. For, as said by this court in Sherlock *v.* Alling, 93 U. S. 99, 103: 'In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. . . . And it may be said generally that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in other pursuit.'"

This opinion was concurred in by Justices Gray, Brown, Shiras, Jackson, and White. Chief Justice Fuller, with Justices Field and Brewer, dissented. In Silz *v.* Hestenberg,[1] this case has been approved by Justice Day delivering the unanimous opinion of the Court.

§ 264. In delivering the opinion of the Court in Prigg *v.* Pennsylvania,[2] Justice Story said:

"The police power belonging to the States in virtue of their general sovereignty, extends over all subjects within the territorial limits of the States; and has never been conceded to the United States."

Justice Gray, in delivering the dissenting opinion of the court in Leisy *v.* Hardin,[3] in which Justices Harlan and Brewer concurred, said:

"Among the powers thus reserved to the several States is what is commonly called the police power — that inherent and necessary power, essential to the very existence of civil

[1] 211 U. S. 42, 53 L. ed. 74, 29 S. C. 10.
[2] 16 Peters, 625, 10 L. ed. 1060.
[3] 135 U. S. 127, 34 L. ed. 128, 10 S. C. 681.

society, and the safeguard of the inhabitants of the State against disorder, disease, poverty and crime."

At page 128 he further says:

"This power, being essential to the maintenance of the authority of local government, and to the safety and welfare of the people, is inalienable. As was said by Chief Justice Waite, referring to earlier decisions to the same effect, 'no legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation and cannot divest itself of the power to provide for them.'"

Again he says, speaking of the case of Brown *v.* Maryland, 12 Wheat. 419, page 134:

"The statute there in question was evidently enacted to raise revenue from importers of foreign goods of every description, and not as an exercise of the police power of the State. And Chief Justice Marshall, in answering an argument of counsel, expressly admitted that the power to direct the removal of gunpowder or the removal or destruction of infectious or unsound articles which endanger the public health 'is a branch of the police power, which unquestionably remains, and ought to remain, with the States.'"

§ 265. The language of Chief Justice Marshall, in Gibbons *v.* Ogden,[1] must always form a part of the discussion of this question. In speaking of the inspection laws of the States, he says:

"They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to a general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power

[1] 9 Wheat. 1, 6 L. ed. 23.

over these subjects is granted to Congress; and, consequently, they remain subject to state legislation."

In Holmes *v.* Jennison,[1] Justice Baldwin uses this language:

"Every State has acknowledged power to pass and enforce quarantine, health and inspection laws to prevent the introduction of disease, pestilence or unwholesome provisions; such laws interfere with no power of Congress or treaty stipulations; they regulate internal police, and are subjects of domestic regulation within each State, over which no authority can be exercised by any power under the Constitution, save by requiring the consent of Congress to the imposition of duties on exports or imports, and their payment into the Treasury of the United States."

And on page 619 he says:

"Whenever internal police is the object, the power is excepted from every grant and reserved to the States."

§ 266. In the License Cases,[2] which involved laws of New Hampshire, Rhode Island, and Massachusetts, requiring a license to sell liquor, it was claimed that such law was an invasion of the commerce power of Congress. In the one case the liquor was from abroad, and in the other from a neighboring State. Justice Daniel,[3] in these cases, said:

"A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State."

Justice Grier in these cases, uses this striking language:[4]

"It has been frequently decided by this Court, 'that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the Constitution of the United States; and that consequently, in relation to these, the authority of a State is complete, unqualified, and conclusive.' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for

[1] 14 Pet. 616, 10 L. ed. 579.
[2] 5 Howard 504, 12 L. ed. 256.
[3] *Id.*, 613.
[4] *Id.*, 631.

the preservation of the public peace, health and morals, must come within this category."

Justice Woodbury [1] said in the same case:

"Call them by whatever name, if they are necessary to the well-being and independence of all communities, they remain among the reserved rights of the States, no express grant of them to the general government having been either proper, or apparently embraced in the Constitution."

Justice McLean said [2]:

"A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power."

§ 267. In the Passenger Cases [3] the question was whether laws of the States of New York and Massachusetts were unconstitutional in attempting to regulate foreign commerce and whether they conflicted with the treaty between the United States and England. The case was decided by a divided court of five to four. The five holding that the laws in question were void as attempts to regulate commerce. Taney, Daniel, Woodbury, and Nelson dissented. Justice Daniel, in his opinion, said:

"The law of New York has been further assailed in argument, as being an infraction of the fourteenth article of the treaty of amity and commerce negotiated between Great Britain and the United States . . . and the second clause of the sixth article of the Constitution having declared the Constitution and the laws of the United States, made in pursuance thereof, and treaties made under the authority of the United States, to be the supreme law of the land, the laws of New York, being in derogation of the fourteenth article of the treaty of 1794, are unconstitutional and void . . . Admitting this fourteenth article of the treaty to be in full force, and that it purported to take from the State of New York the right to tax

[1] 5 Howard 627, 12 L. ed. 627.
[2] 7 Howard 506, 507, 12 L. ed. 702.
[3] *Id.*, 588, 12 L. ed. 256.

aliens coming and commorant within her territory, it would be certainly incompetent for such a purpose; because there is not, and never could have been, any right in any other agent than her own government to bind her by such a stipulation."

Chief Justice Taney uses this language:[1]

"For if the people of the several States of this Union reserved to themselves (as he elsewhere holds they did) the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this court could neither recognize nor enforce."

§ 268. Justice Brewer,[2] in South Carolina *v.* United States, delivering the opinion of the court, in clear and forceful language states the relationship of the Federal to the State governments and that of the State to the Federal government.

"We pass, therefore, to the vital question in the case, and it is one of far-reaching significance. We have in this Republic a dual system of government, National and State, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, *and there are others in which the State is supreme, and in respect to them the National Government is powerless.*[3] To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preëminently of this — a duty often times of great delicacy and difficulty.

"Two propositions in our constitutional jurisprudence are no longer debatable. One is that the National Government is one of enumerated powers, and the other that a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself.

[1] 7 Howard 466, 12 L. ed. 466.

[2] 199 U. S. 447, 448, 50 L. ed. 261, 26 S. C. 110. [3] Author's italics.

"The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded. As said by Mr. Chief Justice Taney in Dred Scott *v.* Sandford, 19 How. 393, 426:

"'It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizens; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.'"

And again at page 451:

"Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government, just as it follows from the second clause of Article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it.

"'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.'

"In other words, the two governments, National and State, are each to exercise their power so as not to interfere with the

free and full exercise by the other of its powers. This proposition, so far as the Nation is concerned, was affirmed at an early day in the great case of M'Culloch *v.* Maryland, 4 Wheat. 316, in which it was held that the State had no power to pass a law imposing a tax upon the operations of a national bank. The case is familiar and needs not to be quoted from."

§ 269. Mr. Chief Justice Fuller, delivering the opinion of the Court in *In re* Rahrer,[1] uses the following language:

"The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive.

"And this court has uniformly recognized State legislation, legitimately for police purposes, as not in the sense of the Constitution necessarily infringing upon any right which has been confided expressly or by implication to the national government."

§ 270. The preservation of those essential powers which are necessary to the existence of a State, free from the domination or control of any extrinsic power, is well recognized in the case of Collector *v.* Day.[2] In this case, under a law of Congress, the salary of a Judge of the State Court of Massachusetts was subjected to a tax, and the Court held that such a law was unconstitutional and void. The grounds of this decision are well set forth in the opinion of the Court by Justice Nelson at page 125.

"Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfill-

[1] 140 U. S. 554, 35 L. ed. 572, 11 S. C. 65.
[2] 11 Wall. 125, 20 L. ed. 122.

ing the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might."

And further at page 126 he says:

"We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the State, disables the general government from levying the tax, as that depends upon the express power 'to lay and collect taxes,' but it shows that it is an original inherent power never parted with, and, *in respect to which, the supremacy of that government does not exist*,[1] and is of no importance in determining the question: and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government, stand upon as solid ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in Dobbins *v.* The Commissioners of Erie[2] from taxation by the State; for in this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other."

[1] Author's italics.

[2] 16 Pet. 435, 10 L. ed. 1022.

§ 271. In Boyd *v.* Alabama,[1] Mr. Justice Field, in delivering the opinion, said:

"We are not prepared to admit that it is competent for one legislature, by any contract with an individual to restrain the power of a subsequent legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals. See Moore *v.* The State, 48 Miss. 147; Metropolitan Board of Excise *v.* Barrie, 34 N. Y. 663."

In Thurlow *v.* The Commonwealth of Massachusetts,[2] Mr. Justice McLean said:

"These laws do not in terms prohibit the sale of foreign spirits, but they require a license to sell any quantity less than twenty-eight gallons. Under the decision of Brown *v.* Maryland, it is admitted that the license acts cannot operate upon the right of the importer to sell. But, after the import shall have passed out of the hands of the importer, whether it remains in the original package or cask, or be broken up, it becomes mingled with other property in the State, and is subject to its laws. This is the predicament of the spirits in question.

"A license to sell an article, foreign or domestic, as a merchant or innkeeper or victualler, is a matter of police and of revenue, within the power of a State. It is strictly an internal regulation, and cannot come in conflict, saving the rights of the importer to sell, of any power possessed by Congress. It is said to reduce the amount of importation, by lessening the profits of the thing imported. The license is a charge upon the business or profession, and not a duty upon the things sold. The same price is charged to every retailer of merchandise, or spirits, at the same place, without regard to the amount sold. This charge is in advance of any sales. It would be difficult to show that such a regulation reduced the amount of imported goods. But, if this were the effect of the license, would that make the acts unconstitutional?

"The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious

[1] 94 U. S. 645, 650, 24 L. ed. 302.
[2] 5 Howard 504, 589, 12 L. ed. 256.

disease prevails, being liable to communicate the disease, may be excluded; and, in extreme cases, it may be thrown into the sea. This comes in direct conflict with the regulation of commerce; and yet no one doubts the local power. It is a power essential to self preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity. He may resist that which does him harm, whether he is assailed by an assassin, or approached by poison. And it is the settled construction of every regulation of commerce, that, under the sanction of its general laws, no person can introduce into a community malignant diseases, or anything which contaminates its morals or endangers its safety. Individuals in the enjoyment of their own rights must be careful not to injure the rights of others."

§ 272. In N. Y. & N. E. R. R. Co. *v.* Bristol,[1] Chief Justice Fuller, in delivering the opinion of the court, said:

"It is likewise thoroughly established in this court that the inhibition of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury."

The same doctrine has been laid down by Justice Harlan,[2] in the following language:

"There are certain fundamental principles which those cases recognize and which are not open to dispute. In our opinion, they sustain the power of the State to enact the statute in question. Briefly stated, those principles are: That the Government created by the Federal Constitution is one of enumerated powers, and cannot, by any of its agencies, exercise an authority not granted by that instrument, either in express words, or by necessary implication; that a power

[1] 151 U. S. 556, 567, 38 L. ed. 311, 14 S. C. 533.

[2] House *v.* Mayes, 219 U. S. 281, 55 L. ed. 213, 31 S. C. 234.

may be implied when necessary to give effect to a power expressly granted; that while the Constitution of the United States and the laws enacted in pursuance thereof, *together with any treaties made under the authority of the United States*,[1] constitute the supreme law of the land, a State of the Union may exercise all such governmental authority as is consistent with its own constitution, and not in conflict with the Federal Constitution; that such a power in the State, generally referred to as its police power, is not granted by or derived from the Federal Constitution but exists independently of it, *by reason of its never having been surrendered by the State to the General Government;*[1] that among the powers of the State, not surrendered — which power therefore remains with the State — is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety, and the public health, as well as to promote the public convenience and the common good; and that it is with the State to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own Constitution or the Constitution of the United States. The cases which sanction these principles are numerous, . . . and need not be here cited."

The case of the United States *v.* De Witt,[2] strongly affirms the doctrine which we are seeking to enforce in this chapter. An act of Congress rendered it a misdemeanor "to mix for sale naphtha and illuminating oils, or to sell petroleum inflammable at less than a prescribed temperature." This was purely a matter which affected the police of the State that Congress had no power to legislate upon and so the act was held void as an encroachment upon the police power of the State. Chief Justice Chase delivered the opinion of the court and said:

"As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from

[1] Author's italics. [2] 9 Wallace 41, 19 L. ed. 593.

the terms of the Constitution, and has been so fully explained and supported on former occasions,[1] that we think it unnecessary to enter again upon the discussion."

§ 273. Among the recent cases which show the strong tendency of the Supreme Court to recognize the inalienability of the police power of the State, may be mentioned that of Compagnie Française &c. *v.* Board of Health.[2] This case involved a conflict between the action of the Board of Health of the State of Louisiana operating under a law of that State, and the treaty between France and the United States, wherein France was accorded all the rights of the most favored nation.

The Board of Health had established certain quarantine regulations, looking to the protection of the health of the people against the scourge of disease from which they had recently suffered. A vessel, the "Britannia," was not permitted to enter certain quarantined sections of Louisiana. The treaty between the United States and France at the time provided that France should be treated on the footing of the most favored nation and the officers of the "Britannia" appealed to the provisions of a treaty between the United States and Greece, Article XV of which, on the subject of quarantine, was as follows:

"Article XV. It is agreed that vessels arriving directly from the United States of America at a port within the dominion of His Majesty the King of Greece, or from the Kingdom of Greece, at a port of the United States of America, and provided with a bill of health granted by an officer having competent power to that effect at the port whence such vessel shall have sailed, setting forth that no malignant or contagious diseases prevailed in that port, *shall be subjected to no other quarantine than such as may be necessary for the visit of the health officer of the port where such vessel shall have arrived, after which said vessels shall be allowed immediately to enter and unload their cargoes;*[3] Provided always, that there shall be on board no person, who, during the voyage, shall have been attacked with

[1] License Cases, 5 Howard 504; Passenger Cases, 7 Id. 283; License Tax Cases, 5 Wallace 470; and the cases cited.

[2] 186 U. S. 380, 46 L. ed. 1209, 22 S. C. 811. [3] Author's italics.

any malignant or contagious disease; that such vessel shall not, during the passage, have communicated with any vessel liable itself to undergo quarantine; and that the country whence they came shall not at that time be so far infected or suspected that, before their arrival, an ordinance had been issued in consequence of which all vessels coming from that country should be considered as suspected, and consequently subject to quarantine."

The Board of Health, explaining the detention of the vessel, justified its act under the law of Louisiana, which authorized the State Board of Health in its discretion to "prohibit the introduction into any infected portion of the State persons acclimated, unacclimated, or said to be immune, when in its judgment the introduction of said persons would add to or increase the prevalence of the disease"; and at its meeting on September 29, 1898, the Board of Health adopted the following resolution:

"That hereafter, in the case of any town, city or parish of Louisiana being declared in quarantine, no body or bodies of people, immigrants, soldiers, or others, shall be allowed to enter said town, city or parish, so long as said quarantine shall exist, and that the president of the board shall enforce this resolution."

and instructed the quarantine officers to detain the vessel for the following reasons:

"Referring to the detention of the S. S. Britannia at the Mississippi River quarantine station, with 408 Italian immigrants on board, I have to inform you that under the provisions of the new State Board of Health law, section 8, of which I enclose a marked copy, this board has adopted a resolution forbidding the *landing of any body of people in any town, city or parish in quarantine.*" [1]

These were the substantial facts in the case and the Court upheld the action of the quarantine officers in detaining the "Britannia." Justice White delivered the opinion of the Court

[1] Author's italics.

and Justices Brown and Harlan dissented. Justice White in rendering the opinion of the Court, said:[1]

"Conceding, *arguendo*, this latter proposition, and therefore assuming that all the treaties relied on are applicable, we think it clearly results from their context that they were not intended to and did not deprive the government of the United States of those powers necessarily inhering in it and essential to the health and safety of its people. We say the United States, because if the treaties relied on have the effect claimed for them that effect would be equally as operative and conclusive against a quarantine established by the government of the United States as it would be against a State quarantine operating upon and affecting foreign commerce by virtue of the inaction of Congress. Without reviewing the text of all the treaties, we advert to the provisions of the one made with Greece, which is principally relied upon. The text of article XV of this Treaty is the provision to which our attention is directed, and it is reproduced in the margin.

"It is apparent that it provides only the particular form of document which shall be taken by a ship of the Kingdom of Greece and reciprocally by those of the United States for the purpose of establishing that infectious or contagious diseases did not exist at the point of departure. But it is plain from the face of the treaty that the provision as to the certificate was not intended to abrogate the quarantine power, since the concluding section of the article in question expressly subjects the vessel holding the certificate to quarantine detention if, on its arrival, a general quarantine had been established against all ships coming from the port whence the vessel holding the certificate had sailed. In other words, the treaty having provided the certificate and given it effect under ordinary conditions, proceeds to subject the vessel holding the certificate to quarantine, if, on its arrival, such restriction had been established in consequence of infection deemed to exist at the port of departure. Nothing in the text of the treaty, we think, gives even color to the suggestion that it was intended to deal with the exercise by the government of the United States of its power to legislate for the safety and health of its people or to render the exertion of such power nugatory by exempting the vessels of the Kingdom of Greece, when coming to the United States, from the operation of such laws. In other

[1] 186 U. S. 394, 395, 46 L. ed. 1209, 22 S. C. 811.

words, the treaty was made subject to the enactment of such health laws as the local conditions might evoke not paramount to them. Especially where the restriction imposed upon the vessel is based, not upon the conditions existing at the port of departure, but upon the presence of an infectious or contagious malady at the port of arrival within the United States, which, in the nature of things, could not be covered by the certificate relating to the state of the public health at the port whence the ship had sailed."

§ 274. The conflict between the commercial clause and the police power of the State, and the proper relations of the one to the other, has been so well expressed in the following language that I will insert it in the discussion of the case:[1]

"A vessel proposes to enter a harbor of a State under Congressional commercial regulations; and the State, to protect its people from disease, quarantines it. These two powers seem to conflict, but they do not, except as both operate upon the movement of the vessel, though from different sources of power. The vessel is subject to two powers which are entirely different, but not in conflict. It does not check a rightful object of commerce. It merely erects a bar against disease. Congress regulates the *rightful* object of commerce, under color of which it cannot authorize *wrongful* commerce. It cannot introduce disease, but may a rightful subject of commerce. The two powers are made to consist by restraining the State, under color of quarantine, from regulating rightful commerce, and restraining Congress, under color of commerce, from regulating the unlawful importation of disease."

§ 275. Justice White holds that the fifteenth Article of the treaty did not intend to abrogate the quarantine power in the State, because under certain conditions stated in said Article, should they arise, the right of quarantine was allowed. It would seem clear that the treaty did not attempt to abrogate *all* quarantine powers, for it stated conditions under which the right of quarantine was to be recognized, but it seems equally clear that the treaty intended to abrogate the quarantine power so far as the "Britannia" was concerned, because the "Bri-

[1] Tucker on the Constitution, Vol. II, 538.

tannia" had conformed to every positive requirement of the treaty and none of the subsequent conditions which gave the right of quarantine applied to it.

Justice Brown in his dissenting opinion, in which Justice Harlan concurred, expressed his inability to see how a conflict between the treaty and the law of Louisiana could be avoided as follows:

"If the law in question in Louisiana, excluding French ships from all access to the port of New Orleans, be not a violation of the provisions of the treaty that vessels 'shall be subject to no other quarantine than such as may be necessary for the visit of a health officer of the port, after which such vessels shall be allowed immediately to enter and unload their cargoes,' I am unable to conceive of a state of facts which would constitute a violation of that provision. Necessary as efficient quarantine laws are, I know of no authority in the States to enact such as are in conflict with our treaties with foreign nations."

§ 276. The difficulty of reconciling Article XV of the treaty with the law of Louisiana without a conflict between the two is, however, removed by Justice White in the following passages from his opinion:

"Assuming that all the treaties relied on are applicable we think it clearly results from their context that they were not intended to and did not deprive the Government of the United States of their powers necessarily inhering in it, and essential to the health and safety of its people. We say the United States, because if the treaties relied on have the effect claimed for them, that effect would be equally as operative and conclusive against a quarantine established by the government of the United States as it would be against a State quarantine operating upon and affecting foreign commerce by virtue of the inaction of Congress."

and the following passage:

"Nothing in the text of the treaty, we think, gives even color to the suggestion that it was intended to deal with the exercise by the government of the United States of its power to legislate for the safety of its people or to render the exertion

of such power nugatory by exempting the vessels of the Kingdom of Greece, when coming to the United States, from the operation of such laws. *In other words, the treaty was made subject to the enactment of such health laws as the local conditions might evoke not paramount to them.*" [1]

In these two clauses are contained most important conclusions. In these passages it is clearly recognized that the annulment of the police power of the State in the preservation of the health and safety of the people of the State has not been attempted by the treaty under consideration, and the reason Justice White assigns for this opinion is the assumption, which he is clearly justified in making, that "the treaty was made subject to the enactment of such health laws as the local conditions might evoke not paramount to them." The result of his decision seems to be no less conclusive and no less effective because he declares that the police laws must have been recognized as binding and effective when the treaty was made, and that therefore the treaty must be construed as not interfering with them, but as having been made subject to the right of enactment of such laws. This opinion is sanctioned by an eminent authority: [2]

"The police power may be justly said to be more general and pervading than any other. It embraces all the operations of society and government; *all the constitutional provisions presuppose its existence, and none of them preclude its legitimate exercise. It is impliedly reserved in every public grant.*[1] Chartered rights and privileges are therefore like other property, held in subordination to the authority of the government, which may be so exercised as to preclude the use or doing of the very thing which the company was constituted or authorized to manufacture or perform. The legislature cannot be presumed to have intended to tie its hands in this regard in the absence of express words; but if such a purpose were declared, it would fail, as an attempt to part with an attribute of sovereignty which is essential to the welfare of the community." [3]

[1] Author's italics.

[2] Hare, "American Constitutional Law," Vol. II, 766.

[3] Mr. Hare cites the following cases as sustaining the above views:

§ 277. The opinion of Justice White does hold that the quarantine power of the States was not intended to be abrogated by the treaty, but with equal power the opinion holds that this was an inherent and necessary power in the States and that therefore the treaty was made "subject to the enactment of such health laws," etc. Indeed, when Justice White thus recognizes that a treaty must be made *under the Constitution* to be valid, his opinion receives powerful sanction in the words of the Apostle Paul: "For he hath put all things under his feet. But when he saith, All things are put under him, it is manifest *that he is excepted*, which did put all things under him." [1]

This case illustrates most strikingly the importance of the doctrine of the inalienability of the police power of the State. If allowed by the treaty to enter, the "Britannia" could have entered the quarantined ports of Louisiana and would have furnished the additional fuel of four hundred Italian immigrants to the consuming flames of the pestilence that was sweeping the State. If a municipality can order the destruction of a building in order to prevent the spread of flames, under its police power, it is inconceivable why the same right should not reside in the State to prevent the spread of disease and pestilence.

This case will therefore be placed in our judicial history alongside of those already quoted, which maintain that the police power of the State is inalienable, and that being inalienable, treaties must be made in recognition of their validity, and must be so construed.

The Butcher's Union Co. *v.* Crescent City Co., 111 U. S. 746, 751, 28 L. ed. 585, 4 S. C. 652.
The License Cases, 5 How. 583, 12 L. ed. 256.
Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77.
The Commonwealth *v.* Alger, 7 Cushing 53, 84.
The Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, 24 L. ed. 1036.
Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989.
Galena R. R. *v.* Appleby, 28 Ill. 283.
Ohio R. R. Co. *v.* McClelland, 25 Ill. 140.
Dingman *v.* The State, 51 Ill. 277.

[1] I Corinthians xv, 27.

§ 278. The consideration of the above cases leads to this conclusion: If Justice Harlan was stating the law when he said:[1] "The police power is not granted by or derived from the Federal Constitution, but exists independently of it, by reason of its never having been surrendered by the State to the general government"; If Judge Cooley was stating the law when he said,[2] referring to the police power, "It cannot be taken from them (the States) either wholly or in part and exercised under legislation of Congress. Neither can the National Government, through any of its departments or officers, assume any supervision of the police regulations of the States"; If Judge Gray was stating the law when, in Leisy *v.* Hardin, *supra*, he declared this power was "inalienable" in the States; If Judge Bradley, with the approval of the whole court, was stating the law when, in Beer Co. *v.* Massachusetts, *supra*, he said, "They (the police powers) belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself"; If Chief Justice Redfield was stating the law when in Thorpe *v.* Rutland & Burlington Railway Company, *supra*, he said, "We think the power of the legislature to control existing railways in this respect may be found in the general control over the police of the country, which resides in the law-making power in all free States, and which is by the Fifth Article of the Bill of Rights of this State, expressly declared to reside perpetually and inalienably in the legislature; which is perhaps no more than the enunciation of a general principle applicable to all free States, and which cannot therefore be violated so as to deprive the legislature of the power, even by express grant to any mere public or private corporation"; If Chief Justice Waite was stating the law when he said, in Stone *v.* Mississippi, *supra*, with the approval of the whole court, "No

[1] House *v.* Mayes, 219 U. S. 281, 55 L. ed. 213, 31 S. C. 234.
[2] Cooley, "Constitutional Limitations," 831.

government dependent on taxation can bargain away its whole power of taxation, for that would be substantially abdication"; If Judge Swayne, in the case of The Northwestern Fertilizing Company *v.* Hyde Park,[1] was stating the law when, speaking of the power of a village to pass an ordinance prohibiting the carrying of offal through the village, though a charter had been granted to a fertilizing corporation to manufacture dead animals into agricultural fertilizer, he said, "We cannot doubt that the police power of the States was applicable and adequate to give an effectual remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases"; If Judge Story, in Prigg *v.* Pennsylvania, *supra*, stated the law when he said, "The police power belonging to the States . . . has never been conceded to the United States"; If Justice Nelson was stating the law when he said in Collector *v.* Day, "In respect to the reserved powers, the State is as sovereign and independent as the general government"; If Chief Justice Fuller stated the law when, in New York & New England Rwy. Co. *v.* Bristol, he said, "The governmental power of self protection cannot be contracted away"; If Justice Harlan was right when he said in Patterson *v.* Kentucky,[2] "State legislation, strictly and legitimately for police purposes, does not, in the sense of the Constitution, necessarily entrench upon any authority which has been confided, expressly or by implication, to the national government"; if these judges have stated the law in these cases, they have laid down a rule and established a principle that should settle this question for all future time; for if the States with their sovereign powers are thus circumscribed as to *their own powers*, so that they cannot be given up or surrendered because they are trust powers committed to them for the benefit of the people, by what stretch of constitutional construction can the Federal Government be supposed to have acquired them for any purpose?

[1] 97 U. S. 659, 24 L. ed. 1036. [2] *Id.*, 504, 24 L. ed. 1115.

The States, their original proprietors and owners, can't relinquish them by barter, sale, or gift to any person for any purpose, for to do so would be "abdication," as Chief Justice Waite says; and yet it is urged by some that though the States cannot relinquish such powers for any purpose, when the Federal Constitution was adopted, they granted a general and exclusive power to the Federal government to make treaties, and included these police powers in such grant; and this too, in the face of these decisions holding that these powers of the States cannot be surrendered or abandoned by them in any way. If, from the nature of the States, these powers cannot be alienated or surrendered, because the lack of them would be a surrender of Statehood, it is clear they never granted them to the Federal government, because they could not do so; and if the surrender or grant of these necessary powers by the States be "abdication," the assumption of them or the taking of them by the Federal Government *from the States* would be spoliation.

§ 279. It will not suffice as against this view to suggest that the States agreed in making the Constitution that the treaty power was to be the supreme law of the land, and therefore supreme over all State laws. If the police power be *inalienable*, the States never granted such supremacy in the broad sense in which it is claimed. Nor is such construction limiting the treaty-making power more strained than that heretofore referred to where the Supreme Court holds that the Constitutional provision, Article I, § 10, clause 1, "No State shall . . . pass any law impairing the obligation of contracts," does not apply to a State when, in order to protect the health and morals of the people, charters may be modified or contracts changed under the resistless force of this police power. Nor is it more strained than when, under the commerce clause railroads undertake to run interstate trains on Sunday, the police power of the State is recognized as strong enough to prevent it,[1] nor when, under the same Federal power, the limitation of the carriage of gunpowder and explosives is admitted to be controlled by the

[1] Hennington *v.* Georgia, 163 U. S. 299, 41 L. ed. 166, 16 S. C. 1086.

police power of a State,[1] even when applied to interstate commerce.

§ 280. If the treaty power may absorb the police powers which belong to the States, then the States, upon which the Union is dependent for its existence, may be shorn of their powers and of their existence, as States. The States have many police powers, undoubtedly, whose exercise is not absolutely essential to the existence of the State, though eminently appropriate to be exercised by the State. May not the solution of the conflict be found just here; that where a seemingly exclusive and paramount power in the Federal Government needs a local power of the State which may be necessary to the complete and symmetrical development of such Federal Power, if such State power be not an essential but only an appropriate power in the autonomy of the State, the States by amendment to the Constitution might grant such powers to the Federal Government for such purposes. Thus the supremacy of a Federal power on a subject committed to its exclusive keeping would be recognized, while the State would be deprived of no essential attribute. But where a power of a State, included either in its reserved powers or its police power, is one without which no State can exist, which is essential and necessary to the protection of the health, the safety, or the morals of the people, such power cannot be surrendered by the State or absorbed by the Federal Government, because to do so would be to annihilate the State. The States may be said to represent the piles upon which the Federal structure has been erected, and this superstructure cannot be added to, enlarged, or strengthened by withdrawing one of them from the foundation to be worked into the superstructure without endangering the whole Federal building. The taking of one for such purpose would be dangerous to the superstructure; the taking of all, its total destruction.

§ 281. If therefore, we find any power which is essential to

[1] License Cases, 5 How. 589, 12 L. ed. 256; Davenport *v.* Richmond, 81 Va. 636; Brown *v.* Maryland, 12 Wheat. 419, 6 L. ed. 678.

the State, such as we find in Collector *v.* Day,[1] the power to establish a judiciary to determine the rights and privileges of the people of a State, such power cannot be controlled or curtailed by any Federal power, however exclusive or paramount; nor can it be alienated by the State itself, because such alienation would be an act of suicide. But if, on the other hand, some power is sought to be utilized by the Federal Government which belongs to the State in its ordinary exercise and which is necessary for the completeness of some Federal power, but is not essential to the autonomy of the State, though its use by the State is usual and appropriate, such power might be granted to the Federal Government by an Amendment, because by so doing the States would be aiding a legitimate grant of the Federal Constitution over the general subject, and not endangering their own existence upon which the Federal Government rests. But if the State power sought for use, by an exclusive or paramount Federal power, be an essential power of the State, such Federal power will be thus perfected at the expense of the life of the State. That these interdependent bodies-politic — the States and the United States — should possess the power of destroying the other was never contemplated, and has been distinctly denied by the Supreme Court in the cases of Collector *v.* Day, *supra*, and Dobbins *v.* Commissioners.[2]

§ 282. The coefficient clause of the Constitution[3] follows the seventeen enumerations of powers of Congress in Article I, § 8, and declares that Congress may "make all laws which shall be necessary and proper for carrying into execution the foregoing powers," but it adds, "and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." The treaty-making power is one of these. So that to carry out the treaty-making power,

[1] 11 Wall. 113, 20 L. ed. 122.

[2] 16 Pet. 435, 10 L. ed. 1022. See also Texas *v.* White, and Lane County *v.* Oregon, *supra*.

[3] Art. 1, § 8, cl. 18.

Congress may pass laws which shall be necessary and proper to carry into execution the treaty-making power. What laws may be passed then to carry this power into effect? They must be "necessary and proper." Chief Justice Marshall, in McCullough *v.* Maryland,[1] says:

"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."

"Necessary" does not mean absolutely indispensable, yet "it must be found to be one among many possible means which might be suggested for use, each and all of which are indispensable as means to the end of the execution of an expressly granted power."[2] The law must also be "proper." Judge Story,[3] speaking of the interpretation of this word, says:

"It has a sense, at once admonitory and directory. It requires that the means should be *bona fide*, appropriate to the end."

Judge Story's definition of the word "proper" has been adopted by the courts in many cases; so that when Congress, under the coefficient clause undertakes by law to breathe life into the grants of power included in Article I, § 8, such laws must not only be necessary as one of the appropriate means for attaining the end in view, but they must be "*bona fide*, appropriate" to the end. Tested by this definition, and by these constructions, can any law of Congress or any treaty be "*bona fide* appropriate" that seeks to destroy the relations of the States to the Union, or the Union to the States, or that may destroy the foundations upon which the Union rests in the annihilation of the States, for it must be remembered that when the States are stripped of their powers they will cease to be States?

[1] 4 Wheat. 421, 4 L. ed. 579.
[2] Tucker on the Constitution, Vol. I, 370.
[3] Story on Constitution, § 1253.

§ 282*a*. The cases above cited show that many of the justices of the Supreme Court, as well as commentators upon the Constitution, have expressed the opinion that the right of a State at all times, on the principle of self-preservation, to maintain its police power, was recognized as a settled principle of our constitutional law. The doctrine seems to be founded in reason and is sustained by the authority of the Supreme Court; and while the cases from the Supreme Court above quoted have sustained this doctrine, it must be admitted as equally true that the same Court has decided in numerous cases that the police power of the State may be enforced in the enactment of local laws pertaining to the health and safety of the people, having no intent to regulate commerce among the States, though they may incidentally affect it, and that such laws are valid *until* superseded by an act of Congress; but if Congress acts, all State laws that conflict with the constitutional laws of Congress on the subject must yield.

§ 283. This line of decisions would seem to conflict with the cases we have quoted; for if the police power of the States cannot be alienated, as held by the Courts, *supra*, the right of the States to pass local laws under their police powers which only incidentally affect interstate commerce, must be admitted; for if inalienable, the States have never parted with this power. In other words, the first line of cases holds that the police power of the States cannot be alienated; the second holds, in effect, that this power has been granted to Congress in the general grant of power to regulate commerce. If the first line of cases propounds the law correctly, then, of course, Congress has no power to interfere, even in carrying out the commerce clause, with the local laws of the States, which do not affect commerce, except incidentally.

§ 284. How is this conflict to be reconciled? It is not our purpose in these pages to attempt a task so difficult, for it is not necessary to the solution of the question under discussion; and moreover, the Court that made it will reconcile it. If the latter group of cases holding that the police power of the

States is subordinate to the power of Congress over commerce state the law correctly, it can only be on the theory that when the States granted to Congress the power to regulate commerce among the States they granted *everything* to Congress necessary to carry out completely such grant of power, and this view is enforced by the fact that interstate commerce, it is claimed, cannot be successfully maintained if every State through which it is carried on may hamper it by local laws. This view has received additional sanction in the general rule adopted in the construction of grants; for it is well settled that if there be no other provision in the same instrument whose validity might be involved, or other limitation, ordinarily a grant of power carries with it all that is necessary to its completeness. If, then, the commerce power includes the police powers of the State in its scope, another question is pertinent and must be met: If the States granted to Congress the power over commerce and this grant carried with it all of the police powers of the States (because the use of these local powers and rights was necessary to the complete development of the commerce power) does not the same line of reasoning justify the conclusion that when the States, in the Constitution, granted to the treaty-making power an exclusive, supreme power like the commerce power, that such grant carried with it also the police powers of the State in order to its complete and full development? This would seem to be a natural conclusion, but the two grants stand upon very different footings, and even if the grant of power to Congress to regulate commerce carried with it the police power of the States, it by no means follows that the same rule applies to the grant of the treaty power.

§ 285. When the Constitution was framed the States, in order to form the government of the United States, gave up of their powers certain ones to the Federal Executive, to the Judiciary, and to Congress, and did not grant back to themselves — but *reserved* to themselves all other powers. The States were the grantors, the Federal Government the grantee. Among the powers granted to Congress by the States is that of regulat-

ing commerce among the States. It is a *specific* grant, complete in itself, but limited to commerce and its incidents. In the same instrument which contains this grant is the Tenth Amendment, which does not undertake to enumerate the powers left with the States, but reserves all not given. Every local right and every local power which the State possesses not granted to the Federal Government is specifically reserved; so this instrument contains provisions of a *specific* grant to Congress of the commerce power and the *specific* reservation to the States of every other State power not granted, which is equivalent to a specific *grant* of power. If we consider the Constitution as framed on the Hamiltonian theory, and not on the Jeffersonian, then the people of the whole United States as one body-politic were the grantors of all powers contained in the Constitution. The result under this supposition would be the *specific grant* to Congress of the commerce power, and the *specific grant* in the Tenth Amendment to the States of each and every power not granted to the Federal Government. The conflict between these two would require the construction of two specific grants of power in the same instrument, affecting, it may be, the same subject. The conflict would be between the two *specific* grants of power, or, more accurately speaking, a specific grant of power and the reservation of a specific power in the same instrument which is equivalent to the grant of power. Such a conflict is quite different from that which arises in the grant to the treaty power, and its decision rests upon different principles, for in the case of the treaty power, not a specific but a *general* grant of power is given. In this grant there is no verbal limitation such as applies to the commerce grant, for the grant of the commerce power is confined within the narrow limits of the word "commerce" and its incidents, no more and no less. As to the treaty power, no "pent up Utica confines its bounds"; its scope is as "boundless and limitless as the sea," it is claimed. It may embrace any and all subjects — commerce among them. So that in this case the Constitution contains a *general* grant of power to the President and Senate to make treaties, and a

specific reservation of each reserved or police power to the States, and the conflict between the two is a conflict between a *general* grant and a *specific* reservation of power (which is equivalent to a *specific* grant in the same instrument). It is seen at once that the rule of construction in the two cases is very different and in the latter case the *general* grant of power to the President and Senate to make treaties is limited by the *specific* reservation of powers to the States which is equivalent to a specific grant. For in all instruments where there is a conflict between *general* and *specific* grants, the former is limited by the latter. If by deed I grant *all* my landed estate known as High Acre, and in the same instrument reserve the woodland on it, the specific reservation limits the general grant, and High Acre goes to the grantee without the woodland. The same would be true under a will.

§ 286. The States may have been willing to relinquish all powers over commerce and give to the Federal Government *all* of their local powers necessary to make complete the commerce power, for the proper regulation of commerce among the States was the express object of the Annapolis Convention, which was the forerunner of the Federal Convention. They may have been willing to do the same as to every other granted power to Congress, but these were few in number and were only such as had relation to the people of all the States. All other State powers remained with the States: but when it is claimed that all of the powers remaining in the States after the grants to Congress, are embraced in the power to make treaties, it may well be asked what powers are left to the States, since this power is exclusive and unlimited by any words in the grant, and because the word "treaty" in its broad significance may include every and any subject that may be the subject of agreement. If this line of reasoning be correct, we find the States gave up all of their local powers that might interfere with the complete development of the exclusive grants of power to Congress, and then with unexampled prodigality gave up all remaining powers to the treaty-making power. If this be the

correct interpretation of these various grants, it is interesting to inquire what could have occasioned the intense and universal feeling throughout the country for the adoption of the Tenth Amendment? For, if the States, under this supposition, gave up to Congress in the specific grants to it, all of their local powers that interfered with the complete development of the exclusive Federal powers, and then with lavish hand bestowed all remaining powers upon the treaty power, what rights of the States were left to be reserved to them? Had they not given up all?

§ 287. So we conclude that though we may admit that the decisions of the Supreme Court, *supra*, that hold that the police power of the States is inalienable have been rendered doubtful as authority by later or other decisions of the Court, and that the grant to Congress to regulate commerce carries with it the right to appropriate all reserved and police powers of the State, still, as we have seen, this does not justify the conclusion that the same rule of construction applies to the treaty power. But there is another cogent reason why the same rules of construction should not and do not apply to the commerce power and the treaty power. The one deals with internal affairs, interstate commerce; the other with external affairs. The one deals only with Americans, while the other seeks to fix the relations between Americans and foreigners. The one by the absorption of the police powers of the State or the reserved powers of the State, can give no greater right to any one American citizen than to another; the other by the absorption of the reserved rights or police powers of the State may give to the *foreigner* greater rights in America than the *American* citizen possesses. The one by the absorption of the police power and all the reserved powers of the State cannot put one American over another; the other, by the absorption of the same powers might make the foreigner superior in rights and dignity to the native American.

§ 288. On the supposition discussed above the commerce power knows no limitations, except those contained in the Constitution itself, while the treaty power has always been regarded

until recently as subject to limitations, by the judges who have discussed it. It would seem useless to attempt to give the views of the judges running through all of the reports as to the extent of the commerce power. Chief Justice Marshall, in the case of Gibbons *v.* Ogden,[1] has described it in a way that leaves no doubt of his position:

"This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." [2]

Contrast this definition of the commerce power with that of the treaty power given by Judge Field, in the case of Geofroy *v.* Riggs,[3] where he says:

"The treaty power as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government or its departments, and those arising *from the nature of the government itself and of the States.*[4] It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, *or in that of one of the States* [4] or a cession of any portion of the territory of the latter without its consent."

§ 289. Chief Justice Marshall declares the commerce power in Congress to be complete, that it is plenary, and while he admits that the Constitution limits its application in certain direc-

[1] 9 Wheat. 1, 6 L. ed. 23.

[2] This construction of the power of the commerce clause is not given because we think the Court has adopted it in subsequent cases to the full extent expressed by the Chief Justice, but because this case is one of the initial cases on the subject of commerce, and illustrates the marvelous power of the great Chief Justice.

[3] 133 U. S. 266, 33 L. ed. 642, 10 S. C. 257. [4] Author's italics.

tions, yet where it does apply it knows no limitation. How different from the definition of Judge Field as to the treaty power when he declares that though unlimited in terms, it is restrained by the nature of the States, and that it can do nothing that would operate as a change in the character of one of the States. Judge Field's opinion in this case is constantly quoted by those who claim that the treaty power in its unlimited scope may override not only the powers of the States, but the powers committed to the Federal Government; yet this opinion which is quoted improperly by most writers as deciding the question of the supremacy of a treaty over a State law,[1] declares as a fundamental principle that the States are to be considered in the making of treaties, and that their characters cannot be changed. This being true, how can a treaty take from the State those powers which are essential and necessary to Statehood, or those police powers which are equally necessary for the protection of the people of the State, without changing its character? No stronger view can be found than that in Judge Field's opinion, for the protection of the States. By his words it is not left to inference or to general interpretation, but the States are mentioned by name to insure their security against the aggressions of the treaty power. If the commerce power be as extensive as Chief Justice Marshall has declared it to be, and if it be true that the Court in other decisions has subordinated the reserved rights and police powers of the States to the commerce power, still the judges, when they come to consider the treaty power, hold that the same rule does not apply to it, for the States must be considered in the exercise of this great power, and nothing admitted as a proper subject of treaty regulation that would change the character of the States.

Justice Swayne, in Hauenstein *v.* Lynham,[2] speaking of the treaty power, said:

"There are doubtless limitations of this power, as there are of all others arising under such instruments, but this is not the proper occasion to consider the subject."

[1] See Chapter VI.

[2] 100 U. S. 483, 25 L. ed. 628.

Judge Field's view as expressed above in his opinion in Geofroy *v.* Riggs has received the sanction of many Federal and State judges and commentators upon the Constitution, and reference is here made to Chapter I and Chapter II where the views of statesmen and judges on this subject are found which accord fully with Justice Field's opinion.

§ 290. Another view, which has been treated elsewhere in these pages, may be referred to briefly. If the treaty power may take from the States one of their reserved rights, it may take all. If it may appropriate the police power of the States in one respect, it may appropriate it altogether. To do so would lead to the destruction of the States which constitute prime elements in the Federal Government itself. Chief Justice Marshall, in Gibbons *v.* Ogden, says:

"Although many of the powers formerly reserved by the States are transferred to the Government of the Union, yet the State governments remain and *constitute a most important part of our system.*" [1]

Can the States then be destroyed without destroying the whole system? And can they be stripped of their powers without their destruction?

And so, we may add that a construction that gives to one power in an instrument the power of destroying the whole instrument is not to be favored, for every instrument should be construed *ut res magis valeat, quam pereat.*[2]

[1] Author's italics.

[2] Judge Cooley has laid down a wholesome rule of construction as follows:

"The rule applicable here is that *effect is to be given if possible to the whole instrument,** and to every section and clause. If certain portions seem to conflict the court must harmonize them if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory. This rule is applicable with special force to written constitutions. . . . One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat

* Author's italics.

§ 291. Again, the effect of the claim that Congress in regulating interstate commerce and the treaty power in making treaties may take the reserved rights of the States, as well as their police powers, is seen by the following considerations to lead to very different results. The enumerated powers delegated to Congress are but few in number, and are powers given to Congress because they affect all of the States, and are powers in which all the States have a common interest. The power to regulate commerce, to coin money, to establish post-offices and post-roads, the power of taxation, etc., would give to Congress, under the supposition of controlling the reserved rights of the States, the power to do anything in reference to these subjects which are expressly granted, or anything that could be implied from such grants, and also all that could be done by any legislative power, national or State, with reference to these subjects, whether they pertained to the common interest of all, or affected the local interests of the people of one State alone; but each one of these grants of power in its legislative development, would still be necessarily confined to the specific subject of the grant. This would be a limited sphere, but on our supposition, a paramount and exclusive one; embracing all legislation that could affect the subject, either national or local.

§ 292. Now, if we apply this principle to the treaty-making power, we find there is no such restriction as in the case of the enumerated powers of Congress. The power to regulate commerce, to coin money, the power to tax, the power to naturalize foreigners, have all restricted and circumscribed limits. Under commerce nothing but matters relating to commerce could be considered, etc. The power to make treaties has no such limitation. It is, in effect the power to make agreements — contracts — and an agreement or a contract may be made upon any subject in the entire catalogue of human desires and human wants. It may embrace not only matters which pertain to a

another, if by any reasonable construction the two can be made to stand together.†

† "Constitutional Limitations," Seventh Edition, pp. 91,92.

Nation in its international relations alone, but it may come down to the very fireside of the citizen, in the private walks of his everyday life and from these sources gather the subjects of mediation and agreement with foreign countries. No subject would be excluded, no right of property or of person secured by municipal, county, magisterial, State, or National power, would be exempt from its voracious grasp.

§ 293. The grants of power to Congress embrace single subjects of a national character. The treaty power in the above suggestion would embrace all subjects, national and local. The powers of Congress are limited to specific subjects, those of the treaty power would embrace all subjects. The powers of Congress are national in extent and scope, those of the treaty power would embrace local as well as national rights. No right of person or property under this suggestion could escape the meshes of its net. The beasts of the field and the fishes of the streams that water the meadows of the plantation as well as the birds of the air,[1] would come under its controlling force. The highways of the country, and the schools of the neighborhood would be surrendered to its control. Property rights and personal rights that pertain to the citizen in the magisterial district, in the county, in the State, in the municipality, and in the country would be subjects of barter and trade in the world's international market, while rights secured by the law of the State or by the laws of Congress, or by the Constitution itself, would be subjects of international exchange or diplomatic concessions. Under this construction every local right would be surrendered, every federal right might be, for be it remembered that if this power can include all rights secured in the Tenth Amendment, by parity of reasoning it would include in its grant the powers conferred on the Federal Government also. The latter would not be more secure than the former from its aggressions, for

[1] It is understood that a treaty is now proposed, if not in process of negotiation between the United States and Canada, to regulate migratory birds in conformity with the Weeks-McLean Migratory Bird Law.

does not the supremacy accorded the Constitution in the Sixth Article pervade the whole instrument and every section of it, and is not the Tenth Amendment as much a part of it as the section that grants the enumerated powers to Congress? The result of such a conclusion would be the concession to the treaty-making power of the power to destroy the Constitution, to which it owed its existence. The concession to Congress to take the reserved rights of the States to perfect its grants of power might cripple the States, but the same concession to the treaty power would destroy them.

If the States be destroyed, Judge Story very forcibly tells us the result:[1]

"In the next place, the State governments are, by the very theory of the Constitution, *essential constituent* parts of the general government. They can exist without the latter, but *the latter cannot exist without them.*"[2]

Another distinguished New England writer recounts with fervid eloquence the dire results to be expected from a disregard of the proper limitations of the Federal Constitution in the following language:

"Our federal government has indeed shown a strong tendency to encroach upon the province of the State governments, especially since the Civil War. Too much centralization is our danger to-day, as the weakness of the federal tie was our danger a century ago . . . . If the day should ever arrive (which God forbid) when the people of the different parts of our country shall allow their local affairs to be administered by prefects sent from Washington and when the self-government of the States shall have been so far lost as that of the departments of France, or even so far as that of the counties of England, — on that day the progressive political career of the American people will have come to an end, and the hopes that have been built upon it for the future happiness and prosperity of mankind will be wrecked forever."[3]

§ 294. If James Wilson of Pennsylvania had succeeded in incorporating into the Constitution a resolution he advocated

[1] Story on the Constitution, § 511, p. 383. [2] Author's italics.
[3] Fiske, "Critical Period of American History," 237.

there would certainly be ground for the claim that both Congress and the treaty power have no limits to their powers.

"With respect to the province and object of the general government they (the States) shall be considered as having no existence."

But this doctrine has been discarded so often by the Supreme Court, from Chief Justice Marshall to Justice Brewer, that further refutation of it need not be attempted.

§ 295. Those who maintain the unlimited supremacy of the treaty-making power by annihilation of the States, would seem to paraphrase Article VI of the Constitution so as to have it read: "*The Federal Government* and the laws of Congress made in pursuance of it, and all treaties made, or which shall be made under the authority of the Federal Government, shall be the supreme law of the land." They proceed as if the Constitution embraced only Federal powers. They seem blinded to the fact that the States and State powers are as distinct and necessary factors in the Government of the United States as Federal powers. The first step in every argument on this subject they base upon the fact of the supremacy of the treaty under Article VI of the Constitution, but signally fail to recognize the fact that this same Article makes *the Constitution*, which embraces the powers of Congress, the treaty-making power, and every other power under it, *supreme;* and when the Constitution is made supreme, it follows that every right and power under it is made as supreme as every other power and right, and if all are supreme, then no one power is supreme over another. Supremacy is infused into every right and power under it and these rights and powers are not only Federal, but State; and by this Article of the Constitution the reserved powers in the Tenth Amendment are made as supreme in the governmental structure under the Constitution as the treaty power or the laws of Congress, for the same pervasive supremacy which makes the one supreme operates upon the other in the same manner, even though the reserved rights of the States were not already

supreme powers within their spheres, having never been surrendered to the Federal Government.

§ 296. If the establishment of an "unlimited" treaty power is to be the ultimate conclusion on this great question, it must be admitted that the incorporation of the treaty-making power into the Constitution of the United States was the introduction into our governmental citadel of a Trojan horse, whose armored soldiery, for years concealed within it, now step forth armed *cap-à-pie*, shameless in their act of deception, eager and ready to capture the citadel upon which they pretended to bestow their gift. If such construction be possible it would be of interest to know for what purpose the Tenth Amendment was ever demanded and incorporated into the Constitution.

§ 297. A summary of the argument attempted and the views expressed in this chapter, may serve to elucidate the subject in the mind of the reader:

(*a*) A careful consideration of the relation of the States to the Federal Government, and the purposes and objects for which the Government was formed, together with an examination of the provisions of the Constitution itself, lead strongly to the conclusion that no essential power of a State, whether a reserved power or a police power, can by reasonable construction be constitutionally taken from it, in furtherance of the treaty-making power.

(*b*) A number of cases have been collected and cited, *supra*, in which the Supreme Court holds that the police power of the States is inalienable, and cannot be surrendered; and in some of them it is held that even the provision of the Constitution itself that no State shall pass any law impairing the obligation of contracts cannot prevent the States from exercising its police powers in the interests of the safety and morals of the people.

(*c*) Another line of decisions by the same Court has been referred to, beginning with Gibbons *v.* Ogden, *supra*, and ending with the Employer's Liability Cases,[1] which hold that under the police power of the States, laws may be enacted by the States

[1] 223 U. S. 1, 56 L. ed. 327, 32 S. C. 169.

which, though they may incidentally operate upon interstate commerce, are valid, but only valid *until* Congress chooses to legislate on the same subject: Thereby placing the police power under the control of the commerce power.

(*d*) We have sought to show that if the line of decisions referred to under "*c*" are to be accepted as the final opinion of the Court on this subject, in the face of the decisions under "*b*," it does not follow that the police power of the States can be, or has been, absorbed by or merged into the treaty power for the following reasons:

1. Because it is an accepted rule of construction of instruments containing grants that a *general* grant will be modified and limited by a *specific* grant. For example, the grant to the President and Senate to make treaties is a *general* grant; the right to control the tenure and devolution of real property in the States is a reservation of power, of a specific power; or, if the Hamiltonian theory of the formation of the Government be accepted, wherein the people of the United States, as one body politic, were recognized as the grantors of all powers in the Constitution, under this theory we find a *general* grant to make treaties to the President and Senate, and a *specific* grant to the States to control the tenure of real property, etc. And a treaty could not undertake such control, under a *general* grant of power, because it would be manifestly limited by the *specific* grant to the States.

2. Because the extent and character of the two powers are different, and therefore a rule that may be applied in the construction of the one may not apply to the other; the commerce power is said by Chief Justice Marshall to be unlimited in scope and extent, except where the Constitution puts restraint upon it. Judge Field in Geofroy *v.* Riggs, *supra*, declares in so many words that the treaty power is limited *by the character of the States*, and that no treaty can change the character of the States; so that no treaty can be made that fails to recognize the relations of the States to the Federal Government, and their powers and position in that Government.

3. The effect of the right of the commerce power and of the treaty power to absorb the police power of the States, if allowed, would show very different results. The commerce power is limited to commerce and its incidents, and if it be admitted that the commerce power may take the police power of the States when needed, the number of times would be few. But, if the treaty power were permitted to take the police powers of the States *ad libitum*, they would be unlimited in number, for the treaty power may embrace any and all subjects. Such a concession to the commerce power might take some of the powers and weaken the States, but such a right in the treaty power would allow it to take all their powers and destroy them, and no construction of the Constitution can be admitted that would concede the power in any one department of it to destroy any part or the whole of it.

CHAPTER XI

Report of J. Randolph Tucker, Chairman of the Judiciary Committee of the House of Representatives, 49th Congress, on the Hawaiian Treaty, holding that a Treaty cannot change Revenue Laws without the Sanction of the House of Representatives

§ 298. The propriety of placing this report in full in these pages would seem justified by the following language of the late Sereno E. Payne, of New York, the leader of the Republican side of the House of Representatives in the Fifty-seventh Congress, who, when the question of the power of the President and Senate to make commercial treaties affecting tariff duties was under discussion, said:[1]

"I think, Mr. Speaker, that no Committee of this House would ever present a report on this question which did not embody substantially the report of Randolph Tucker made some years ago, from the reasoning of which, I think any lawyer who will fairly read it, will say there is no escape."

Mr. Tucker, in the 49th Congress, 2nd Session, as Chairman of the Judiciary Committee, submitted to the House of Representatives March 3, 1887, a Report, Number 4177, on a resolution submitted to the Judiciary Committee on the 22nd of January, 1887, which resolution and report was as follows:

"Mr. Wallace submitted the following; which was agreed to:

"'Whereas it has been stated in the public prints, and is no doubt true, that the President and Senate have agreed to and

[1] 57th Congress, 1st Sess., *Congressional Record*, Vol. 35, part 2, page 1183.

ratified a convention, by which the terms of the treaty made between the United States and the Government of the Hawaiian Islands on the 30th day of January, 1875, have been extended for seven years longer, and beyond the period limited for its operation by the original treaty; and

"'Whereas by the original treaty it was agreed that certain articles therein mentioned were to be admitted to the United States free of duty; and

"'Whereas the original treaty was by its terms subject to the confirmation of an act of Congress, which provision is not inserted in the convention said to have been ratified: Therefore,

"'Resolved, That the Committee on the Judiciary be instructed to inquire into the facts hereinbefore recited, and to report to this House as soon as possible whether a treaty which involves the rate of duty to be imposed on any article or the admission of any article free of duty can be valid and binding without the concurrence of the House of Representatives, and how far the power conferred on the House by the Constitution of the United States to originate measures to lay and collect duties can be controlled by the treaty-making power under said Constitution.

"'Resolved, That the President be requested to lay before the House, if consistent with the public welfare, a copy of the treaty, or convention, proposed to the Senate and ratified by that body, between the United States and the Government of the Hawaiian Islands.

"'Resolved, That the Committee on the Judiciary may report at any time under the foregoing resolution.'

§ 299. "The question thus referred to the Committee is one of great importance in its relations to our foreign intercourse and our internal government. The treaty-making power is granted in these terms:

"'He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.' (Constitution United States, Art. II, § 2, cl. 2.)

"The President is the active instrument in the treaty-making power; he has the power to make a treaty which two-thirds of the Senators either advise or consent to.

"The power is delegated to the President by and with the advice and consent of the Senate, and is expressly prohibited to the States. (Constitution of the United States, Art. I, § 10.)

"The power is not only prohibited to the States and delegated to the President and Senate, but there is no part of the Constitution which expressly divides the power with any other Department or officer of the Federal Government.

"And it has been further claimed in behalf of this power, that 'treaties made under the authority of the United States shall be the supreme law of the land.' (Constitution of the United States, Art. VI, cl. 2.)

"These clauses constitute the full title of the treaty-making power. No other clause refers to it. On these therefore the extent and nature of the power must rest.

"It will not be denied that the power is exclusive; that is, that all which is involved in the power to make treaties is exclusively vested in the President and Senate.

§ 300. "But it is claimed that the power is not only exclusive, but is unlimited.

"This term may have two references:

"1. It may be unlimited as to the objects over which it may be exercised.

"2. Or it may be unlimited in the extent of its operation on the objects within its scope.

"The first question is as to what things the treaty-making power may contract: and the second as to what limits, if any, there are in the power to treat as to those things within its scope.

"The first relates to the objects within the scope of the power; the second, to the extent of the power over such objects. The first may be limited and the second unlimited, or *vice versa*.

"It might be conceded that the power is absolute as to the objects within its grasp, and yet those objects be themselves limited in number. The degree of power is one thing, the number of objects subject to the power an entirely different thing.

§ 301. "The discussion may, therefore, be analyzed so as to present two inquiries:

"1st. Is the power itself absolute and unconditioned and unlimited? If not, what are its limitations?

"2d. Does it extend to and embrace all subjects? If not, to what subjects is the power restrained?

"Even as to those matters, which are clearly within the scope of the treaty power, there can be no question that it is, like all other powers, a trust power, delegated to the Government for the great objects named in the preamble to the Constitution, and implied in the other clauses of that instrument. It cannot be so exercised as to defeat the purposes of the Constitution.

"While it will be conceded that a treaty may make peace, yet it is equally true that it cannot make peace upon terms which would surrender a State of the Union to a foreign power, nor make invasion of a State by a foreign power lawful, in the face of the duty of the United States to protect every State against invasion (Constitution of the United States, Art. IV, § 4), nor to dissolve the Union, nor to change the Constitution itself, nor to divest the States of powers reserved to each by the tenth amendment to the Constitution, nor to deny the essential rights of liberty secured by its express terms to its people, as in respect of the habeas corpus, bills of attainder, and the like. (Constitution of the United States, Art. I, § 9.) It cannot be held with any show of reason that these limitations upon legislative power, these duties imposed on the United States as a governmental corporate being, can be set at naught by a treaty of peace. Such a construction of the Constitution, besides being a *reductio ad absurdum*, is contrary to the whole framework of the system, and to its plainly expressed purposes.

"So that it cannot be maintained that this power is absolute and unlimited, even as to the rightful subjects within its scope. As to such subjects the power is limited in its exercise by the plain and expressed, or clearly implied, trusts upon which the power was delegated.

§ 301*a*. "But the case becomes stronger when we consider

the second inquiry above presented. Can it be maintained that the essential rights of the States, of the people, or of the citizen, secured by the Constitution, are within the scope of the treaty-making power? Can the President and Senate make a treaty which touches these subjects? Are they not beyond its scope? Can a treaty be made which shall divest the citizen of his constitutional right to *habeas corpus*? Can a treaty reduce a State to a province, or so amend the Constitution as to deny its equal vote in the Senate, or subject it to a government not its own, or to a centralized government of the Union?

"It may be said that these are extreme cases. The answer is, they are the tests of the extent of this power. They only prove beyond dispute that if the power were unlimited over the rightful subjects for its exercise, which has been and is denied, yet the question still remains, are all subjects within its scope; and, if not, what are included and what excluded?

"The instant it is admitted that the power has limitations even as to what is rightfully subject to it, the question at issue is narrowed to determining all these limits on principles of justice and of fair interpretation of the Constitution.

§ 302. "Before proceeding with this inquiry two preliminary objections have been stated to any limitation upon the binding effect of a treaty.

"First. It is said that as a treaty is a compact between two nations it must abrogate all acts of either contrary to its terms. In other words, that a compact between two parties must be supreme over the separate acts of either.

"This may be conceded, although it will appear upon well-considered cases not to be so broadly adjudged. (Foster *v.* Neilson, 3 Peters, 314; Turner *v.* American Baptist Union, 5 McLean, C. C. R., 344; Taylor *v.* Morton, 2 Custis, C. C. R., 454; Cherokee Tobacco, 11 Wall. 616; Head-Money Cases, 112 U. S. Rep., 580.)

"But this proposition can only be true when the compact is complete and perfect. If it is *ultra vires*, or is inchoate, needing any other act to complete its binding efficacy, it is *petitio prin-*

cipii to claim that a treaty, which may need legislation in order to bind the nation, is a compact, which needs none, and which abrogates all laws repugnant to it.

"Second. But it is said that foreign nations know nothing of the constitutional distribution of political powers, and that the treaty, so called, must in good faith be held supreme, despite a lack of what the Constitution may seem to require for its completeness.

"But this position is unsound. The maxim *qui cum alio contrahit, vel est, vel debit esse non ignarus conditionis ejus* is conclusive upon the foreign nation. That nation has no right (especially as to the United States, which have a written Constitution) to hold us bound by a paper not executed according to our Constitution. That nation need not be deceived. Willful blindness to a fact or negligence in taking note of what is within reach of inquiry is notice in law. As well might the foreign power assume the faith of the United States, bound by a treaty without the consent of the Senate, as by a treaty made by President and Senate, which lacked legislative sanction, if our Constitution makes it incomplete without such sanction.

"These objections involve the *petitio principii*, and are unsound.

§ 303. "The question then recurs, what limitations are there on the power of the President and Senate to make treaties? Or, to limit the inquiry to the terms of the resolution referred to us, can a treaty (so called) made by President and Senate repeal existing tax laws or impose taxation *proprio vigore*, or make it imperative on the House of Representatives, to pass laws conforming to the terms of the treaty relative to taxation?

"A treaty is a contract, compact, or agreement between nations. It binds each nation when made by its lawful authority. If not so made, it is not binding at all. The agency through which the national faith is bound must be authorized to bind it. The power to make some contracts may be exclusive and even absolute, but the question still remains, what contracts may be made? When, therefore, it is asserted that the Presi-

dent and Senate alone have authority to make treaties, it does not follow that it may by treaty do anything which is a possible subject of contract. What subjects the treaty power embraces is untouched by the conclusion of the exclusive authority to make treaties being vested in the President and Senate.

"What limitations exist as to the subjects within the treaty power are to be determined by the circumstances.

"Vattel declares a treaty is not valid which is contrary to a former one with another nation. (Vattel, Book II, chap. 12, §§ 164, 165, p. 196; 2 Phil. International Law, 75.)

"So he declares that no treaty is binding on a nation which is pernicious to the nation for whose safety the Government is constituted a trustee. (Vattel, Book II, chap. 12, § 160, pp. 194, 195.)

" 'It is from the fundamental laws of each State that we must learn where resides the authority that is capable of contracting with validity in the name of the State.' (*Id.*, § 154, p. 193.)

§ 304. "It is therefore beyond question, that a treaty is invalid which destroys the constitution of the nation, or the rights of its people thereby secured. A treaty cannot violate the constitution of the nation. It is a sound principle of international law, on the high authority just cited, that the Government of a nation cannot annul the constitution from which its authority is derived.

"But it is also a clear constitutional doctrine. The language of the Constitution of the United States, which gives the character of 'supreme law' to a treaty, confines it to 'treaties made under the authority of the United States.' That authority is limited and defined by the Constitution itself. The United States have no unlimited but only delegated authority. The power to make treaties is bounded by the same limits which are prescribed for the authority delegated to the United States by the Constitution. To suppose that a power to make treaties with foreign nations is unlimited by the restraints imposed on the power delegated to the United States would be to

assume that by such treaty the Constitution itself might be abrogated and the liberty of the people secured thereby destroyed. The power to contract must be commensurate with and not transcend the powers by virtue of which the United States and their Government exist and act. It cannot contract with a foreign nation to do what is unauthorized or forbidden by the Constitution to be done. The power to contract is limited by the power to do. (3 Story, Com. on Const. § 1501.)

"It is on this principle that a treaty cannot take away essential liberties secured by the Constitution to the people. The treaty power must be subordinate to these. A treaty cannot alien a State or dismember the Union, because the Constitution forbids both.

"In all such cases the legitimate effect of a treaty is to bind the United States to do what they are competent to do and no more. The United States by treaty can only agree with another nation to perform what they have authority to perform under the constitutional charter creating them. The treaty makes the *nexus* which binds the faith of the Union to do what their Constitution gives authority to do. A treaty made under that authority may do this; all it attempts to do beyond it is *ultra vires* — is null, and cannot bind them.

§ 305. "We advance to a further limitation. Can a treaty do what the Constitution has expressly delegated to another department the exclusive and independent authority to do? Or can a treaty compel a department to do what the Constitution submits to its exclusive and absolute will? and is not the obligation of the treaty conditioned upon its free action in those things which the Constitution confides to it as an exclusive and independent department?

"If a treaty has any operation to supersede legislative action, or to constrain it, it would follow that by treaty a State might be admitted into the Union. Congress alone has that power. The treaty between the United States and Texas did not propose to make her a member of the Union, and the admission was made by the action of Congress.

"Congress has power to naturalize foreigners. A treaty cannot do so without or contrary to the will of Congress. So as to bankruptcy, patents, copyright, coinage of money, &c.; so as to Army, Navy, postal service, exclusive legislation in the District of Columbia. If a contract may be made with a foreign nation as to all these subjects, which is obligatory on the United States, then it follows that foreign intervention in all our internal concerns may supersede under treaty stipulations all the powers of Congress intrusted to it by the Constitution. The cases of the power to tax and to appropriate money to public objects is a stronger case than any other against the construction which gives this supremacy to the treaty power. The same results follow as to the powers of the President and of the judiciary. These, too, may be subordinated by treaty to the supreme control of foreign nations, through the action of the treaty-making power, under this construction. Treaties may thus usurp the chair of the Executive and the bench of the judges.

"Strong as the argument is against this construction upon its apparent absurdity, your committee propose to subject the theory to the analysis which its importance demands.

§ 306. "First. Upon fair principles of interpretation of the Constitution, let us examine this large pretension for the treaty-making power.

"It is a familiar canon of interpretation of all papers, and of the Constitution of the United States, to give such construction to each part as that all shall stand together in the integrity of each, where the repugnancy between them is not unavoidable. By our admirable system of government certain powers are delegated by the people to a general government for important general purposes, while a large mass of power is reserved to the States respectively, or to the people. (Constitution of the United States, tenth amendment.) The powers so delegated to the United States are distributed between three departments — the legislative, executive, and judicial. Each is absolutely exclusive in its appointed sphere of action.

"All legislative power granted is vested in Congress. (Constitution of the United States, Art. I, § 1, cl. 1.) The executive power is vested in the President, except that in appointments to office, and in making treaties, a branch of Congress, the Senate, participates. The judicial department is confided to a Supreme Court and other courts. The powers of each are defined. In their independent positions as parts of the whole organism, they are made consistent by so construing their powers as to prevent collision and to make them harmonious in action.

"In the masterly judgment of Chief Justice Marshall, in Marbury *v.* Madison (1 Cranch, 49), and Fletcher *v.* Peck (6 Cranch, 87) we see how the exclusive law-making power is not obstructed, but is made to yield to the supremacy of the Constitution under the judicial authority to declare what law is operative.

"In the jealous vigilance with which the domain of law making and that of law executing are defined and separated during our whole history, we see how apparent repugnancy is reconciled, conflicts adjusted, and the constitutional orbits of the two departments are preserved from collision.

"In all these cases absolute terms are qualified so as to harmonize differences and make seeming conflicts consistent with the integrity of the power of each department and the harmonious action of the whole organism.

§ 307. "Apply this canon to the question in issue.

"The treaty-making power by itself seems to be absolute and unconditioned. Nothing is said which indicates its dependence upon the legislative department. This is all that can be claimed for it, and is freely conceded.

"But look at the powers of Congress — that body whose laws are made for the protection of the people and their liberties:

"'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.' (Constitution of the United States, Art. I, § 1.)

"'The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.' (Constitution of the United States, Art. I, § 8, clause 1.)

"'All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.' (Constitution of the United States, Art. I, § 7, clause 1.)

"'A bill passed by both houses becomes *a law* when approved by the President.' (Constitution of the United States, Art. I, § 7, clause 2.)

"'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.' (Art. I, § 9, clause 7.)

"'Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof.' (Art. I, § 8, clause 18.)

"'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.' (Constitution of the United States, Art. VI, clause 2.)

"All of these provisions are contained in the first article of the Constitution, which is confined to the law-making power.

"We thus find all the exclusive and absolute forms for grants of power, claimed for the treaty-making authority used, and with great emphasis as to the law-making department. We

find the supremacy claimed for the treaty asserted primarily for the laws made in pursuance of the Constitution, and, most strikingly, that the power to give effect to and to carry into execution the powers vested in the Government of the United States or in any Department or officer thereof (which includes the treaty power) is vested in Congress through the agency of necessary and proper laws. (Constitution of the United States, Art. VI, clause 2, Art. I, § 8, clause 18.)

§ 308. "This clause is most pertinent to this discussion. A treaty is an agreement to do or not to do. It is in many cases, to use a law phrase peculiar to contracts, *executory*. It is not *executed*. It does not act, it agrees to act. The deed must be done by another than the party making the agreement to do, which is the treaty.

"This clause declares that 'Congress shall have power to pass all laws necessary and proper for carrying into execution all powers vested by this Constitution in the Government of the United States or in any Department or officer thereof.'

"This language makes it clear that while the *executory* agreement is in the treaty-making power, the power of *execution* is vested in Congress. It is a power of independent action not constrained. It is a power to do or not to do, as Congress may decide. The treaty is thus made to depend for its consummate obligation on the action of Congress, not of constraint, but of independent will; and therefore no such treaty can bind the country's faith until the power which makes the executory stipulations of a treaty obtains concurrence from the power which alone can carry the agreement into execution.

"This clause establishes beyond doubt that the validity of a treaty is conditioned on the will of Congress, and it is totally inconsistent with a purpose to supersede the law-making by the treaty-making authority, or to subordinate the former to the latter, by constraining the conformity of the action of Congress to that of the President and Senate.

"The construction of the two parts of the Constitution must be such as to make them consistent, and not repugnant.

§ 309. "But another canon of construction may be invoked. It is true the power to make treaties is without express limitation; but so is the tax power; it is more; it is in terms exclusive of all participation in the origination of bills to raise revenue. A general expression for the grant of power must always be qualified by a special grant of anything comprehended under the general phrase. How then can a general grant to make treaties fail to encounter an exception from a special and exclusive grant to this House to originate, and to Congress to pass, all bills to raise revenue?

"If the claim of supremacy for a treaty be admitted in the matter of taxation, then the President and Senate may levy taxes to the exclusion of the House of Representatives, or confine it only to the registration of the will of the President and Senate. How can this consist with the right to originate tax bills by the House, and the only right of the Senate to propose or concur with amendments? How can the exclusive power of the House to originate stand with the exclusion of the House even from the consideration of the treaty which levies taxes?

"But if this claim be admitted in the case just stated, then *a fortiori* a treaty may borrow money, regulate commerce, coin money, establish post-offices and post-roads, raise armies and navies, regulate the militia, establish bankrupt laws, and laws as to naturalization, and patents and copyright, and exercise exclusive legislation in the District of Columbia. It may thus by a perpetual treaty annul or paralyze all the powers of Congress, and admit a foreign nation to exact, with the alternative of war, a compliance with these sweeping stipulations in the internal government of the people of the United States.

"Such consequences, the logical result of the claim asserted, are conclusive against its validity, and demonstrate the fallacy of the construction of the constitution on which it rests.

§ 310. "The result from a true construction of the Constitution is this: Both powers are independent in their respective orbits. The law-making power must be heard in its full voice in all that operates on the people as statutory law. Their

taxes must be collected and their money appropriated by the laws of Congress. Their commerce, their defense by Army and Navy, their coinage, their citizenship, and their internal administration must be under the control of the legislative department.

"The Congress cannot reach out to negotiate with other nations. It cannot make compacts or agreements. It may condition its own legislation on that of foreign nations, and thus make overtures of international policy. But the *nexus* of international faith must be bound by the treaty-making power, and Congress may pass the laws necessary and proper to carry into execution the stipulations of a treaty. The treaty is executory and tentative as to all which it cannot do of and by itself and which requires the perfecting and completing hand of the legislative power.

"This construction makes all parts consistent. The contrary construction lays the executive and legislative departments under the arbitrary and supreme dictation of the President and Senate. It does more. It may hold them by a chain for years or forever, binding future Presidents and Senates and Houses of Representatives to the will of a foreign power, a chain which can only be broken by a rude appeal to war.

"The domain for the operation of municipal law cannot be invaded by the authority which makes compacts with foreign nations. The primary trust of all Governments is the welfare of the people for which they are created; the interference of a foreign will in internal affairs must be secondary and subordinate. This is modern international law, and must be that upon which a republic will insist. In its nature, therefore, an executive treaty ought not to frame or modify municipal law for any people, and cannot, under our Constitution. A treaty cannot disjoint or disturb the equipoise of powers fixed by the Constitution. It cannot be the main-spring of authority, nor derange the constitutional distribution of powers. Such a treaty cannot bind the United States to do what Congress alone can do under the Constitution, unless Congress by law consents,

nor can such treaty bind a foreign power to do what is not in harmony with the domestic policy of this country.

§ 311. "The argument may be thus stated: The Constitution has created diverse agencies for the different functions to be performed. The power of taxation is exclusive in Congress. The power to make treaties is exclusive in the President and Senate. These two are independent of each other, with no direct control by either over the other. How can the agent to make a treaty make a valid one which assumes for that agent the power to do what the Constitution denies to it, and takes from another agent a power the Constitution has given to it? Under cover of a contract to do a thing, this would involve a power in the agent to do what was forbidden to it by the Constitution. In other words, by assuming authority to contract with a foreign nation to do what the Constitution forbids it to do, it would confer the forbidden power on itself.

"This conclusion seems upon the analysis of the Constitution to be established upon impregnable grounds, which subordinates foreign policy to home governments, treaty stipulations with foreign nations to the municipal law, and admits no entangling alliance with alien nations to an intrusive control of the laws made by Congress for the promotion of the welfare and protection of the liberties of the people.

§ 312. "The inquiry may be suggested, Upon what, then, can the treaty-making power operate independently of that of Congress?

"The answer is not difficult. The status of war created by Congress may be determined by a status of peace created by treaty — agreements as to mutual extradition, mutual expatriation, for the cession of territory to the United States, mutual intercourse by ambassadors, &c., and all proposals as to matters which may be consummated by statutory law.

"Some stress is laid upon the power of a treaty of peace to repeal a declaration of war. It is conceded that this may be true but the reverse is equally true. A peace by treaty to-day may be repealed by a declaration of war to-morrow. Congress

cannot create the status of peace by repealing its declaration of war, because the former requires the concurrence of two wills, the latter but the action of one. Suppose a treaty with Great Britain provided that the United States should never keep an army or navy except by its consent, or should make a permanent appropriation for an army, when the Constitution declares none shall be made for a longer period than two years, it cannot be supposed that Congress could not repeal or rather disregard such stipulations. Thus, the war power in Congress may annul the action of the treaty power.

"Your committee is not content to rest the conclusions thus reached by a critical analysis of the Constitution upon this view alone. They will be found to be sustained by the historic analogy of our system of government with that which it so closely resembles in respect to this subject, and by the processes by which the balances of our Constitution were finally adjusted by its wise framers.

§ 313. "While the constitutional system of our great Republic differs very much from that of Great Britain, it is an historic fact that ours was framed upon the British model as to the distribution of the functions of the three departments of government, with a radical departure in respect to the sources of the powers of all of them. Annul the hereditary principle as the source of authority in the British Constitution, and substitute the popular will for it, and the likeness between the two in the distribution of powers is very striking.

"By the British Constitution the powers of peace and war — of treaty-making — are in the Crown. The power over taxation is primarily in the Commons, as a consummate law, in King, Lords, and Commons. All money bills, to levy taxes and to appropriate their proceeds must originate with the Commons.

"The treaty power in the Crown is as absolute as the money power in the Commons. The Crown can no more levy taxes or appropriate money than the Commons can make treaties. Independent in their spheres, these rival powers are conditioned for consummate effect upon the will of the other. The

Crown would not dare by treaty to levy a tax, or put its hand into the nation's treasury. Nor is the *nexus* of completed compact ever formed in cases requiring the change of laws relating to taxation, or the appropriation of money, until the supreme guardians of the people's liberties shall vote a supply. The national faith is never bound, in practice is never pledged, until Parliament, under the originating will of the Commons, shall pronounce its fiat. (Lawrence's Wheaton International Law, 457.)

"The Treaty of Utrecht, in respect of reciprocity of commerce between Great Britain and France, was never consummated, Parliament rejecting it. (1 Mahon's Hist. of England, p. 24, cited by Wheaton, *supra*.)

"In such cases the British faith is never pledged until Parliament sanctions the terms of the treaty. The validity of the compact is dependent on the will of Parliament, and no other nation can claim England to be bound by any act of its Crown which trenches upon the constitutional powers of Parliament to legislate for the interests of its people.

"Your committee deem it unnecessary to dwell further on this well-settled doctrine of the British Constitution. The supremacy of the law-making power over the treaty power of the Crown, and the dependence of the validity of the latter on the independent and unconstrained volition of Parliament, stand out in English history as the muniments of popular liberty against the influence of foreign nations in the control of the essential rights and interests of the English people.

"This striking fact was well known to the framers of the Federal Constitution; is well known to the civilized world as a fundamental principle in their international relations with England. No nation would charge a breach of compact on England because the proposal by treaty of the Crown failed of parliamentary sanction. Faith cannot be broken until it is pledged, and the pledge of England is not given in such cases until the word of her monarch is confirmed by the law of her Parliament.

§ 314. "When the States of the Confederation came to adopt articles for their general government, finally ratified and going into operation in March, 1781, this question was brought to their consideration with a full view of the British constitution.

"By these articles the power to regulate commerce with foreign nations and the sole power of internal taxation and of tariff revenue remained with each State. Congress had no tax power.

"But Congress had the war and peace power and that of making treaties; the States being denied that power without the consent of Congress. (Articles VI and IX.)

"The possible conflict between these related powers was avoided by precise provisions.

"In the sixth article it was provided that 'no State shall lay any imposts or duties, which may interfere with any stipulations in treaties entered into by the United States in Congress assembled with any king, prince, or state in pursuance of treaties already proposed by Congress to the courts of France and Spain.'

"In looking at those treaties we find the only limit upon the power of the States as to imposts and duties was against any discrimination which would not place the foreign nation on the footing of the most favored. It did not interfere with the tax power at all, except to forbid injurious discrimination against the nations with whom treaties were made.

"In the ninth article it was provided, 'That no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own subjects are subjected to, or from prohibiting the exportation and importation of any species or commodities whatsoever.'

"Here again the only limit was against a discrimination to the prejudice of foreigners.

"In both cases the amount and method of taxation and the regulation of commerce by the States was left untouched by the treaty power, and it is obvious that, had the two clauses above

quoted been left out of the articles, no qualification of the power of the States in the matter of taxation and commerce would have been admitted by reason of the treaty-making power in Congress.

§ 315. "Without dwelling upon these provisions, they serve to show that the men who framed those articles saw the need of defining precisely wherein the treaty power might intrude upon the power of the States over taxation and commerce, and that they were sedulous to conserve the legislation in these matters by the States from the treaty power of Congress, the same body in which the legislative power of the Confederation was vested.

"But when the Federal Convention met in May, 1787, to revise these articles, and when the tax power for Federal purposes and that over commerce were vested in Congress, and the treaty power was vested in the President and Senate, it will be instructive to mark the process by which that great body reached its final conclusion on this subject and with what purpose it was done.

"The equality of vote of the States in the Congress of the Confederation was not felt so strongly in the matter of taxation, because, though the quota of burden borne by each State was fixed by a vote of Congress according to the value of land in each State, the taxing power was exclusively in the States. But when the Convention proposed to vest the taxing power for Federal purposes in Congress, the question assumed an importance which menaced the Convention with dissolution.

"Mr. Randolph, of Virginia, and Mr. Charles Pinckney, of South Carolina, in an early period of the Convention, proposed skeletons for the Constitution upon which all the debates were based. The former proportioned the rights of suffrage in the national legislature upon the 'quotas of contribution, or to the number of free inhabitants, as the one or the other may seem best in different cases.' (2 Mad. Papers, 731.) Mr. Pinckney proportioned it to the 'number of inhabitants.' (*Id.*, 736, 737.) The first plan gave to each branch of the legislature the power to originate bills; the second gave the origination of all money

bills to the House, without power in the Senate to alter them.

"In each of these plans the Senate was to be chosen by the House, the number from each State being left blank in the proposition of Mr. Pinckney. Mr. Pinckney's plan gave the treaty power to the Senate exclusively. (P. 742.)

"But when the small States insisted upon an equal vote in both houses, the large States opposed it with strenuous zeal. This conflict was serious and threatening. The issue was narrowed to a contention upon an equality of the States in the Senate.

"Mr. Wilson, of Pennsylvania, showed that twenty-four-ninetieths of the total population was in seven small States, who would thus control sixty-six-ninetieths; less than one-third controlling more than two-thirds. (2 Mad. Papers, 1001.)

"Dr. Franklin said the small States feared for their liberties from a proportional representation; and he added, 'If the equality of votes is to be put in its plan, the large States say their money will be in danger.' (*Id.*, p. 1009.)

"The question being referred to a committee, it reported a plan by which the House was based on a proportional representation, and the Senate on equality, with the power in the House to originate bills for raising or appropriating money, not to be altered or amended by the Senate. (*Id.*, p. 1024.)

"This report was substantially adopted July 16. (*Id.*, 1108–1109.)

"The Committee of Detail reported the whole plan August 6. (*Id.*, 1226, *et seq.*) The constitution of the two Houses was as previously decided on — the House based on numbers, the Senate on States as equals. Bills for raising and appropriating money to be originated in the House, with no power to amend or alter by the Senate. (P. 1228.) The treaty-making power was given to the Senate. (Art. 9, p. 1234.)

"This report was taken up August 7.

"Mr. Pinckney moved to strike out the clause giving the power to originate money bills to the House.

"George Mason said, in his objection to the Senate having

equal power to originate money bills, 'The purse-strings should never be put into their hands.' (P. 1267.)

"The clause was stricken out by a vote of seven States to four.

"In the debate on the reconsideration of this vote it was repeated again and again that the power to originate money bills in the House and the equality of the States in the Senate were essentially connected as considerations for each other in the compromise agreed on. (*Id.*, pp. 1270–1272.) Mr. Randolph, on moving the reconsideration, urged the two provisions as based on mutual consideration, and as a compromise. (*Id.*, p. 1297.) The question was reconsidered by a vote of nine States to one.

§ 316. "The discussion upon it was earnest and able. Mr. Mason urged that the Senate represented the States in their political character, and not the people. 'It was improper therefore that it should tax the people.' His whole speech is so strong and valuable that your committee beg leave to quote it at large.

"'Again, the Senate is not, like the House of Representatives, chosen frequently, and obliged to return frequently among the people. They are to be chosen by the States for six years; will probably settle themselves at the seat of Government; will pursue schemes for their own aggrandizement; will be able, by wearying out the House of Representatives and taking advantage of their impatience at the close of a long session, to extort measures for that purpose. If they should be paid, as he expected would be yet determined and wished to be so, out of the National Treasury, they will particularly extort an increase of their wages. A bare negative was a very different thing from that of originating bills.

"'The practice in England was in point. The House of Lords does not represent nor tax the people, because not elected by the people. If the Senate can originate, they will, in the recess of the legislative sessions, hatch their mischievous projects for their own purposes, and have their money bills cut and dried (to use a common phrase) for the meeting of the House

of Representatives. He compared the case to Poyning's law, and signified that the House of Representatives might be rendered by degrees, like the Parliament of Paris, the mere depository of the decrees of the Senate. But in all events he would contend that the purse-strings should be in the hands of the representatives of the people.'

"Mr. Gerry said, 'Taxation and representation are strongly associated in the minds of the people; and they will not agree that any but their immediate representatives shall meddle with their purses.' (*Id.*, p. 1309.)

"The whole proposition failed of a favorable vote (*Id.*, 1316) and the convention was again at sea.

"It was again moved (*Id.*, 1330, 1331), and was postponed until the powers of the Senate were further considered, especially as to treaties. It was finally adopted in the form in which it stands in the Constitution, by a vote of nine States to two. (*Id.*, 1531.)

"This fierce conflict (for, as Dr. Franklin said, the contest between the large and small States was marked by less good temper than any other in the convention) was thus ended by securing to the representatives of the people the original power to tax the people, with a power to the representatives of the States 'to propose or concur with amendments as on other bills.'

"In the meantime the power of making treaties was transferred from the Senate to the President, by and with the advice and consent of the Senate, and a motion to add the House of Representatives was voted down by ten States to one (*Id.*, 1518, 1519), as it had been before. (*Id.*, 1414, 1415.)

"During this debate, the necessity in Great Britain for the action of Parliament in the execution of treaties was referred to, but the treaty-making power was unquestionably left to the President and Senate, excluding the House of Representatives from any function in their negotiation.

"The discussion upon these points leaves no doubt that while the President and Senate were intended to have the exclusive power to make treaties, the jealousy of the convention of the

money power being in other hands than those of the representatives of the people in the House forbids the supposition that the convention ever intended the treaty-making power to supersede or override the power of the House to originate all bills for raising revenue, or from its part in appropriations of the public money by act of Congress.

"For, it will be observed, when the power of making treaties was in the Senate, according to the report of the Committee on Detail, offered August 6, 1787, the power of originating money bills, with no power to amend by the Senate, was vested in the House. It cannot be supposed that those who were struggling for the people to control their purse strings would have consented to give to the Senate, who could neither amend nor alter money bills, a monopoly of the whole money power through treaties, to the exclusion of any participation by the House, to whom was granted by the same Constitution the exclusive power to originate money bills. Such an hypothesis makes the whole contest useless, and the action of the convention utterly unworthy of the high intelligence of its members.

"And when the final action was taken, it is absurd to suppose that by the treaty power the President and Senate might enact revenue laws and laws appropriating the money of the people, through the agency of treaties, from all participation in which the House was to be excluded, when, by the Constitution, to that House was exclusively confided the key to the pockets of the people and the key to the door of their treasury.

§ 317. "But this absurdity is enhanced when we look at the effect of this construction upon the then relation of the States and to their relations now.

"In 1790, the year after the Constitution went into effect, the total population of the country was 3,843,621. Two-thirds of the States, the smallest in population, could ratify a treaty. They contained a population of 1,685,360. The other third contained a population of 2,160,419. That is to say, the power of taxation of the whole would be given to a minority of four-ninths of the people if a treaty could do it. But worse than

that the President was to be elected by a body of electors appointed not by the people, but in such manner as the legislatures of the States might prescribe, and in methods from which the people might be excluded. In a certain event he might be elected by a majority of States representing but a little more than one-fourth of the whole population.

"This President, so far removed from immediate relations to the body of the people, could make a treaty levying taxes upon the people and appropriating their money. The only check upon his authority is a Senate elected for six years, not by the people, but by legislatures of the States. So that upon the theory which gives this power to the President and Senate, taxes might be levied without an act of Congress, revenue might be raised by measures originating with the Executive and sanctioned by the Senate, and the House, in whom was vested the exclusive power to originate bills to raise revenue, would be divested of this power and excluded even from a potential dissent to their action.

"And at this day the result is even more striking. By the census of 1880, upon this theory, a treaty ratified by two-thirds of the present Senate, representing 19,755,532, could levy taxes, against the protest of 29,615,818, or by two-fifths against three-fifths of the people. And if Dakota were admitted into the Union, then 18,348,529, of the people could levy a tax against the protest of 31,157,998, or a little over three-eighths against the will of nearly five-eighths of the people of the Republic.

"Such a result is abhorrent to our ideas of popular and representative government, and such a construction of the Constitution a stigma upon the intelligent patriots who framed it.

§ 318. "In the sixty-fourth number of the Federalist, Mr. Jay, afterwards Chief Justice of the United States, comments on this treaty-making power, and asserts its benefits because it is vested in a President and Senate, neither of whom are directly elected by the people, nor responsible to their wishes, nor frequently amenable to their censure; but by electors and legislatures, chosen bodies of select men, through whom the

people cannot easily operate to influence the actions of these treaty makers. He argues that secrecy and dispatch are important elements in making treaties, and that the long term of Senators, which makes them less sensitive to popular sentiment, is a more important consideration in favor of vesting this power in them.

"This reasoning may be good, unless the treaty-making power embraces within its range the power to levy taxes and appropriate money. If it does, how absurd to republican ears is the suggestion that taxes should be levied on the people in the secret session of a Senate, and with a dispatch which takes no heed of popular protest! The very argument urged by the writer to recommend the Constitution would have shocked the public opinion it was seeking to influence had it been supposed that by treaty a tax might be levied without the consent of the taxpayer, or money be appropriated without the people being consulted.

§ 319. "Your committee will next proceed to consider the precedents in our history bearing upon this question.

"By the treaty with Great Britain, known as Jay's Treaty, in 1795, there were stipulations as to commerce and duties upon vessels of Great Britain and merchandise therein. The question arose as to the execution of these stipulations.

"President Washington communicated the treaty for the information of Congress March 1, 1796. (Annals of Congress, p. 394.) Thereupon a debate arose upon a resolution calling for papers connected with the negotiation of the treaty (Annals of Congress, p. 759), which was adopted by a vote of 62 to 37. Among the affirmatives were Abraham Baldwin, of Georgia, and James Madison, of Virginia, both of whom were members of the Federal Convention of 1787. With these are also found the great names of Albert Gallatin, Nathaniel Macon, and William B. Giles.

"The President replied to the resolution in a carefully worded message (Annals of Congress, 760), in which he asserted the prerogative of the treaty-making authority in strong terms.

He held that a treaty made by the President and ratified by the Senate became obligatory as the law of the land. He adverted to the action of the general convention already cited, by which the proposition 'that no treaty should be binding on the United States which was not ratified by law' was explicitly rejected. He closed by saying that 'the assent of the House of Representatives was not necessary to the validity of a treaty'; that the treaty showed 'all the objects requiring legislative provision'; and he, therefore, declined to comply with the resolution.

"It will be noticed that the President, while denying the necessity of assent to a treaty by the House, speaks of the objects of the treaty 'requiring legislative provision.' The President must have meant by the word 'requiring' either that they needed legislative provision or that legislative provision was constrained by the treaty. He could not have meant the latter, for that would involve a violation of the right of independent action by the House. If he meant that legislative action was wanting to the completeness of the treaty, and by the free action of the House, it is a confession of an invalidity in the treaty due to the want of legislative action, which, when supplied, would give the treaty completeness.

"One other point in the message should be noted. Mr. Jay, who negotiated the treaty, had written the number of the Federalist in which 'secrecy and dispatch' were named as essential elements in the negotiation of treaties. President Washington says, 'the necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President with the advice and consent of the Senate'; and he adds that 'to give the House information respecting a negotiation would establish a dangerous precedent.' Surely President Washington meant no such reason to apply to cases of taxation and appropriation of money, and he could not therefore have intended to imply such matters to be within the treaty-making power.

§ 320. "In the debate which occurred upon the message Mr.

Madison, who was with President Washington in the Federal Convention, made the obvious criticism upon the citation from the Journal referred to by the message, that the proposition rejected was one which made the House a participant in all treaties. There are some treaties which operate *proprio vigore*, and need no legislation. The proposition would have made these depend on the assent of the House as well as those which needed a law to perfect them. This was the distinction indicated by Mr. Madison in the Convention in the debate on the proposition between 'treaties eventual' (complete and final *per se*) and others which were incomplete without law. (3 Mad. Papers, 1415.)

"The House, after long debate, passed the following resolution by a vote of 57 to 35, and counting the votes of absentees, the House stood 63 to 36:

" 'Resolved, It being declared by the second section of the second article of the Constitution that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur, the House of Representatives do not claim any agency in making treaties; but that when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress, and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon as in their judgment may be most conducive to the public good.'

"The House afterwards resolved to carry the treaty into effect, which was done by act of Congress. (1 U. S. Stat. at L. 459.)

"This precedent shows that the House asserted the principles of its independent right to consider and decide upon the execution of the treaty, and maintained it by passing a law to carry it into execution, which was approved by the President. Thus

by the unconstrained action of Congress an appropriation of money was made, which the treaty *proprio vigore* could not effect. The potential opinion of President Washington did not go to the extent of claiming any conclusive effect for a treaty in taxation or appropriation, and conceded the need of legislative action, and his opinion was balanced against that of Mr. Madison, who, as the reporter of the debates of the Federal Convention and the careful observer of its action on its floor, is entitled more than any other of its members to the name of the founder of the Federal Constitution.

§ 321. "The next precedent to which attention may be called is the action taken on the Treaty of Ghent, made in 1815, with Great Britain.

"That treaty contained stipulations as to the duties on articles imported from Great Britain and as to commerce with that country.

"The President (Madison) by message transmitted the proclamation of it, and recommending to Congress such legislation as the convention (treaty) called for. (Annals of Congress, 402.)

"After long debate and conferences between the two Houses, a bill was passed (3 U. S. Stat. at L. 255), in which Congress modified its duties according to the terms of the treaty approved March 1, 1816.

"The report of Mr. Forsyth, of Georgia, for the managers of the House (Annals of Congress, 1816, p. 1018, *et seq.*) is a full statement of the contention between the houses and the settlement agreed on.

"The debate was very able in the House, and against the bill (on the ground that the treaty did not require legislative action), was conducted by Calhoun, of South Carolina, and William Pinkney, of Maryland, and others, with masterly force, and for the bill, with equal force, by Lowndes, of South Carolina, Randolph, of Virginia, and others.

"The great point made against the bill was that a treaty was a compact between two nations, which necessarily overrode all

legislative acts of either, which was answered, as your committee have suggested, by holding that it was *petitio principii* to claim that to be a complete compact which depended for its consummate effect upon the concurrence of the law-making authority.

§ 322. "In all cases to which your committee have referred the action was like that in the cases of Jay's treaty and that of Ghent.

"One other case has been cited of the action of President Jackson in December, 1834. (Annual Register, 1834, Public Documents, p. 352.)

"He asserted two leading propositions:

"1. That the treaty involved commercial regulations and rates of duties, which had to be submitted to Congress to be carried into full execution.

"2. That France having by the treaty (1831) recognized a precedent obligation for depredations on our commerce, though her legislative department refused to comply with its provisions, should be forced to comply by acts of retaliation. This is assumed to be a concession by the President in respect to the effect of the treaty on the national faith of France, without the concurrence of her legislative department, that a like construction should prevail as to our Constitution.

"It is obvious that had the obligation of France been created by the treaty, instead of being only recognized by it as a pre-existing obligation, the conclusion would have been just. But President Jackson insisted that it had pre-existed for a long time, and had been too long disregarded, and that the refusal of the French Chambers to carry out the pre-existing obligation, so recognized by the treaty, authorized the United States to enforce the prior claim, and not to punish the violation of the treaty. And the President further insisted that Congress had carried out the treaty of 1831 by enacting commercial and duty regulations favorable to France, and which she was receiving, and yet refused compliance with her just duty to our people. (See 4 Stat. at L. pp. 574–576.)

§ 323. "The treaty with Mexico was carried into effect by act of Congress.

"In 1844 the Senate considered the Zollverein Treaty, and in the report of the Committee on Foreign Affairs by Mr. Rufus Choate there is a passage of great force, in which the views already asserted in this report are well sustained.

"The report says (Senate Journal, first session, Twenty-eighth Congress, 1843 — 44, p. 445 *et seq.*):

"'The committee, then, are not prepared to sanction so large an innovation, upon ancient and uniform practice in respect of the Department of Government by which duties on imports shall be imposed. The convention which has been submitted to the Senate changes duties which have been laid by law. It changes them either *ex directo* and by its own vigor or it engages the faith of the nation and the faith of the legislature, through which the nation acts, to make the change. In either aspect, it is the President and Senate who, by the instrumentality of negotiation, repeal or materially vary regulations of commerce and laws of revenue which Congress had ordained. More than this; the executive department, by the same instrumentality of negotiation, places it beyond the power of Congress to exceed the stipulated maximum of impost duties for at least three years, whatever exigency may intervene to require it.

"'In the judgment of the committee the legislature is the department of Government by which commerce should be regulated and laws of revenue be passed. The Constitution in terms communicates the power to regulate commerce and to impose duties to that department. It communicates it in terms to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress. They infer this from the language of the Constitution, from the nature and principles of our Government, from the theory of republican liberty itself, from the unvaried practice, evidencing

the universal belief of all, in all periods, and of all parties and opinions. They think, too, that, as the general rule, the Representatives of the people sitting in their legislative capacity, with open doors, under the eye of the country, communicating freely with their constituents may exercise this power more intelligently and more discreetly; may acquire more accurate and more minute information concerning the employments and the interest on which this description of measures will press, and may better discern what true policy prescribes and rejects than is within the competence of the Executive department of the Government.

"'To follow, not to lead; to fulfill, not to ordain the law; to carry in effect, by negotiation and compact with foreign Governments, the legislative will, when it has been announced upon the great subjects of trade and revenue, not to interpose with controlling influence, not to go forward with too ambitious enterprise — these seem to the committee to be the appropriate functions of the Executive.'

§ 324. "The treaty of the United States with Russia March 30, 1867, by which Alaska was ceded by Russia to the United States for $7,200,000, in coin is in point. After much discussion a committee of conference between the two Houses agreed upon a bill, in which it was recited, referring to the stipulation of the treaty for the payment of said sum of money:

"'And whereas said stipulations cannot be carried into full force and effect, except by legislation, *to which the consent of both Houses of Congress is necessary*,'[1] &c.

"The history of this matter may be seen in 2 Wharton's International Law Digest, 131a.

"As late as January 20, 1880, this House adopted a resolution in full accord with the views maintained in this report, by a vote of 175 to 62.

"These precedents having been examined, it may be well to add that in no case has it ever been claimed that a tax could be laid or repealed, or money taken from the Treasury by a

[1] Author's italics.

treaty *proprio vigore*. Intimations have been thrown out that a treaty put a constraint upon the legislative department which made its conformity a matter of moral duty, but no one has ever had the temerity to claim that the free will of the House was impaired in its legislative action in execution of a treaty.

"The agreement by the treaty-making authority that something shall be done which Congress alone can do, has never been held binding in the United States until Congress has by its free action legislated that to be done which the treaty stipulated; and until and unless by express declaration or clear implication the executory act of one of two agents is made obligatory on the other, who alone can execute it, no compact is consummate from the executory agreement of the one until and unless the other freely consents.

§ 325. "It remains to refer to the text writers and to the judicial decisions on this question.

"In Wheaton's Elements, page 329, that author says on this point:

"'The treaty, when thus ratified, is obligatory upon the contracting States, independently of the auxiliary legislative measures which may be necessary on the part of either in order to carry it into complete effect. Where, indeed, such auxiliary legislation becomes necessary, *in consequence of some limitation upon the treaty-making power, expressed in the fundamental laws of the State, or necessarily implied* from the distribution of its constitutional powers — such, for example, as a prohibition of alienating the national domain — then the treaty may be considered as imperfect in its obligation until the national assent has been given in the forms required by the municipal constitution.'

"And Mr. Lawrence, the learned annotator of Wheaton, claims no more than that 'if the treaty be within the constitutional limits, free from fraud, and not destructive of any of the great rights and interests of the country, then there is a moral obligation to grant the aid required.' And this accords with Chancellor Kent. (1 Kent, p. 285.)

"Judge Story, in his Commentaries on the Constitution (vol. II § 1502), says:

"'The power "to make treaties" is, by the Constitution, general; and, of course, it embraces all sorts of treaties, for peace or war, for commerce or territory, for alliance or succors; for indemnity for injuries or payment of debts; for the recognition and enforcement of principles of public law; and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other.

"'But though the power is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the State. A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and cannot supersede or interfere with any other of its fundamental provisions. Each is equally obligatory and of paramount authority within its scope; and no one embraces a right to annihilate any other. A treaty to change the organization of the Government or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers, would be void; because it would destroy what it was designed merely to fulfill, the will of the people. Whether there are any other restrictions necessarily growing out of the structure of the government will remain to be considered whenever the exigency shall arise.' (See also 1 Tucker's Blackstone App. 332, 333.)

§ 326. "In Foster *v.* Neilson, 2 Peters, 314, Marshall, C. J., says:

"'A treaty is, in its nature, a contract between two nations, not a legislative act, and does not generally effect of itself the object to be accomplished, but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States the Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself, without any legislative provision. But

when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department, and the legislature must execute the contract before it can become a rule for the court.'

"In Turner *v.* The American Baptist Union, 5 McLean's Circuit Court Reports, 344 (decided in 1852), Mr. Justice McLean said:

"'A treaty under the Federal Constitution is declared to be the supreme law of the land. This unquestionably applies to all treaties where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the Constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our Government. The action of no department of the Government can be regarded as a law until it shall have all the sanctions required by the Constitution to make it such. As well might it be contended that an ordinary act of Congress, without the signature of the President, was a law as that a treaty which engages to pay a sum of money is in itself a law.

"'And in such a case the representatives of the people and States exercise their own judgments in granting or withholding the money. They act upon their own responsibility, and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign Government may be presumed to know that, so far as the treaty stipulates to pay money, the legislative sanction is required.'

§ 327. "A promise in a treaty with Russia as to a particular rate of duty was considered by the late Judge Curtis, in Taylor *v.* Morton, 2 Curtis's Circuit Court Reports, 454, decided in 1855. He said, after quoting the second section of the fourth

article of the Constitution, as to the supremacy of the Constitution and laws of the United States made in pursuance thereof, and treaties made under the *authority of the United States* (and remark, in passing, it does not say by the President and Senate, but under the authority of the United States; that is, with the sanction of that law which is necessary and proper to carry the treaty into effect):

"'There is nothing in the language of this clause which enables us to say that in the case supposed the treaty, and not the act of Congress, is to afford the rule. . . . This provision of our Constitution has made treaties part of our municipal law. But it has not assigned to them any particular degree of authority in our municipal law, nor declared whether laws so enacted shall or shall not be paramount to laws otherwise enacted.'

"And after holding that a treaty and its obligatory force as between the United States and the foreign nation is a question for the political and not for the judicial department, he says:

"'There is nothing in the mere fact that a treaty is a law which would prevent Congress from repealing it.'

"And again:

"'To refuse to execute a treaty for reasons which approve themselves to the conscientious judgment of the nation is a matter of the utmost gravity and delicacy; but the power to do so is a prerogative, of which no nation can be deprived without deeply affecting its independence. That the people of the United States have deprived their Government of this power in any case I do not believe. That it must reside somewhere, and be applicable to all cases, I am convinced. I feel no doubt that it belongs to Congress.'

"The decision was, that a law of Congress could repeal a treaty.

"And finally, in the Cherokee Tobacco, 11 Wallace, 616 (decided in 1870) Swayne, justice, speaking for the Supreme Court, and citing the case of Taylor *v.* Morton, already quoted with approval, said:

"'A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.'

"It is proper to say that the case did not decide the first branch of this proposition, but only the latter. The latter was decided, the former was *obiter dictum*.

"And speaking of the power to regulate commerce and lay duties, he says:

"'But it cannot be admitted that these powers can be or were expected to be exerted under all circumstances which might possibly occur in the life of a nation in subordination to an existing treaty; nor that the only modes of escape from the effect of an existing treaty, were the consent of the other party to it, or a declaration of war.'

"The case of Head Money, 112 U. S. R., 580, confirms these views.

§ 328. "These decisions seem to settle the question mooted by Mr. Calhoun in the debate in 1816, that the supremacy of a treaty over an act of Congress results necessarily from its being a compact between two nations. These decisions adjudge that Congress may repeal a treaty, may annul a treaty stipulation with a foreign nation. And Chief Justice Marshall, in the passage above quoted, seems to think that a treaty which is not eventual (*i.e.*, final, self-effective), as Mr. Madison expresses it, is not operative as law until the legislative act gives it validity.

"In confirmation of the general views submitted, your committee, for the benefit of the opinion of a very able constitutional lawyer, refer to the case of McLeod in 1842. The British Government offered to protect McLeod, on the ground that his act, which resulted in the murder of a citizen of the State of New York, was done under the direction of Her Majesty. The British Government demanded of Mr. Webster, then our Secretary of State, that McLeod, who was arrested and held by the New York State authorities to be tried for the murder, should be surrendered to the British Government, because his act was an act of war, a public act of that Government, and not

an act of a private British subject against an American citizen. What said Mr. Webster?

"In substance his reply was:

"'I am very sorry to say that such is the organization of our Federal system that McLeod is in the hands of State authorities, and no negotiation or action on the part of the executive department of the Federal Government can take the man out of the hands of the State authorities.'

"It is fair to say that Mr. Calhoun, who so strongly maintained the claim of the treaty-making authority in his great Disquisition on Government has greatly qualified, if not abandoned, these views, and stands with the opinions advanced, in this report. (Calhoun's Works, 208.)

§ 329. "Your committee have thus considered the question on the true interpretation of the language of the Constitution; upon the construction of the Government itself; on the historic development of the Constitution from its British original through the Articles of Confederation to its present form; on analogy to the British prototype; on precedents and authority; and have come to the conclusion which, though the discussion has taken a wider range, is confined to the question submitted by the resolution referred to the committee. . . . Your committee, therefore, with great respect, recommend the adoption of the following resolutions:

"'(1) That the President, by and with the advice and consent of the Senate, cannot negotiate a treaty which shall be binding on the United States, whereby duties on imports are to be regulated, either by imposing or remitting, increasing or decreasing them, without the sanction of an act of Congress; and that the extension of the term for the operation of the original treaty or convention with the Government of the Hawaiian Islands, proposed by the supplementary convention of December 6, 1884, will not be binding on the United States without like sanction, which was provided for in the original treaty and convention, and was given by act of Congress.

"'(2) That the President is respectfully requested to withhold final action upon the proposed convention, and to condition its final ratification upon the sanction of an act of Congress, in respect of the duties upon articles to be imported from the Hawaiian Islands.'"

CHAPTER XII

JAPANESE-CALIFORNIA CONTROVERSIES. VIEWS OF SENATOR ELIHU ROOT AND OTHERS

§ 330. In this chapter will be considered the position taken by some modern writers, notably by Senator Elihu Root[1] of New York, who advances the position that the reserved rights of the States constitute no limitation upon, and have no effect upon the power in the Federal Government to make treaties, because the treaty power in its scope, being unlimited, applies to every subject which could be made the subject of agreement between nations, among which are necessarily included rights derived from the States, and that *quoad* the treaty-making power, therefore, there are no reserved rights of the States, because they were included in the grant to the treaty power.

The address from which these views are taken was devoted chiefly to the consideration of the California School question and the position that California assumed by its legislation at that time in its relation to the treaty between the United States

[1] See the address of Senator Elihu Root as President of the American Society of International Law, First Annual Meeting, Washington, D. C., April 10, 1907, page 41, *et seq.*

The same view is presented by Professor Corwin when he says, "On the precise question, therefore, of the relation of the treaty-making power to the reserved rights of the States, our conclusion must be that the latter do not limit the former to any extent; that, in other words, *the United States has exactly the same range of power in making treaties that it would have if the States did not exist.*" "The Treaty-making Power: A Rejoinder", by Edward S. Corwin, The North American Review, June, 1914.

and Japan. The question involved in Senator Root's declaration has been considered quite fully in preceding chapters.[1]

Against Senator Root's exclusion of the States from any consideration, when the treaty power enters the arena and seeks subjects for its exercise, we place the long list of opinions expressed on this subject by statesmen, writers, and judges of the Supreme Court which are collected in chapters I and II, to which the reader is referred. Among these we will cite again Judge Story's statement:[2]

"But though the power is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the State. A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and cannot supersede or interfere with any other of its fundamental provisions. Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other. A treaty to change the organization of the government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers, would be void; because it would destroy, what it was designed merely to fulfil, the will of the people."

And also Judge Cooley's statement:[3]

"The Constitution imposes no restriction upon this power, but it is subject to the implied restriction that nothing can be done under it which changes the constitution of the country, or robs a department of the government or *any of the States*[4] of its constitutional authority. [Story on Const., § 1508; 1 Tucker's Bl., Ap. 332.]"

And also a paragraph from Judge Field's opinion in Geofroy *v.* Riggs:[5]

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the govern-

[1] See Chapters IV and X. [2] Story on the Constitution, § 1508.
[3] Cooley's "Principles of Constitutional Law," p. 117.
[4] Author's italics. [5] 133 U. S. 267.

ment itself and *of that of the States*.[1] It would not be contended that it extends so far as to authorize what the Constitution forbids, or *a change in the character of the government or in that of one of the States*,[1] or a cession of any portion of the territory of the latter, without its consent."

Why should Judge Field hesitate at "a change in the character of" a State, in the making of treaties, if the making of treaties was to be carried on as if the States did not exist?

These rights of the States which are eliminated from consideration by Senator Root when the treaty power expresses a desire for them form an interesting study in the make up of the Constitution. In the first place it is admitted by all that *some* of these rights were granted by the States to the Federal Government in the Constitution. These are no longer subject to State power; they have been surrendered to the Federal Government. But those not granted remain with the States or the people. Where else could they abide, since they were never granted? and how can powers never granted by the States be under the control of the Federal Government? The ungranted powers of the States can no more be subject to the Federal Government than were the States of Rhode Island and North Carolina subject to the Federal Government for months after the adoption of the Constitution because they had not consented to it or ratified it; and there was no power to compel their assent. And so these ungranted powers which belong to the States are no more under the control of the Federal Government than they are under the control of the government of Great Britain. Their security rests, 1st. On the fact that they are original powers never surrendered by the States, and this fact is recognized by the Tenth Amendment, which recites in words what is stated above as to all State powers which are not granted to the Federal Government or prohibited to the States. This Amendment constitutes no grant of power, but is merely the statement of an existing fact which was put in writing to avoid further misunderstandings. 2d. Some of

[1] Author's italics.

these reserved rights involve the essential principles of civil and religious liberty which the people enjoyed as citizens in their respective States, and to make sure that these should never be taken from them by the new government which was being formed, many of them were incorporated in the first ten amendments; so that these latter have a double security in that they are original powers never granted to the Federal Government by the States and are placed in the amendments that they may be secure against loss from the Federal Government. When, therefore, it is claimed that these rights which were never given to the Federal Government at all (though others had been given) can be taken by a branch of that Government *ad libitum*, such a thing can be justified only on the ground that the thief justified his taking a watch from his employer, *viz.*, that his employer *had once given him a cow*. To this position it may be answered that when the unlimited and unrestrained grant was made to the President and Senate to make treaties it carried by necessary implication all State powers necessary to make such grant complete. If this be true, the argument and conclusion may be stated as follows: 1. The grant of the treaty power is unrestrained and unlimited. 2. The nature of the grant requires that all that is necessary for its completeness was by implication carried in the grant. 3. That national powers assigned to different branches of the Federal Government in the Constitution may be needed by the treaty power. If so, such national powers were by implication carried in the grant to the treaty power. 4. The reserved powers of the States may also be needed by the treaty power looking to its complete development. If so, all of them needed were by implication carried in the grant. The inevitable conclusion from this argument is that since all the Federal powers and all reserved State powers may be needed by the treaty power in order to its complete and symmetrical development, they were necessarily implied in the grant of that power, and this being true, the government is changed from a government under the Constitution—in accordance with its distribu-

tion of powers — to a government under the treaty power. Or, if we exclude from consideration the grant by implication to the treaty power of all national powers secured in the Constitution, and only consider the grant by implication of the reserved rights of the States to that power, this result follows: that the States granted to the Federal Government a power, in the treaty power, which by implication carried every reserved right of the States. Is such a result consistent with the conditions upon which the Constitution was originally ratified by the States? If such argument be accepted, why did the States exhibit such uneasiness at the time of the ratification of the Constitution about the adoption of amendments to secure these very rights, which, under the argument above, are claimed to have been given away? Why did Massachusetts declare that in order to quiet the fears of her people an amendment looking to the preservation of these very rights was to be practically a condition upon which she ratified the Constitution? Why did New Hampshire, Rhode Island, New York, Virginia, and South Carolina demand as a condition of their ratification that an amendment to secure these very rights should be adopted at once, if they had by their ratification surrendered them to the treaty power, as claimed? It is readily seen that the effect of such argument could only result, not only in the destruction and annihilation of the States, but in the downfall of the Federal Government itself. Judge Cooley [1] in speaking of the mode of construing statutes, says:

"The rule applicable here is, that *effect is to be given, if possible, to the whole instrument* and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative rather than one which may make some words idle and nugatory. This rule is applicable with special force to written Constitutions. . . . It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written Constitution nugatory because of ambiguity. One part may qualify

[1] "Constitutional Limitations," 7th ed. p. 91.

another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; *but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together.*" [1]

§ 331. An examination of the first ten Amendments to the Constitution will add additional strength to the views advanced on this subject which bear upon the position taken by Senator Root. These Amendments are commonly spoken of as the Bill of Rights of the Constitution. They represent also the redeemed promises of the makers of the Constitution to the people of the country, and it may be well doubted whether the Constitution would ever have been finally adopted without the promise of a speedy response to the demands of the people as represented in these Amendments. An examination of them shows that they represent the great fundamental principles of civil, political, and religious liberty that the people were unwilling should be left to change or impairment by the Federal Government, and the Courts have held from the earliest decisions down, that these Amendments embodied rights and principles which pertain to the people of the States, and that they were not intended to circumscribe or limit the powers of the States in reference thereto, but were adopted as a restraining force upon the powers of the Federal Government as to their use or abuse.

Justice Harlan in his dissenting opinion in Twining *v.* New Jersey,[2] said of these Amendments:

"The original Amendments of the Constitution had their origin, as all know, in the belief of many patriotic statesmen in the States then composing the Union, that under the Constitution, as originally submitted to the people for adoption or rejection, the National Government might disregard the fundamental principles of Anglo-American liberty for the maintenance of which our fathers took up arms against the mother country."

[1] Author's italics.

[2] 211 U. S. 118, 53 L. ed. 97, 29 S. C. 14.

Chief Justice Waite has well stated the principle in Spies *v.* Illinois,[1] when he said:

"That the first ten Articles of Amendment were not intended to limit the powers of the State governments in respect to their own people, but to operate on the National Government alone, was decided more than half a century ago, and that decision has been steadily adhered to since."

He also quotes Barron *v.* Baltimore,[2] and a large number of other cases.

§ 332. In delivering the opinion of the court in Twining *v.* New Jersey,[3] discussing the Slaughter House Cases and the effect of that decision on the Fourteenth Amendment, Justice Moody said:

"There can be no doubt, so far as the decision in the *Slaughter-House Cases* has determined the question, that the civil rights some times described as fundamental and inalienable, which before the war Amendments were enjoyed by State citizenship and protected by State government, were left untouched by this clause of the Fourteenth Amendment. . . . This part at least of the *Slaughter-House Cases* has been steadily adhered to by this court, so that it was said of it, in a case where the same clause of the Amendment was under consideration (Maxwell *v.* Dow, 176 U. S. 581, 591), 'The opinion upon the matters actually involved and maintained by the judgment in the case has never been doubted or overruled by any judgment of this court.' The distinction between National and State citizenship and their respective privileges there drawn has come to be firmly established. And so it was held that the right of peaceable assembly for a lawful purpose (it not appearing that the purpose had any reference to

[1] 123 U. S. 166, 31 L. ed. 80, 8 S. C. 21.

[2] 7 Pet. 247, 8 L. ed. 672.

[3] 211 U. S. 96, 53 L. ed. 97, 29 S. C. 14. See Corfield *v.* Coryell, 4 Washington C. C. 371. See also Turner *v.* Williams, 194 U. S. 279, 48 L. ed. 979, 24 S. C. 719; Jack *v.* Kansas, 199 U. S. 372, 50 L. ed. 234, 16 S. C.; Gompers *v.* Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 31 S. C. 492; Standard Oil Co. *v.* Missouri, 224 U. S. 270, 56 L. ed. 760, 32 S. C. 406; Graham *v.* W. Va. 224 U. S. 616, 56 L. ed. 917, 32 S. C. 583.

the National Government) was not a right secured by the Constitution of the United States, although it was said that the right existed before the adoption of the Constitution of the United States, and that 'it is and always has been one of the attributes of citizenship under a free government.' United States *v.* Cruikshank, 92 U. S. 542, 551. And see Hodges *v.* U. S. 203 U. S. 1. In each case the *Slaughter-House Cases* were cited by the court, and in the latter case the rights described by Mr. Justice Washington, were again treated as rights of State citizenship under State protection."

§ 333. The Supreme Court has universally recognized the fact that the Amendments from two to eight inclusive, contain rights, which in their nature belong to the people, under the control of the States, and that the adoption of these Amendments was not for the purpose of curtailing the power of the States, in their application of the principles contained in them, but it was for the purpose of rendering certain that in the government, which was then being constructed, these rights should remain unimpaired in the States, and free from the touch of Federal power in their administration. "The right of the people to keep and bear arms shall not be infringed" (Amendment II) may be changed, or modified, by the States, but the Federal Government is forbidden to do either. "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner," etc. (Amendment III.) The State may quarter soldiers in time of peace in the houses of its citizens without their consent, *if allowed by its own constitution*, but the Federal Government cannot. "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated." (Amendment IV.) The State may exercise the right of search, the State may invade the home, seize the papers and effects of its citizens, *if allowed by its own constitution to do so*, but the Federal Government must not. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." (Amendment V.) The State may do this, if agreeable to its own consti-

tution, but the Federal Government cannot.[1] And so through all the other Amendments referred to, it is seen that while the rights secured in them, being rights which belong to the States, may be secured, changed, or altered as the States may determine under their own constitutions, they are free from the touch of the Federal Government except so far as State action may be restrained by the Fourteenth Amendment. And to make it doubly sure that the rights secured in the Amendments were not all that were intended to be secured from the interference of the Federal Government, the Ninth Amendment was adopted. "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," and then follows the Tenth Amendment.

[1] Eilenbecker *v.* Plymouth County, 134 U. S. 31, 33 L. ed. 801, 10 S. C. 424.

Chief Justice Chase, in the case of Twitchell *v.* Commonwealth, 7 Wall. 325, has well stated the relations of the 5th and 6th Amendments to the States. "We are by no means prepared to say, that if it were an open question whether the 5th and 6th Amendments of the Constitution apply to the State governments, it would not be our duty to allow the writ applied for and hear argument on the question of repugnancy. We think, indeed, that it would. But the scope and application of these amendments are no longer subjects of discussion here.

"In the case of Barron *v.* The City of Baltimore [7 Peters, 243], the whole question was fully considered upon a writ of error to the Court of Appeals of the State of Maryland. The error alleged was, that the State court sustained the action of the defendant under an act of the State legislature, whereby the property of the plaintiff was taken for public use in violation of the 5th Amendment. The court held that its appellate jurisdiction did not extend to the case presented by the writ of error; and Chief Justice Marshall, declaring the unanimous judgment of the court, said:

"'The question presented is, we think, of great importance, but not of much difficulty. . . . The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to

§ 334. Now, when Chief Justices Marshall, Chase, and Waite declare that these Amendments were intended only to operate on the National Government, in restraining it from invading these sacred rights and privileges therein secured, by what process of reasoning can it be held that the treaty power, one of the branches of the Federal Government, may be so used as to embrace and include in its exercise those rights and privileges? Is not the treaty power, when exercised, a part of the National Government? If the National Government is denied the right, how can the treaty power, which is a part of it, claim to be exempt from that prohibition? And how could such a claim consist with Judge Story's statement that, "A power given by the Constitution, cannot be construed to authorize a destruction of other powers given in the same instrument"? If the treaty power may embrace the subject of these Amendments, which the Supreme Court has held were the subjects of State power, which the National Government cannot touch, may not such rights and privileges secured to the States be absolutely destroyed?

promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes.'

"And, in conclusion, after a thorough examination of the several amendments which had then (1833) been adopted, he observes:

"'These amendments contain no expression indicating an intention to apply them to State governments. This court cannot so apply them.'

"And this judgment has since been frequently reiterated, and always without dissent.

"That they 'were not designed as limits upon the State governments in reference to their own citizens,' but 'exclusively as restrictions upon Federal power,' was declared in Fox *v.* Ohio, 5 Howard, 434 to be 'the only rational and intelligible interpretation which these amendments can have.'"

Justice White, in the case of Talton *v.* Mayes, 163 U. S. 378, has reaffirmed the position of Chief Justice Chase in a well-considered opinion.

It would seem, therefore, that the reserved powers of the States, having never been given up to the Federal Government, are no more subject to that Government than they are to the government of Great Britain. While such of these rights as are secured against Federal interference by the amendments are doubly secured from Federal control, and these can never be reached by the treaty power until it has been judicially determined that that power is superior to the Constitution itself. Our conclusion, therefore, is that the treaty power, which has been granted to the Federal Government, carrying with it apparently all freedom from restraint in the choice of subjects for its exercise, is limited by clear implication and a reasonable construction of the Constitution, by the provisions of the above Amendments and of the Constitution, as well as by the reserved powers of the States. This is strikingly shown in the decision of Compagnie Française &c. *v.* Board of Health,[1] *supra*, where the precise question it seems was raised and the police power of the State was upheld.

§ 335. It has been accepted that the State as *parens patriae*, owes a duty to the children of the State to provide for their proper education. The duty of the State to educate its children has in the past been controverted, but is to-day an accepted principle of governmental policy. In our dual system of Government it is also accepted that this duty rests with the State and not with the Federal Government. Ethnical and climatic conditions in a country as large as ours, combine in sanctioning the placing of this right in the State and not in the Federal Government, for all questions involving the proper curriculum, text-books to be used, length of session, compulsory or voluntary attendance, regulations affecting the health and morality of the children, can best be determined by the local authorities. In speaking of the effect of the Fourteenth Amendment on the States, Chief Justice Fuller says:[2]

[1] 186 U. S. 498, 46 L. ed. 1260, 23 S. C. 856.

[2] Giozza *v.* Tierman, 148 U. S. 662, 37 L. ed. 599, 13 S. C. 721.

"The Amendment does not take from the States those powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens, and to promote their health, morals, *education* and good order. Barbier *v.* Connolly, 113 U. S. 27, 31; *In re* Kemmler, 136 U. S. 436."

§ 336. A long line of cases coming from many States, has sanctioned the power in the States to separate the white and negro children in the schools, and though the Constitution provides (Article IV, § 2) that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," the negro child, a citizen of the State of Washington, residing in California, if debarred by the law of that State, even though, under the law of the State of Washington, of which he is a citizen, he is permitted to attend the white schools, cannot attend the white schools of California. In the claim of the Japanese and Chinese to place their children in the white schools of California, they assert a right, therefore, which may be denied a citizen of the State of Washington, an American citizen. If California may deny such right to an American citizen, why may not she deny the same to a foreigner? Can the treaty power give rights to a foreigner that are denied our own citizens? Or can it give greater rights to foreigners than may be accorded to American citizens? The Supreme Court has decided that when a State has declared its policy as touching any question that affects the health and morals of its people, that Congress, under the commerce power, cannot be used to force upon that State what its people reprobate, and have excluded from its borders. Shall the treaty power, then, be permitted to force upon a State a policy foreign to that which has been adopted by the State and which Congress could not enforce?

§ 337. The Treaty between the United States and Japan of 1894 provides:

"The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territory of the other contracting party, and shall enjoy full and perfect protection for their persons and property. . . .

"In whatever relates to rights of *residence and travel;*[1] to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects of the most favored nation."

Section 1662 of the school law of California provides:

"Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district, and the board of school trustees, or city board of education, have power to admit adults and children not residing in the district, whenever good reason exist therefor. Trustees shall have the power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Mongolian or Chinese descent. When such separate schools are established, Indian, Chinese, or Mongolian children must not be admitted into any other school."

The Board of Education of the City of San Francisco adopted the following resolution in 1906.

"RESOLVED: That in accordance with Article X, section 1662, of the school law of California, principals are hereby directed to send all Chinese, Japanese or Korean children to the Oriental Public School situated on the south side of Clay Street, between Powell and Mason Streets, on and after Monday, October 15, 1906."

§ 338. The expediency or policy of the legislation of California on this subject will not be discussed in these pages. We are only concerned with the question of power. Senator

[1] Author's italics.

Root in his discussion of this question asks, "Was the right to attend the primary schools a right, liberty, or privilege of residence?" And further he sums up his conclusion as follows:

"There was a very general misapprehension of what this treaty really undertook to do. It was assumed that in making and asserting the validity of the treaty of 1894 the United States was asserting the right to compel the State of California to admit Japanese children to its schools. No such question was involved. That treaty did not, by any possible construction, assert the authority of the United States to compel any State to maintain public schools, or to extend the privileges of its public schools to Japanese children or to the children of any alien residents. The treaty did assert the right of the United States, by treaty, to assure to the citizens of a foreign nation residing in American territory equality of treatment with the citizens of other foreign nations, so that if any State chooses to extend privileges to alien residents as well as to citizen residents, the State will be forbidden by the obligation of the treaty to discriminate against the resident citizens of the particular country with which the treaty is made and will be forbidden to deny to them the privileges which it grants to the citizens of other foreign countries. The effect of such a treaty, in respect of education, is not positive and compulsory; it is negative and prohibitory. It is not a requirement that the State shall furnish education; it is a prohibition against discrimination when the State does choose to furnish education. It leaves every State free to have public schools, or not, as it chooses, but it says to every State: 'If you provide a system of education which includes alien children, you must not exclude these particular alien children.'"

§ 339. It is seen in the above that he disavows the fact that the effect of the treaty is "to compel the State of California to admit Japanese children to its schools," but at the same time the claim is made with force that if the children of other nationalities are permitted to enter the schools, that the treaty *has the power to compel California* to admit those of Japan, because the treaty gives the Japanese the privileges, liberties, and rights of residence of the most favored nation. He admits in the above statement that although rights and privileges of

residence are accorded the Japanese in the treaty, that still the treaty cannot force Japanese children into the schools of California against her will. This is perfectly clear from his statement: "That treaty did not, by any possible construction, assert the authority of the United States to compel any State to . . . extend the privileges of the public schools to Japanese children, or to the children of any alien residents." We agree with the learned Senator entirely on this proposition, because the question of the education of the children of a State being one of the reserved rights of the State, no treaty would be valid which attempted to control that subject. Then, on what ground does he claim their right of admission to the schools? Because said treaty in the matter of rights and privileges of residence grants to the Japanese all the rights of the most favored nation, and the children of other nationalities are allowed to enter said schools. But if, as Senator Root admits, the Japanese cannot enter the schools of California because the treaty cannot force California to admit them against her will, neither can Germans or English enter the schools of California by reason of treaties containing the same rights and privileges of residence; and if, therefore, the children of Germans and English attend the schools, it is not by reason of treaties; and if they be not admitted to the schools by reason of rights and privileges of residence under treaties the most favored nation clause has no application.

§ 340. The error in the Japanese position is the claim that their exclusion from the white schools of California is the denial of a privilege or right which is accorded to *all* native citizens of California or those who enjoy the most favored nation clause in treaties. This is erroneous, for it will not be denied that under the decisions of the Courts, the native Indian or the native negro children may be denied entrance to the white schools of California. If, then, the native citizens of California may be deprived of such right, and the treaty accords the Japanese the rights and privileges of native citizens, it would seem there is no ground for complaint, unless it be argued that

the treaty power may grant privileges to the foreigner that may be denied the American citizen.

That the children of other nationalities, French, German, and English, were permitted to enter the white schools of California, does not show by any means that such permission was granted them because of treaties between those countries and the United States, granting "the privileges, liberties, and rights of residence" in America. No such claim can properly be made. Such right has been accorded by the State of California, and other States, in the spirit of comity, as well as with the desire on the part of the States to attract strangers to reside in their midst in the hope of their becoming permanent citizens.

§ 341. Senator Root's argument is that though treaties with England, France, and Germany contain the same provisions, as to rights of residence, as the treaty between the United States and Japan, that California could rightfully exclude the French, German, English, and Japanese children from the schools, and Japan would not complain, but that if for any reason California was willing to admit the former it could not deny admission to the latter. This view would seem to change the position of the Japanese from one of protest against the denial of school privileges to their own children to a protest against the admission of British, French, and German children to the schools. It is not denied that the State has the power to determine in the interest of the morals and health of the children of the State all questions affecting school age, discipline, separation of sexes, as well as hygienic conditions imposed upon the children. Where does this power come from? It is one of the reserved rights of the State, which has never been questioned, and if under this power the State may exclude children affected with disease, or of vicious habits, or if in its wisdom it finds that the bringing together of two such diverse races as the white and African races, would operate to the benefit of neither, but to the injury of both, the State may prevent it, and it has been decided there is no power in the Federal Government to prevent it. Is the right to control education

less essential to the proper development of a State than the right of quarantine asserted by a State, which may prevent the commerce of the world from entering a port of a State of the Union in vessels sailing under the protection of a treaty with the United States, giving it the right to enter any port of the United States? If the State, as decided in Compagnie Française *v.* Board of Health, *supra*, may for its own protection and that of its people, bar the commerce of the world from its ports, may it not, looking to the welfare of its own children, bar from contact with them in the schools, those whose social, moral, or racial habits may tend to break down, instead of build up American character? Is the right to exclude physical disease more sacred or stronger than that to prevent a contact that may weaken American character?

§ 342. Senator Root felicitates the country that this question, which was presented to the courts of the United States, and also to the State courts of California, has been happily disposed of without proceeding to judgment. It may be doubted whether such has been a happy disposition of the question. It is common with us to boast that the distinguishing characteristic of our diplomacy has been its frankness. If this be true, may it not be more in consonance with that spirit that the nations of the world, whose intercourse we enjoy and whose commerce we seek, shall understand in no uncertain way that the constitutional Government under which we live will be maintained inviolate, no less in the interest of American citizens in the preservation of their rights guaranteed to them in the Constitution of the country, than in the interest of those whose pleasure or profit may bring them temporarily to our shores? The right of controlling absolutely the educational systems of the States is an essential right which has never been parted with by the States and cannot be controlled by the Federal Government or any of its departments, and this fact is well known by the statesmen of foreign countries, whose duties call them to the delicate task of framing and negotiating treaties with the United States.

§ 343. Senator Root's argument may be summarized as follows: First: Rights and privileges of residence include rights of education; Second: Since the Japanese were accorded all the rights of the most favored nation, *and the children of the citizens of some foreign nations attended the schools of California*, therefore, the Japanese could not be excluded from them. No treaty is quoted by the distinguished author between the United States and any foreign country, under which rights and privileges *of education* are accorded foreigners, but it seems to be assumed that because the children of citizens of some of the nations of the world, resident in California, attended the schools of California, that they have done so because of rights and privileges of education accorded them under treaties, or because the "rights and privileges of residence" embrace those of education. This, however, is quite a violent presumption and not justified by the history of the usual diplomatic relations between the nations of the world. The schools of California as well as those of the other States of the Federal Union, without law, and without the force of treaties, are open usually to the children of foreign residents, just as the latch string of American homes is usually on the outside for the cordial reception of visitors. The privilege exists by right of courtesy, and not usually by right of law or treaty. In fact, the privilege of education in the schools of the States is not a "right or privilege of residence" that may be demanded by the foreigner, and to claim such a privilege it must be specifically stated in the treaty.

§ 344. Some writers have sought to show that the right of residence includes the right of education because § 1662 of the Political Code of California provides "Every school, unless otherwise provided, must be open for admission of all children between the age of six to twenty-one years residing in the district;" it is claimed that this section conferred the rights of education because the schools were to be open to *all children*. It is apparent that no such conclusion can be drawn because the words "unless otherwise provided" give to the State the

right of limiting the schools to such children as in their judgment should be admitted, but if the above section does confer the right of education, it only serves to demonstrate that such right comes *from the State*, and not from the treaty. The history of all the most enlightened and progressive nations of the world shows that the rights of aliens are curtailed, and in rare cases are such rights accorded them as those enjoyed by the native citizens of any country; and the challenge may well be made to show a country in which under the mere "right and privilege of residence" the right of education is admitted as one of such rights. If we are to be controlled and governed by the common practice of modern States, such right cannot be claimed. The military and naval schools of the countries of the world are certainly not open to foreigners, though on rare occasions the privileges of such institutions are accorded to foreigners. The great universities of Europe are in a sense open to foreigners, but they are open, not as a matter of right, or as a matter of course, but they are open to foreigners by the grace of their governments.

§ 345. The mode of granting this right differs in different countries. Of course it may be by treaty stipulation, where such provisions would be binding on the countries making them under their peculiar constitutions. In the countries of Europe this right is accorded foreigners sometimes by legislative act, sometimes by royal decree, sometimes by ministerial action, and sometimes by the authorization of the minister of education under prescribed forms and conditions, but in some form or other this right by the countries of Europe is *accorded* or *granted* foreigners, which tends strongly to show that the mere "right and privilege of residence" does not carry with it the right and privilege of education. That the educational systems of the States are free from the control of the Federal Government and of the treaty-making power as a part of that Government, is singularly demonstrated in the treaty between the United States and China [1] of 1868. In Article VII of this

[1] Senate Documents, Vol. XXXVII, 155.

treaty it is provided "Citizens of the United States shall enjoy all the privileges of the public educational institutions under the control of the government of China, and reciprocally Chinese subjects shall enjoy all the privileges of the public educational institutions under the control of the United States which are enjoyed in the respective countries by the citizens or subjects of the most favored nation." The language herein used is carefully guarded. It does not venture to grant to the Chinese rights to enter the schools of the States of the Union, nor does it grant to Americans the right to enter any educational institution in China except those under the control of that government. The specification of "public educational institutions under the control of the Government of the United States" is a clear limitation of the right, and is in effect a denial of the right to enter the schools of the States, because of its limitation to the schools under the control of the United States. Indeed, the failure to include the schools of the States is a clear implication of a lack of power to do so. *Expressio unius, exclusio alterius.* But this view is made conclusive by Article VI of the same treaty, which declares:

"Chinese subjects visiting or residing in the United States, shall enjoy the same privileges or immunities and exemptions in respect of travel or residence, as there may be enjoyed by the citizens or subjects of the most favored nation."

By placing Article VI in a treaty which contained Article VII, it would seem to be conclusive that the rights and privileges of residence do not carry with them the right of education, for if so, the provisions in reference to education would not have been inserted in Article VII, for Article VI would have been sufficient to grant it.

§ 346. If the doctrine that rights of residence give the right of education be admitted, it will be of interest to trace the character of rights which residence may give. Is not the term "rights of residence" a misnomer? Is it not more properly the "privilege of residence"? Why should a resident, not a

citizen with the duties and obligations which pertain to citizenship, be able to *demand* rights? True, he may have privileges by international convention or the comity of nations, but why rights? Strip a man of his citizenship and he becomes a suppliant at the feet of government; clothe him with citizenship and he must be heard, for he has "rights" which he may dare maintain. The so-called "right of residence" naturally carries with it, if protected by treaty, the right of protection to property and person, to engage in business, to contract and be contracted with, to barter and sell, etc., but even then these, as other privileges, may be controlled by the local laws of taxation, hygiene, etc.; and even the privilege of entering into contracts may be curtailed, for clearly the rights of residence under a treaty, which we may suppose carries the right to contract and be contracted with, would not be available to a resident of a State against its laws regulating the right of contract. The citizen of Hayti, a resident of Virginia, could not enter into a contract of marriage with a white woman in Virginia, though under a treaty between the United States and Hayti he is permitted to enjoy all the rights of residence.

§ 347. If, however, we are mistaken in the above views in our construction of the language of the treaty between Japan and the United States as to the rights of residence, and it should be accepted that these words in the treaty give to the Japanese residents in California the right to place their children in the public schools of that State (which right has never been denied the Japanese in California), still it may be contended that California against such treaty right could not segregate the children of Japanese residents and place them in one school, or deny them the right to enter the white schools of the State; for it must be observed that the record in the controversy shows no law of California or any act of any of its officers which excludes the Japanese from the privileges of education in that State; but California, through her Legislature, exercising a constitutional right, has provided separate schools for the

Japanese children. Has California the right to do this? Under the treaty, which gives all rights and privileges of the most favored nation, can the Japanese be excluded from schools which other foreigners are permitted to enter? To put the position of the Japanese in the strongest light, it may be admitted, *arguendo*, that the right of residence carries the right of education, and it may be admitted further, for the sake of the argument, and only on that account, that the treaty power may grant to citizens of a foreign country the right of education in the schools of a State of this Union; all this being granted, it still remains that the State of California in the administration of its school system in all of its details has a right to regulate it in the interest of the Japanese, as well as of the Americans, by establishing separate schools for each. It will not be denied that the supreme police authority of the State, looking to the welfare of its children may authorize all boys to be taught in one school and all girls in another. It may provide that children under a certain age must be located in one school, while others over such age must be located in another. Indeed, all that pertains to the system must be left to the State whose power in the question has never been surrendered to the Federal Government.

§ 348. The courts have settled this question of the separation of the races, and settled it finally, by decisions of State courts, as well as the Supreme Court of the United States. One of the most powerful decisions which has been rendered, was by the State Court of Massachusetts in 1849.[1] One sentence from the opinion of the Court will be quoted:

[1] Roberts *v.* City of Boston, 5 Cush. 198. For other cases see also Ward *v.* Flood, 48 Cal. 36; Wysinger *v.* Crookshank, 82 Cal. 588, 23 Pac. 54; Maddox *v.* Neal, 45 Ark. 121; Hooker *v.* Town of Greenville, 130 N. C. 472, 42 S. E. 141; McMillan *v.* School Committee, 107 N. C. 609, 12 S. E. 330; Lehew *v.* Brummell, 103 Mo. 551, 15 S. W. 765; Martin *v.* Board of Education, 42 W. Va. 514, 26 S. E. 348; Nevada *v.* Duffy, 7 Nev. 342; People *v.* Easton, 13 Abb. Pr. (N. Y.) 159; Dallas *v.* Fosdick, 40 How. Pr. (N. Y.) 249; People *v.* Gallagher, 93 N. Y. 438; Cisco *v.* The Board of Education, 161 N. Y. 598, 56 N. E. 81; State *v.* McCann, 21 Ohio 198; Cory *v.* Carter, 48 Ind. 327.

"It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. . . . This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools may well be doubted."

New York, Indiana, California, Missouri, West Virginia, Nevada, Ohio, and others, have followed this decision. The cases are referred to in the note.

The Supreme Court of the United States has finally settled the question of the right of the State Legislatures to provide for the separation of the races.[1] In the case of Plessy *v.* Ferguson, Justice Brown, in delivering the opinion of the court, referring to the Fourteenth Amendment, said, p. 544:

"The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the State legislatures, in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States, where the political rights of the colored race have been longest and most earnestly enforced."

And further he adds at page 551:

"The argument assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured

[1] Hall *v.* DeCuir, 95 U. S. 485, 24 L. ed. 547; Plessy *v.* Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 S. C. 986; The Berea College Case, 211 U. S. 45, 53 L. ed. 81, 29 S. C. 33.

to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation."

§ 349. From these considerations and the authorities cited, we conclude that the "rights and privileges of residence" accorded the Japanese in the treaty do not include rights of education, and that if those words do include education, California still has the right to adopt separate schools for separate races resident in her territory. Nor can the most favored nation clause in the interest of the Japanese help their cause, for that clause, as shown in the treaty, only refers to rights and privileges of "residence and travel," and if rights of residence do not include rights of education the clause, of course, can have no application.

§ 350. This school question in California in 1906–1907 was the subject of general interest, and aroused much popular feeling in the country. President Roosevelt sent a special message to Congress December 8, 1906, calling the attention of the Senate and the House to the question.[1] Before that date he had sent Secretary Metcalf to California to investigate conditions, who, on the 26th of November, 1906, submitted his report to the President. This report is included in Senate Document 147. On the 17th of January, 1907, Attorney General Bonaparte filed a Bill in behalf of the United States in the Circuit Court of the United States for the Northern District of California against the Board of Education of the city of San Francisco, the Superintendent of Schools of said city, and the principals of the several schools of that city, asking for an injunction against the defendants to compel them to admit

[1] 59th Congress, 2nd Session, Document No. 147.

Japanese children into the schools. In the third prayer of the Bill it was asked;

"That the said defendants and each and all of them and each and all their agents, servants and employees be restrained and enjoined from excluding the Japanese pupils hereinabove named and described from attending those public schools of the City and County of San Francisco that they attended before the passage of the resolution of the Board of Education as hereinbefore described, and that they each and all be enjoined and restrained from carrying into effect said resolution of the Board of Education in this bill described or any similar resolution, or in discriminating in the manner stated in this bill or in any manner whatsoever against said Japanese children or other like children of school age residing in the State on the ground or because they are of Japanese descent, and that also during the pendency of this action and until the final entry of a decree in this case that said defendants and each of them be so enjoined and restrained."

The case did not proceed to a final hearing by reason of a settlement of the question with the Board of Education.

§ 351. In the Spring of 1913 the smouldering fires of the conflict broke out afresh because of certain proposed legislation by the State of California affecting the ownership of land by aliens. A protest against this legislation was lodged with Secretary of State Bryan by Ambassador Chinda, on the 9th of May, 1913. So acute was the feeling that Secretary Bryan, at the instance of President Wilson, went to California to confer with the Legislature in reference to the proposed legislation. The California bill became a law on the 19th of May, 1913. The sections of the law that are chiefly involved in this controversy are as follows:

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this State, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this State.

"Section 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real

property, or any interest therein, in this State, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise, and may in addition thereto lease lands in this state for agricultural purposes for a term not exceeding three years.

"Section 3. Any company, association or corporation organized under the laws of this or any other State or nation, of which a majority of the members are aliens other than those specified in section one of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy and convey real property, or any interest therein, in this State, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise, and may in addition thereto lease lands in this state for agricultural purposes for a term not exceeding three years.

"Section 4. Whenever it appears to the court in any probate proceeding that by reason of the provisions of this act any heir or devisee cannot take real property in this state which, but for said provisions, said heir or devisee would take as such, the court, instead of ordering a distribution of such real property to such heir or devisee, shall order a sale of said real property to be made in the manner provided by law for probate sales of real property, and the proceeds of such sale shall be distributed to such heir or devisee in lieu of such real property. . . .

"Section 7. Nothing in this act shall be construed as a limitation upon the power of the state to enact laws with respect to the acquisition, holding or disposal by aliens of real property in this State."

The protest filed by the Japanese Ambassador with the Secretary of State on the 9th of May, 1913, states the ground of objection to the proposed legislation as follows:

"This protest is based upon the proposition that the measure is unjust and inequitable, and that it is not only prejudicial to the existing rights of Japanese subjects, but is inconsistent with the provisions of the treaty actually in force between

Japan and the United States, and is also opposed to the spirit and fundamental principles of amity and good understanding upon which the conventional relations of the two countries depend."

§ 352. Secretary Bryan, on May 19th, 1913, replied to the Japanese Ambassador and said:

"The President and I very earnestly attempted to induce the legislative authorities of California to reconsider or to modify their plans in the matter, urging that the State should not act as a separate unit in this case, but, rather, in coöperation with the Federal Government. Under the Constitutional arrangements of the United States we could do no more than that.

"At the same time, we feel that the Imperial Government has been misled in its interpretation of the spirit and object of the legislation in question. It is not political. It is not part of any general national policy which would indicate unfriendliness or any purpose inconsistent with the best and most cordial understanding between the two nations. It is wholly economic. It is based upon the particular economic conditions existing in California as interpreted by her own people, who wish to avoid certain conditions of competition in their agricultural activities."

§ 353. To this the Japanese Ambassador replied on June 4th, 1913, renewing the protest of the Japanese Government against such legislation and used this language:

"The question at issue is a question between the Government of Japan and that of the United States, as to the true intent and meaning of their existing treaty, and the extent to which the rules and principles of fair and equal treatment may, in comity and good conscience, be invoked in the present case. The wrong complained of is directed against my countrymen as a nation. It was committed by the authorities of a single State of the Union, contrary to the expressed wishes and advice of the Federal Government. It is, nevertheless, to that Government alone, that Japan must look to have the wrong undone, since it is with that Government alone that the Imperial Government hold diplomatic intercourse . . . and I beg to assure you that the Imperial Government have

too high an opinion of the sense of right and justice of the American Government to believe for a moment that that Government will permit a State to set aside the stipulations of the treaty or to impair the obligations of reciprocal friendly intercourse and good neighborhood."

§ 354. To this second protest by the Japanese Government Secretary Bryan, on the 16th of July, 1913, replied in full, and on the question of the right or propriety of local legislation in the determination of land tenure he said:

"The treaty to which your excellency's note refers is that which was signed at Washington on February 21, 1911, by Mr. Knox, Secretary of State, representing the United States and by Baron Uchida, your immediate predecessor, representing the Imperial Government.

"This treaty was based upon a draft presented by the Imperial Government. In Article I of this draft there is found the following clause:

"'3. They (the citizens or subjects of the contracting parties) shall be permitted to own or hire and occupy the houses, manufactories, warehouses, shops and premises which may be necessary for them, and to lease land for residential, commercial, industrial, manufacturing and other lawful purposes.'

"It will be observed that in this clause, which was intended to deal with the subject of real property, there is no reference to the ownership of land. The reason of this omission is understood to be that the Imperial Government desired to avoid treaty engagements concerning the ownership of land by foreigners and to regulate the matter wholly by domestic legislation.

"In the treaty as signed the rights of the citizens and subjects of the contracting parties with reference to real property were specifically dealt with (Art. 1) in the stipulation that they should have liberty 'to own or lease and occupy houses, manufactories, warehouses and shops,' and 'to lease land for residential and commercial purposes.' It thus appears that the reciprocal right to lease land was confined to 'residential and commercial purposes,' and that the phrase 'industrial' and 'other lawful purposes,' which would have included the leasing of agricultural lands, were omitted.

"The question of the ownership of land was, in pursuance of the desire of the Japanese Government, dealt with by an exchange of notes in which it was acknowledged and agreed

that this question should be regulated in each country by the local law, and that the law applicable in the United States in this regard was that of the respective States. This clearly appears from the note of Baron Uchida to Mr. Knox of February 21, 1911, in which, in reply to an inquiry of the latter on the subject, Baron Uchida said:

"'In return for the rights of land ownership which are granted Japanese by the laws of the various States of the United States (of which, I may observe, there are now about 30) the Imperial Government will by liberal interpretation of the law be prepared to grant land ownership to *American citizens from all the States, reserving for the future, however, the right of maintaining the condition of reciprocity with respect to the separate States.*'

"In quoting the foregoing passage, I have italicized the last clause for the purpose of calling special attention to the fact that the contracting parties distinctly understood that, in conformity with the express declaration of the Imperial Japanese ambassador, the right was reserved to maintain as to land ownership, the condition of reciprocity in the sense that citizens of the United States, coming from States in which Japanese might not be permitted to own land, were to be excluded from the reciprocal privilege in Japan."

This passage clearly shows an intent on the part of the Japanese Government while dealing through the channels of diplomacy with the United States alone, to so shape their own legislation as to affect the individual States of the United States.

The whole correspondence may be found in a publication of the State Department entitled "DEPARTMENT OF STATE. American-Japanese Discussions Relating to Land Tenure Law of California."

§ 355. To judge of the correctness of the protests of the Japanese Government against the California legislation and to determine whether such legislation was in conflict with the treaty between the United States and Japan, it is proper to submit parts of the treaty of 1911.[1]

[1] Treaties, Conventions, International Acts, Protocols & Agreements between the United States and other Powers, 1910–1913. Charles, vol. III, p. 77.

"Article I. The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses, and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the High Contracting Parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects on their submitting themselves to the conditions imposed upon the native citizens or subjects.

"They shall, however, be exempt in the territories of the other from compulsory military service, either on land or sea, in the regular forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions.

"Article II. The dwellings, warehouses, manufactories, and shops of the citizens or subjects of each of the High Contracting Parties in the territories of the other, and all premises appertaining thereto used for purposes of residence or commerce, shall be respected. It shall not be allowable to proceed to make a domiciliary visit to, or a search of, any such buildings, and premises, or to examine or inspect books, papers or accounts, except under the conditions and with the forms prescribed by the laws, ordinances and regulations for nationals."

In his note of July 16th, 1913, to the Japanese Ambassador, Secretary Bryan conclusively states the case in favor of California as follows:

"From what has been pointed out it appears to result, first, that the California statute, in extending to aliens not eligible to citizenship of the United States the right to lease lands in that State for agricultural purposes for a term not exceeding three years, *may be held to go beyond the measure of privilege*

established in the treaty, which does not grant the right to lease agricultural lands at all,[1] and secondly, that, so far as the statute may abridge the right of such aliens to own lands within the State, the right has been reserved by the Imperial Government to act upon the principle of exact reciprocity with respect to citizens of the individual State. In a word, the measure of privilege and the measure of satisfaction for its denial were perfectly understood and accepted."

In this correspondence it is seen that Secretary Bryan has dealt with characteristic frankness with the Japanese Ambassador. After stating he had gone to California at the request of President Wilson to urge upon the legislature "to reconsider or modify their plans," he adds: "Under the constitutional arrangements of the United States we could do no more than that." Why could he do no more? Because the tenure of real estate, the conditions and terms of its holding, its devolution and transmission, are among the reserved rights of the States and beyond the reach of the Federal Government. If the treaty power could control it, Secretary Bryan would not have declared that the President and himself had done all they could do; and so we are justified in adding the names of President Wilson and Secretary Bryan to the list of those who sustain the legal position taken by California and who sustain the position that the States are not to be considered as nonexisting when treaties are being formulated, ratified, or construed.

§ 356. The claim of the Japanese to enter the schools of California in contravention of her laws, as well as their claim to own and possess land in that State, disregarding the laws of the State, has brought to the attention of the country as never before the far-reaching effect of the treaty power as claimed by a large class of distinguished public men in the United States. These questions have been temporarily settled, but not finally, and in some other form will present themselves to the judgment of the people of the United States. Their proper solution depends not upon popular prejudice or racial feeling, but upon

[1] Author's italics.

a reasonable and just construction of the Constitution of our country.

§ 357. Among those who have proclaimed the largest scope for the treaty power no one perhaps ranks higher in his clear and lucid style than Pomeroy, who, in 1868, writing on the subject, said:[1]

"In conclusion, I shall add a few remarks upon the scope and extent of this executive function of regulating foreign relations, and its influence and effect upon the general powers of the national government. *There is here, as I believe, a mine of power which has been almost unworked, a mine rich in beneficent and most efficacious results.*[2] The President may, and must, manage the foreign relations; he may, in the manner prescribed, enter into treaties. To these executive attributes must be added the legislative authority to pass all laws which may be necessary and proper to aid the President in exercising these functions. From this combination there result particular powers in the national government commensurate with the needs of every possible related occasion."

But this statement, which might be construed too broadly, has been limited by the author in a previous statement as follows:[3]

"But I think it is equally certain that a treaty would be a mere nullity which should attempt to deprive Congress, or the Judiciary, or the President, *of any general powers which are granted to them by the Constitution.*[2] The President cannot, by a treaty, change the form of government or abridge the general functions created by the organic law."

And herein he adopts the views of many, or more properly speaking, many writers of the present day have adopted his view, that the treaty power cannot deprive Congress, the Judiciary, or the President of their powers under the Constitution. To do so would give to this power the right to destroy powers and functions of equal dignity and of equal necessity, secured with equal sanctity in the Constitution and placed there as

[1] Pomeroy's "Constitutional Law," p. 569.
[2] Author's italics.
[3] Pomeroy's "Constitutional Law," p. 567.

necessary branches in a complete form of government. In the proper adjustment of the powers and functions of government, having due regard to the necessity of each, and with due recognition of the importance of each, it would be difficult to assign a valid reason why greater sanctity or greater security should be given one power, or one necessary branch of the government over another. If the treaty power may not invade the powers of Congress, or the Judiciary, or the President, would not the same prohibition apply to any other branch of the Federal Government as well as to those? Surely there is no peculiar sanctity that doth hedge Congress, the Judiciary, or the President, which should be denied to the States — as integral parts of the Federal Government. Must the treaty power timidly pause at the doors of Congress, at the threshold of the Hall of Justice, or at the doorstep of the White House and confess its impotency to deprive either one of them of one jot or one tittle of their Constitutional power, and yet with measured tread march ruthlessly over the States which constitute the basic foundation of the Government itself?

§ 358. The principle, proclaimed by Pomeroy, that the treaty power cannot "change the form of Government," when once admitted cannot be confined to the exemption of the powers of Congress or the Judiciary or the President from destruction, but it must apply with equal force to the States whose destruction would cause the down-fall of the Federal Government. For the treaty power by usurpation to cripple the powers of Congress, the Judiciary, or the President, would undoubtedly tend to weaken the Government, but for it by usurpation to absorb or destroy the essential powers of the States would work the destruction of the Government, *for the Federal Government rests upon the States as its secure and permanent foundation.*

On the other hand, if the treaty power may appropriate the essential powers of the States, on what principle can Congress or the Judiciary or the President escape its aggressions, for each is secured and protected in and by the same Constitution?

§ 359. The right to control the education of the children of the State and the right to determine how and by whom land may be held, are rights which rest with and have always remained with the States of the Union. For the treaty power to attempt to take them from the States would be as inexcusable as if it should attempt to rob Congress or the President of a power secured to them in the Constitution. Treaties are made by all countries to conform to their peculiar constitutions, and in insisting upon this principle for our country we are only asserting a right recognized by all civilized countries of the world.

§ 360. Mr. Willoughby, in his treatise on the Constitution, in discussing the varied opinions of the judges on the conflict between treaties and State laws, says:

"How, now, are we to harmonize these declarations that the reserved rights of the States may not be infringed by the treaty-making power with the fact that, in specific instances, the invasion of these rights has been upheld?

"Essentially speaking, the two positions, thus absolutely stated, cannot be harmonized. There is no principle that can be stated which will bring the *dicta* quoted into consonance with the decisions referred to. Either the *dicta* denying to the treaty-making power the right to infringe State rights are wrong, and must be abandoned, or the decisions upholding such infringement were improper, and will not be followed in future.

"The author is convinced that the *obiter* doctrine that the reserved rights of the States may never be infringed upon by the treaty-making power will sooner or later be frankly repudiated by the Supreme Court. In its place will be definitely stated the doctrine that in all that properly relates to matters of international rights and obligations, whether these rights and obligations rest upon the general principles of international law or have been conventionally created by specific treaties, the United States possesses all the powers of a constitutionally centralized sovereign State; and, therefore, that when the necessity from the international standpoint arises the treaty power may be exercised, even though thereby the rights ordinarily reserved to the States are invaded.

"The writer is led to the belief that this will be the position finally and affirmatively taken by our judiciary from a review of the manner in which, in the past, in every instance in which it has been necessary to endow the Federal Government with a power in order that its national supremacy, and its administrative efficiency, might be preserved, the Supreme Court of the United States has found the means to do so." [1]

We cannot concur in the view expressed in the last paragraph above quoted, and with great deference to the learned author, who has contributed a most valuable work to the interpretation of the Constitution of the United States, we regret the form in which he has expressed his belief of the final determination of this question by the Supreme Court, and his reasons for such belief. The words "the Supreme Court of the United States has found the means to do so," *supra*, are susceptible of an interpretation far from complimentary to that great tribunal, and which we cannot believe was in the mind of the writer at the time. The cynical critic of the Supreme Court may use these words as justifying the conclusion that without regard to the obligations which bind them, and which I believe have uniformly controlled them in the determination of constitutional questions, they have advanced the supremacy of the Federal Government beyond proper constitutional limits at the expense of the States and sought to build a "constitutionally centralized sovereign State" on the ruins of a Federal Republic; and while reaffirming my belief that the author could never have intended such a construction to be put upon his words, it is feared they may be open to such construction. There are few indeed who have made a study of the decisions of this Court from its foundation to the present who could with perfect candor admit his acquiescence in the constitutional soundness of all of its decisions, but it must be admitted at the same time, that whenever it has been confronted with questions involving the fundamental principles upon which the government is founded, it has rarely, if ever, failed to meet the issue

[1] Willoughby on the Constitution, 502.

and to reaffirm the doctrine that the Federal Government is one of enumerated powers, sovereign within the sphere of those powers, but powerless beyond them.

§ 361. To cite the expressions of judges on this subject would increase these pages beyond the limits of this work, but no stronger expression, we think, has ever been made than that by Justice Brewer, representing a united court, in the case of Kansas *v.* Colorado.[1]

No less powerful is the statement of Justice Harlan, in the case of House *v.* Mayse.[2]

It cannot be denied that it was fervently hoped and expected by many, after success had crowned the efforts of the Government in the preservation of the Union, and when the Civil War had resulted in the overthrow of a constitutional principle asserted by the Southern States, that the Supreme Court, which was in sympathy with the objects of the war, would *find occasion* to strengthen the views of those who believed in a "constitutionally centralized sovereign State," and disregard the limitations which the Constitution so fully recognized.

It must be written for the everlasting credit of this tribunal that when the passions of civil strife were still burning in the hearts of men, and the calm consideration of constitutional questions was impossible with the statesmen of that day, that this great Court, even in the days of "envy, hatred, malice and all uncharitableness" erected monuments to constitutional liberty along the highway of judicial progress that will endure as long as the love of liberty shall abide in the hearts of the people, or human freedom shall boast a worshipper at its sacred altar.

§ 362. *Ex parte* Milligan,[3] the Slaughter House Cases,[4] Texas *v.* White,[5] Hepburn *v.* Griswold,[6] and other cases that might be mentioned, now stand as irrefutable arguments against

[1] See *ante*, Chapter V, p. 99.

[2] 219 U. S. 281, 55 L. ed. 513, 31 S. C. 234. See *ante*, Chapter X, p. 312.

[3] 4 Wall. 109, 18 L. ed. 281.

[4] 16 Wall. 36, 21 L. ed. 394.

[5] 7 Wall. 700, 19 L. ed. 227.

[6] 8 Wall. 603, 19 L. ed. 513.

the insinuation that the Supreme Court of the United States will *find the means* to assert the supremacy of the Federal Government where none exists over the rights of the States, or to the detriment of human liberty or property rights as secured in the Constitution of our country.

§ 363. Nor do the recent decisions of the Supreme Court on the subject of the treaty power bear out the prognostications of Mr. Willoughby as to what may be expected of the Court finally on this subject. The case of Compagnie Française *v.* Board of Health,[1] which was decided in 1901, is referred to by Professor Willoughby only once in his work, Vol. II, page 676, and there it is not quoted on the subject of the treaty power, but is cited for a different purpose entirely; while Mr. Charles Henry Butler, whose work was issued from the press in 1902, did not have the advantage of having seen the case, it is presumed, before his book was published, though he refers to it on page 50, Vol. II, as reported by the Supreme Court of Louisiana. This case seems to present the direct question of the conflict between the statute law of Louisiana, as enforced by the Board of Health, and the treaty between the United States and France.

In Ware *v.* Hylton, *supra*,[2] we have attempted to show that the decision of the conflict between the Definitive Treaty of Peace of 1783 and the law of Virginia of October, 1777, was not made, because the majority of the Court held that the law of Virginia was invalid, and therefore there could be no conflict. We have also attempted to show, *supra*,[3] that the cases of Chirac *v.* Chirac, Geofroy *v.* Riggs, and others of that class, involving the right of aliens to inherit in the States, did not involve the decision of a conflict between a treaty and the law of a State, because in these cases the treaty which had the rightful power [for the Federal Government alone under the Constitution of the United States can deal with aliens] had changed the

[1] 186 U. S., 498, 46 L. ed. 1260, 23 S. C. 856. For a full discussion of this case see Chapter X, p. 314.

[2] See Chapter IX.

[3] See Chapter VI.

status of the alien, *but not the law of the State,* so that the law of the State was upheld, and the alien was recognized as no longer an alien as to the matter of inheritance, but *quoad* the right of inheritance as occupying the position of a native.

§ 364. Another recent case decided in 1912 is that of Rocca *v.* Thompson.[1] While the Court decided this case on the construction of a treaty, an examination of the case must show to any candid mind that the decision of the direct question between the treaty and the law of the State could have been made by the Court, and would have been justified by the facts of the case. This was an appeal from the Supreme Court of California. It represented a conflict between a law of California establishing a public administrator, who was an officer of the State, and a treaty between Italy and the United States. Article XVI of this treaty required on the death of an Italian citizen that notice should be given to the Italian Consul or consular agent. Article XVII is as follows:

"The respective Consuls General, Consuls, Vice Consuls and Consular Agents, as likewise the Consular Chancellors, Secretaries, Clerks or Attachés, shall enjoy in both countries, all the rights, prerogatives, immunities, and privileges, which are or may hereafter be granted to the officers of the same grade, of the most favored nation."

The Italian Consul, under the most favored nation clause, claimed that the privilege of administration should be accorded him because by a treaty between the United States and the Argentine Republic, it was conferred upon the Consul of that country in the following language:

"If any citizen of either of the two contracting parties shall die without will or testament in any of the territories of the other, the Consul General or Consul of the nation to which the deceased belonged, or the representative of such Consul General or Consul in his absence, shall have the right *to intervene in the possession, administration, and judicial liquidation of the estate of the deceased* conformably with the laws of the country, for the benefit of the creditors and legal heirs."[2]

[1] 223 U. S. 318, 56 L. ed. 215, 32 S. C. 207. [2] Author's italics.

Justice Day, who delivered the opinion of the Court, decided the case upon the construction of the words of the treaty which are italicized above. His opinion is a masterpiece of critical dissection of the words of the treaty which resulted in sustaining the law of California in the right of the public administrator to administer on the estate of the deceased, and while the learned justice's analysis of the language of the treaty may be accepted as technically correct, it can hardly be doubted that if the Supreme Court, as is claimed by many, had for years settled the question of the supremacy of a treaty over the laws of a State, that this case could have been and would have been promptly decided in favor of sustaining the treaty.

§ 365. The case of Patsone *v.* Pennsylvania,[1] decided in 1913 has likewise a strong bearing on the view we are presenting. The State of Pennsylvania in the exercise of its police powers for the protection of game within its boundaries, as was claimed, passed a law making it "unlawful for any unnaturalized foreign born resident to kill any wild bird or animal except in defense of person or property, 'and to that end' makes it unlawful for such foreign born person to own or be possessed of a shot gun or rifle; with a penalty of $25.00," etc. It was claimed that this statute was in violation of the treaty between the United States and Italy of February 26, 1871. Article III of the treaty was the clause which was invoked in behalf of the defendant. This Article asserted security for the persons and property of Italians, and that they "shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives." Justice Holmes, in delivering the opinion of the Court, said:

"There remains then only Article 3 (of the treaty). With regard to that it was pointed out below that the equality of rights that it assures is equality only in respect of protection and security for persons and property. The prohibition of

[1] 232 U. S. 145, 34 S. C. 281. See also Bondi *v.* Mackay, 87 Vt. 271.

a particular kind of destruction and of acquiring property in instruments intended for that purpose established no inequality in either respect. It is to be remembered that the subject of this whole discussion is wild game, *which the State may preserve for its own citizens if it pleases.*[1] Geer *v.* Connecticut, 161 U. S. 519, 529.

We see nothing in the treaty that purports or attempts to cut off the exercise of their powers over the matter by the States to the full extent. Compagnie Française de Navigation a Vapeur *v.* State Board of Health, 186 U. S. 380, 394, 395."

Here the police law of the State was upheld. It is true the conflict between that law and the treaty is not so clear as in the case of Compagnie Française *v.* Board of Health, *supra*, but the learned Judge cites the latter case as sustaining his position, and endorses the view that wild game is subject to the police power of the State, "which the State may preserve for its own citizens if it pleases." [2]

These are the most recent cases which have been decided by the Court, and in every one of them the police law of the State was upheld.

If the question of the supremacy of treaties over the laws of the States had been settled by this Court for years, as claimed, the doctrine could have been reaffirmed most properly in these cases, for the opportunity seemed clear in two of them at least, but in all three the police law of the State was upheld.

[1] Author's italics.

[2] See also Olsen *v.* Smith, 195 U. S. 344, 49 L. ed. 224, 25 S. C. 52.

CHAPTER XIII

Conclusions. Limitations on the Treaty-making Power. If Greater Power is required the Remedy is by Constitutional Amendment

§ 366. The investigations made in the previous chapters of this book, the consideration of the Constitution as a whole, together with the decisions of the Supreme Court, and the opinions of jurists and statesmen on the different phases of this subject, lead to the conclusion that the following are proper and constitutional limitations upon the treaty-making power under the Constitution of the United States.

I. That a treaty cannot take away or impair the fundamental rights and liberties of the people secured to them in the Constitution itself, or in any Amendment thereof.

No question was more seriously considered at the time of the making of the Constitution than that which affected the civil and religious liberties inherited by our ancestors from the mother country. These were regarded as safe in the keeping of the States. The advocates of a strong centralized government endowed with energies unknown to the government under the Articles of Confederation, were met in debate upon the hustings and in the forum by the advocates of State sovereignty, who feared the loss of personal liberty in the adoption of the new government. The former looked to the development of the country through the strength of the government; the latter to the development of the individual who was to make the government. The one believed that the country could best be developed by a strong government, in which each individual

would share its benefits. The other believed that in proportion to the strength of the individual would be the strength of the government composed of such individuals. Both ideas were patriotic, and both contained much of sound reasoning. Our recent separation from Great Britain, however, with its monarchical form of government created a natural fear among the people of the establishment of a monarchy in America. The spirit of liberty was already aroused in America, and in France the rumblings of the approaching revolution could be heard and its influence was permeating the old and the new world in its powerful appeals for greater liberty of the masses. Throughout America, in every Colony, the struggle for the adoption of a new constitution, confessedly for the purpose of strengthening the government, caused an uneasiness among the people of the several States lest the new government with its new strength might curtail the liberties which they had fought to secure from Great Britain, and for which the whole country at that time was eagerly seeking security. Patrick Henry demanded a Bill of Rights for the Constitution before it should be adopted, that the rights of the people might be secured. Mr. Jefferson, though in France, was familiarizing the people of America with the conditions that were stirring the French nation to the first steps of revolution. And so, when the Constitutional Convention had finally adopted the Constitution without a Bill of Rights, its ratification by the different States became a question of great doubt. The struggle was long and doubtful, but when, under the influence of the Father of his Country, Virginia, by a close vote, ratified the instrument, the victory was won. In their ratification many of the States recommended Amendments to be adopted as a condition of their ratification.

§ 367. The action of the States in this respect is most interesting. The position of a few of them will be given. Massachusetts, New Hampshire, Rhode Island, Virginia, South Carolina, and New York in their acts of ratification asked for Amendments to the Constitution to secure to the people of the

States their personal and political rights. In Massachusetts, after reciting the fact that certain Amendments would remove the fear of "many of the good people of this Commonwealth and more effectually guard against the undue administration of the Federal Government," the Convention recommended the following Amendment: "That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised." The other States mentioned recommended practically the same Amendment, showing their anxiety about the preservation of their rights secured to them by the States. Rhode Island, New York, and Virginia were specially careful in the language of their ratifications. Rhode Island declared "That the powers of Government may be *reassumed* by the people whensoever it shall become necessary to their happiness." New York in its ratification used exactly the same language as Rhode Island. Virginia declared in her act of ratification, "That the powers granted under the Constitution being derived from the people of the United States may be *resumed* by them whensoever the same shall be perverted to their injury or oppression." Congress at once proposed twelve Amendments to the States for adoption, ten of which were immediately adopted and became parts of the Constitution. These Amendments are recognized as the Bill of Rights to the Constitution for which so many plead before its adoption. And in these Amendments are imbedded many of the fundamental principles of civil and religious liberty which so many opponents of the Constitution had fought to secure. These rights pertain to the people as citizens of their several States. And their security against invasion by the Federal Government was successfully accomplished in the adoption of the Amendments. The Supreme Court has repeatedly held that these Amendments are limitations upon the Federal government alone.

§ 368. Speaking of the Amendments to the Constitution, Judge Miller says:[1]

[1] Miller's "Lectures on the Constitution," p. 13.

"Hence a very slight examination of them shows that all of them are restrictions upon the power of the general Government, or upon the modes of exercising that power, or declarations of the powers remaining with the States and with the people. They establish certain private rights of persons and property which the general government may not violate."

The history of the ratification of the Constitution by the several States shows that it is at least doubtful whether it would ever have received the sanction of the people of the States but for the assurance of the adoption of the Amendments proposed. In Virginia it was ratified by a majority of only 10 in a body composed of 168 delegates. In New York by a majority of 3 in a convention composed of 57 delegates. In Massachusetts by a majority of 19 in a convention composed of 325 members. Virginia, New York, and Massachusetts, the first two at that time constituting the largest States of the Union, only ratified the Constitution by the meagre majorities referred to. "The fundamental liberties of the people," referred to in this branch of our subject, are mostly found in these Ten Amendments. The Constitution is supreme. The Amendments are a part of that Constitution. Its supremacy covers every article in the instrument and every Amendment to it. The treaty-making power is exclusive in the President and Senate, for this power is denied to the States in Article I, § 10, and a treaty may embrace practically every subject including these fundamental rights. And if the treaty power may make agreements touching these rights, it has the power to modify or destroy them.

§ 369. Of course the States that demanded the incorporation of these rights by Amendments in the Constitution never dreamed that they could be taken from them by the treaty-making power after the Federal government, by the adoption of the Amendments, had been denied the right of interference with them. These fundamental rights would never have been demanded by the people and put into the Constitution by Amendments, only to be taken from them by this exclusive

and supreme power as claimed: for the claim is boldly made that this is a pervasive, supreme, exclusive power permeating every avenue of human activity with no limit but its own unhampered will; a general power to control all subjects by treaty, among which may be many of the fundamental rights secured to the people in the Constitution and Amendments. The Constitution and the Amendments contain special prohibitions against the interference of the Government or any branch thereof in the maintenance of certain rights. These prohibitions are absolute — unconditioned — and apply to the Government of the United States and all departments thereof, including the treaty-making power. Can the supposed exclusive power in making treaties destroy the special prohibitions to all departments of the government? Is not the ordinary rule of construction, that where a general grant of power which may embrace all subjects, is subsequently limited in the same instrument by a specific prohibition, the latter prevails? The basic principle which controls the construction of all written instruments, as well as written constitutions, is the intent of the makers of each. A general grant in a written instrument, exclusive in its nature, must be limited by a special grant in the same instrument, which conflicts with the former, or by a special prohibition in the same instrument, limiting the general grant by the exclusion of the subject prohibited.

§ 370. Now the Constitution undoubtedly, taken by itself and construing the words in their natural and ordinary import, without relation to any other clause in it gives to the treaty-making power supremacy and unlimited scope as to subjects, for practically every personal and property right may become the subject of agreement, but this same instrument that has created this unlimited power, in other Articles of the Constitution, and in the Amendments thereto, excludes certain subjects from the treaty-making power or any other power by direct and specific prohibition on all departments of the government. For example, Article I, § 9, declares the privilege of the "writ of Habeas Corpus shall not be suspended unless," etc. or, "No

title of nobility shall be granted by the United States," or Amendment V, "No person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a grand jury," etc., or Amendment VI, "The accused shall enjoy the right to a speedy and public trial by an impartial jury," etc. These and numerous other prohibitions, some on Congress, some on the Executive, some general, but all prohibiting the government or some department thereof from doing certain things are only "as sounding brass, or a tinkling cymbal" if the treaty power may override them, for they clearly show that the rights secured cannot be the subjects of legislation or control of any power within the Constitution that may affect or endanger their security. And, since these rights might be embraced among the unlimited number of subjects to which a treaty might apply, if they were not thus specifically excluded, the enumeration of them in the Amendments and the earnest efforts put forth by many of the States of the Union for their incorporation into the Constitution at the time of its ratification, leave no doubt that they should be and are secure from modification or destruction by the treaty-making power. Nor is this conclusion arrived at by any strained construction, for it is reached by applying the ordinary rules of construction to all written instruments, and while of course it is true that a constitution is to be construed on a broader basis than ordinary commercial written instruments, still, in the respects referred to, we have judicial sanction for its correctness.

Justice White in Downes *v.* Bidwell [1] says:

"It is conceded at once that the true rule of construction is not to accept one provision of the Constitution alone but to contemplate all and therefore to limit one conceded attribute by those qualifications which naturally result from the other powers granted by that instrument, so that the whole may be interpreted by the spirit which vivifies and not by the letter which killeth."

[1] 182 U. S. p. 312, 45 L. ed. 1088, 21 S. C. 770.

§ 371. Some other examples will serve to elucidate the subject. Article II, § 1, declares: "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 the face of this provision, could it be claimed that a naturalized citizen of England, France, or Germany could by a treaty giving such right, be made eligible to the Presidency of the United States by a provision in a treaty eliminating these Constitutional provisions as to birth, age and residence; or could any advocate of the unlimited treaty-making power be found bold enough to claim that the right of trial by jury for all crimes could be destroyed by the ratification of a treaty between the United States and any foreign country wherein it was agreed that the trial of persons for crimes should be determined by the judge to the exclusion of a jury?

If the limitation on the treaty power stated above in Number I, § 366, be not correct and sound, then is our Constitutional system of government a delusion and a snare. To deny the principle therein formulated is to deny the effectiveness of a written constitution, and to affirm the hopelessness, under such a constitution, of securing the guaranteed liberties of the people.

§ 372. II. "That a Treaty cannot bind the United States by any agreement to do what is expressly or impliedly forbidden in the Constitution." Much that has been said under I (§§ 366–371) will apply to this division of our subject. For, if the Constitution forbids an act, such as the suspension of the writ of *habeas corpus* except, etc., or the trial of a prisoner except by jury, or the making of a law respecting the establishment of religion, or the abolition of the militia, or any of those fundamental rights, it is clear that though a general and exclusive power may have been granted to the treaty power, that such general and exclusive grant is limited by specific prohibitions in the same instrument.

It would seem that whether the proposition stated in this subdivision is correct or not depends largely upon the true interpretation of Article VI of the Constitution, and unless treaties referred to in that Article are supreme over the Constitution itself, surely no treaty can contain what is forbidden in the Constitution to be done by any power. Were this the case, then our Government would be not a government under the Constitution, but a government under the treaty power. Such claim would seem to be untenable and is clearly denied by Story, Cooley, Pomeroy, and all standard authorities on the Constitution. For, without quoting again their language, they all hold that a treaty that changes or attempts to change the Constitution of the country is invalid. It is, of course, invalid because the Constitution is superior to the treaty-making power, or any other power that it contains.

§ 373. III. "That a power granted in the Constitution to be exercised by a certain department of the Government and in a certain way, cannot be validly exercised by a treaty in disregard of the manner prescribed in the Constitution."

Judge Story [1] says:

"A power given by the Constitution cannot be construed to authorize a *destruction of other powers given in the same instrument.*[2] It must be construed therefore in subordination to it; and cannot supersede or interfere with any other of its fundamental provisions. Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other."

In a note to this section Judge Story says:

"Mr. Jefferson seems at one time to have thought that the Constitution only meant to authorize the President and Senate to carry into effect, by way of treaty, *any power they might constitutionally exercise.* At the same time he admits that he was sensible of the weak points of this position.[3] What are such powers given to the President and Senate? Could they make appointment by treaty?"

[1] Story on the Constitution, § 1508.

[2] Author's italics.

[3] Jefferson's Correspondence, 498.

In our Constitutional history this has been most commonly seen where the attempt has been made to legislate by treaties, without the action of the House of Representatives. Article I, § 1, reads: "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." The exclusive grant of power to the President and Senate to make treaties is here expressly limited by the exclusive grant of "all legislative powers" to Congress. Story, Cooley, Pomeroy, Tucker, and others, all assert that the treaty-making power cannot change our form of government. Our form of government is prescribed in the Constitution; the basic principle of which is the division of all powers into the executive, legislative, and judicial functions, each separate and independent of the other.

§ 374. The first section of the first Article, at the very threshold of the Constitution, declares: "All legislative powers herein granted shall be vested in a Congress," etc. How, then, can any legislative powers be taken from the Congress, the repository of *all* legislative powers, and be given to another branch of the government, which is not a legislative department of the government, without a change of the form of government? No policy is more firmly rooted in our governmental system than this, that under the Constitution we enjoy a representative government wherein the laws demanded and required by the people are considered by their delegates in the House of Representatives, where records of their votes are kept and published so that the people may know how those who are charged with the duty of representing them, have discharged those duties; and so jealous of this right were the makers of the Constitution that Article I, § 5, declares: "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." Could proof be stronger

than this of the right of the people to know how those to whom they have intrusted the power to legislate are fulfilling the trust? They took no chances in this matter but placed it in the Constitution itself that there might be no doubt throughout the continuance of the government of the right of the people to know by the records how their representatives were living up to their promises. If the treaty-making power, hedged about by secrecy, acting behind closed doors, with no ear to hear and no eye to see what is transpiring, excluding the members of the House — one branch of the legislative power (and in many cases primarily responsible for legislation), can enter into competition with Congress in the field of legislation, and can even oust Congress of its exclusive constitutional grant of the power to legislate, then indeed is our Constitution changed. If the President and Senate undertake to legislate, they undertake a hopeless task, because the Constitution declares that Congress, and Congress alone, can legislate. If the treaty power can exclude from participation in legislation those who are primarily responsible to the people for legislation, who are sent to the House of Representatives charged with certain legislative commissions and pledged to their accomplishment, it can in effect drive from their Father's House the representatives of the people and deny them a right, which the Constitution declares they must assume, to make any legislation valid under the Constitution.[1]

§ 375. IV. "That a treaty cannot change the form of the government of the United States." This proposition seems so self-evident that it need not be discussed, for the Constitution has provided in Article V how it may be changed, and that is, by amendment. And every authority that has written on the Constitution or on the treaty-making power, and judges who have considered the question in their opinions all agree that whatever may be the extent and scope of the treaty-making power, that at least it does not extend to the right to change the form of government of the United States. I shall therefore

[1] For full discussion of this subject see Chapter VI.

content myself with simply giving a reference to the authorities in a note on this subject.[1]

§ 376. V. "Personal and property rights of every kind and description may be the subject of treaties. Whenever the control or protection of such rights is, under the Constitution, confided to any department of the government or to a State, such department or State, as the constitutional repository of such rights, cannot be ousted of their jurisdiction by having the same transferred to the treaty-making power." Rights confided to certain departments of the Government have been considered under III, § 373, so that this division relates to the police power and the reserved rights of the States, and has been heretofore considered fully.[2]

§ 377. VI. "That the treaty power cannot confer greater rights upon foreigners than are accorded citizens of the United States under the Constitution." This proposition would seem to be self-evident from the very nature and object of governments, and therefore, needs no discussion.

§ 378. If it be urged that these limitations upon the treaty power, though admitted to be in accordance with a correct constitutional interpretation of that power, so restrict the power as to render it valueless as a *nexus* between the United States and foreign powers in the adjustment of international rights, the answer is simple. Constitutions are made to meet the demands and requirements of the people who make them and live under them, and whenever a constitution is inadequate to meet such needs, it is only proper that it be changed or amended. Yet, in proposing amendments to our Constitution that has

[1] Story, "Constitution," § 1508.
Cooley, "Principles of Constitutional Law," p. 117.
Tucker, "Constitution," Vol. II, 354.
Pomeroy, "Constitution," pp. 567, 675.
Devlin, "Treaty-making Power," pp. 140, 143.
Willoughby, "Constitution," p. 493.
To these authorities may be added the names of every judge in the Supreme Court of the United States who has had this subject before him for consideration.

[2] See Chapter X, p. 284.

proven itself equal to all emergencies in our history, care should be had that no fundamental granitic principle upon which the Government has rested securely since its foundation, should be disturbed. But, if it be found that some stone of the superstructure was originally improperly placed, or, if properly laid, has become worn by abuse or corroded by occult processes, unforeseen by the student of governmental architecture in its building, surely the hand will not be deemed impious that is lifted to adjust the misplaced stone, or that seeks with loving touch to apply some life-giving lotion to the wasted portion of this "Ark of the Covenant" of our hopes and aspirations. The Constitution has proven adequate for the development of an infant republic, as well as for the progress of a matured nation; it has weathered the storm of Civil War and its attendant evils, and we should be careful, therefore, that the changes suggested should not be organic, but functional; not fundamental, but structural. If the limitations suggested are evils, and they are upheld by the Constitution, then the Constitution should be changed unless, indeed, such changes should result in the organic and fundamental change of our whole government. We can well afford to follow President Washington on this subject when he says:

"If, in the opinion of the people, the distribution of the constitutional powers be in any particular wrong, let it be corrected in the way which the Constitution designates. But let there be no change by usurpation, for this, though it may in one instance be the instrument of good, is the ordinary weapon by which free governments are destroyed."

No less suggestive is the language of President Lincoln:

"It is my duty and my oath to maintain inviolate the right of the States to order and control, under the Constitution, their own affairs by their own judgment exclusively. Such maintenance is essential for the preservation of that balance of power on which our institutions rest."

§ 379. Let us not, therefore, be guilty of committing wrong that good may come of it. If it be argued that no restriction

of this power is compatible with national existence and national obligations, in the crises which arise in the history of every country, I would answer in the impressive language of Justice David Davis [1] spoken at a most critical period of our country's existence, when, combating the claim that the exigencies of the times following the Civil War demanded a broader construction of the Constitution, he said:

"No doctrine involving more pernicious consequences was ever invented by the wit of man, *than that any of its provisions can be suspended during any of the great exigencies of government.*[2] Such a doctrine leads directly to anarchy or despotism; but the theory of necessity on which it is based is false; for the government within the Constitution has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the results of the great effort to throw off its just authority."

The settlement of America was for the avowed purpose of developing the two great principles of civil and religious liberty under republican institutions, freed from the restraint of monarchical ideas. Our fathers brought with them the Christian religion as their religion, which has spread its benign influence from ocean to ocean in its teachings of high ideals and in the diffusion of the soundest principles of morality and virtue. Under these teachings "might" does not make "right," but governmental action must be sanctioned by moral principles. Human laws and constitutions should be controlled by them, for these are made and ratified as the security for human liberty. To disregard the Constitution under the plea of supposed necessity, is to adopt the specious plea of tyrants in all ages. To abandon our Constitutional Government and supplant it with the fleeting suggestion of some supposed temporary necessity, is to deny that this is a government of law, and to accept the fallacy that it is a government of men. Should we be guilty of such folly there will most surely arise in the near future some

[1] *Ex Parte* Milligan, 4 Wall. 109, 18 L. ed. 281.
[2] Author's italics.

Poet-statesman who will depict the moral delinquency of our generation in flowing verse similar in sentiment to that recorded by the ancient Latin poet, who, in describing the ethics of the Eternal City in his day, in the advice of a father to his son, said: "*Rem facias, rem, si possis recte; si non, quocunque modo rem.*"

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