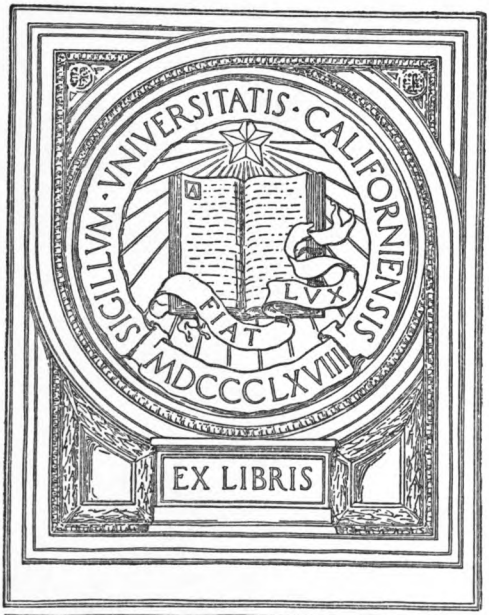

THE AMERICAN CONSTITUTIONAL SYSTEM

The American State Series

THE AMERICAN CONSTITUTIONAL SYSTEM

AN INTRODUCTION TO THE STUDY OF THE AMERICAN STATE

BY

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PREFACE

In the series of volumes bearing the title "The American State," to which this work is intended to serve as an introduction, there will be described in detail the manner in which the governmental agencies of this country—federal, state, and local—are organized and operated. The aim of the present essay is to prepare the way for this descriptive work by disclosing the constitutional character of the American State, explaining the status of its various territorial subdivisions, and indicating the extent of the powers of their several governments. In order to do this it has not been thought necessary or appropriate to prepare a comprehensive treatise upon United States constitutional law. Considered as but an introduction to the volumes that are to follow, it has been conceived that the scope of this study should not include more than a determination of the constitutional character of our complicated federal system, and a statement of the general principles in accordance with which the legal powers of its various governmental agencies are ascertained. The fact is therefore to be emphasized that no attempt is made in this volume even to enumerate the

specific powers possessed by, or the limitations imposed upon, the several organs of the federal and state governments, much less to follow out in detail the manner in which these powers and limitations have been interpreted and applied. Indeed, it is not the collective purpose of the volumes that are to follow to do this. As indicated above, the aim of these volumes is to be a description of the political agencies of the American State, and an explanation of the manner in which they are actually operated. With the specific *activities* of our governments, such, for example, as the federal regulation of interstate commerce or bankruptcy, the state control of corporations or manufactures, or the municipal ownership or regulation of public utilities, these studies are not to be primarily concerned. It may be said, however, that should this series meet with the approval of the reading public, another series will probably be published dealing specifically with the activities of the American States, the individual volumes of which will be devoted to the consideration of such topics as "The American State and Trade and Commerce," "The American State and Labor," "The American State and Education," etc.

Returning now to the statement of the particular purpose of the introductory essay here presented to the public, it will be found that the author has first

attempted to ascertain the constitutional character of the American State; that is to say, to determine whether, in it, ultimate sovereignty is to be found located in the United States, viewed as a single national entity, or in the constituent commonwealths, or divided between the Federal State and its political members. This fundamental question having been answered, he has essayed to explain the manner in which, in actual practice, the integrity of our national government and the supremacy of its laws have been secured without at the same time destroying that independence of action on the part of the individual States which is characteristic of the federal system. This has involved the giving of answers to such questions as the following: Do the States, or did they ever, have a constitutional right to secede from the Union? Have they the right or power to nullify a federal law which they deem obnoxious or unconstitutional; and, if not, where else is to be found a security against unconstitutional action on the part of the General Government? In case of a refusal by States, or their peoples, to perform the functions constitutionally laid upon them, or an attempt upon their part to resist the operation of federal laws, what legal means of coercion are open to the General Government? To what extent may the United States control the form of governments established and maintained by the

States? To what extent may it supervise or compel the exercise by them of their ordinary functions? What is the status of territories belonging to the United States, but not included within the boundaries of any of the states? How may such territories be acquired, and what powers for their government are constitutionally possessed by the Union? These, and other similar questions which have to be answered before one can have an adequate understanding of the nature of the American Constitutional System, and a knowledge of the manner in which its successful operation is secured, are examined in the light of modern political theory, and the latest decisions of the Supreme Court of the United States.

As regards the general method of presentation adopted, it may be said that in very many instances the authoritative language of the Supreme Court has been very closely followed. When space has permitted, it has been deemed proper to give the exact words of that tribunal.

The terms "Federal Government," "General Government," and "National Government" have frequently been used where technical exactness would have demanded the employment of "Federal State," "General State," and "National State." In so doing, however, the author has followed the general practice not only of other writers, but of the courts, and in

no instance, it is believed, has the meaning been obscured. Where the Supreme Court has been spoken of, without other qualification, the highest federal tribunal has been meant.

Dealing as this volume does with the principles or philosophy of our constitutional system, it is hoped that it will be found not only interesting to the general reader but serviceable as a text-book for academic classes beginning the study of the public law and political practice of our country.

W. W. W.

JOHNS HOPKINS UNIVERSITY,
Baltimore, Maryland, July, 1905.

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CHAPTER I

THE NATURE OF THE "FEDERAL" STATE[1]

The Definition of a State. In its form of governmental organization the American State represents a very complex political type. For this reason, in order to determine satisfactorily its exact legal character it will be necessary first to consider the essential attributes of a State in the abstract.

An aggregate of men living together in a single community, and united by mutual interests and relationships, we term a Society. When there is created a supreme authority to which all the individuals of this society yield a general obedience, a State is said to exist. The social body becomes, in other words, a body politic. The instrumentalities through which this superior authority formulates its will and secures its enforcement is termed a Government; the commands it issues are designated Laws; the persons that

[1] In this chapter the author has drawn liberally from an earlier work entitled "The Nature of the State: A Study in Political Philosophy."

administer them, public officials, or, collectively, a Magistracy; the whole body of individuals, viewed as a political unit, is called a People; and, finally, the aggregate of rules or maxims, whether written or unwritten, that define the scope and fix the manner of exercise of the powers of the State, is known as the Constitution. The State itself, then, is neither the People, the Government, the Magistracy, nor the Constitution. Nor is it, indeed, the territory over which its authority extends. It is the given community of individuals viewed in a certain aspect—namely, as a political unity.

The one characteristic that is essential to the State, and serves to distinguish it *in toto genere* from all other human associations, is its possession of political sovereignty. By political sovereignty is meant, on the one hand, complete freedom from the legal control of any other power whatsoever, and, on the other hand, absolute and exclusive control over the legal rights and obligations of its citizens, individually considered or grouped into larger or smaller associations. The State is thus supreme not only as giving the ultimate validity to all laws, but as *itself determining the scope of its own legal powers and the manner of their exercise.*

In every politically organized community that is entitled to be termed a State, there must exist, then, an authority to which, from the legal standpoint, all interests are *potentially* subject. In the entire body of laws of a State are summed up the powers of that State as actually exercised. In the constitutional laws are declared the powers legally exercisable by

the ordinary governmental organs. Thus at any one time the domain of the legal and political liberties of the individual is simply that which neither public officials nor private persons may legally enter. From possible control by the State, however, through the enactment of new constitutional or statutory laws, these liberties are not and cannot be removed. Professor Burgess puts this very clearly when he says: "The individual is defended in this sphere *against* the government by the power that makes and maintains and can destroy the government; and by the same power, *through* the government, against encroachments from any other quarter. Against that power itself, however, he has no defence." [1]

In the eyes of political theory the State is a legal person. It has its rights and duties and possesses a supreme will which it expresses through its law-making organs in authoritative commands. Sovereignty, as thus expressing the State's supreme will, is necessarily a unity and indivisible. That there cannot be in the same being two wills, each supreme, is obvious. But though the sovereign will of the State may not be divided, it may find expression through several legislative mouthpieces, and the execution of its commands may be delegated to a variety of governmental organs. Theoretically, indeed, the State may go to any extent in the delegation of exercise of its powers not only to governmental organs of its own creation, but even to those of other States. Thus a given State may, in fact, retain under its own immediate direction only a most meager complement of activities, and

[1] "Political Science and Constitutional Law," I, 176.

yet preserve unimpaired its sovereignty; for in such a case the public bodies or States to which the exercise of the powers has been granted, act as the agents of the State in question, and this State still possesses the legal, if not the actual, power of again drawing to itself the exercise of the powers it has delegated. Thus mother-countries may concede to colonies the most complete autonomy of government, and reserve to themselves a control of so slight and negative a character as to make its exercise a rare occurrence; yet, so long as such control exists, the sovereignty of the mother-country is not released, and such colony is therefore to be considered as possessing no independent political powers. Again, as we shall later see, in the so-called Confederate State, the member Commonwealths may yield to the Central Government the exercise of their most important powers and yet retain their sovereignty; and, on the other hand, a national Federal State may, without destroying its sovereignty, yield to particular territorial authorities an extent of power sufficient to endow them, apparently, with almost all the characteristics of independent bodies politic.

A State cannot be Created by an Agreement between States. A State owes its existence to the fact that, in the individuals over whom its authority extends, there is a sentiment of unity sufficiently strong to lead them to surrender themselves to the control of a single political power for the sake of realizing the desires to which such a sentiment gives rise. In other words, this subjective condition first comes into being, and,

when sufficiently powerful, finds objective manifestation in the creation of a political organization.

This being the manner in which a State comes into being, it follows that it is improper, in any instance, to ascribe to it a juristic or conventional origin. A State is not created by the formal adoption of a written Constitution. The acceptance by a People of such an instrument is necessarily the political act of a community already transformed into a body politic, and its provisions derive their force as law from that fact. In fine, the Constitution is but the law which definitely determines the organs through which the State, already in existence, is henceforth to exercise its powers. That the adoption of a formal instrument of government is not a politically creative act is shown by the fact that such a Constitution is by no means essential to the existence of a State. Written Constitutions are, indeed, of comparatively recent origin, and their *raison d'être* goes no deeper than political expediency.

Another conclusion following from the fact that a formal or juristic origin cannot be ascribed a State, is that no State can obtain its sovereignty by a simple transfer of authority from other States. A new State can take its origin only after the entire withdrawal of a People from the civic bonds in which they have before been living. Not until the old State (or States) has (or have) been destroyed, peaceably or by force, can the new State take its rise, for a People cannot live under two sovereign powers at the same time. In other words, however peaceably the transition may be effected, the erection of a new sovereignty over a

People already politically organized, is necessarily an illegal, revolutionary act when viewed from the standpoint of the old State. It may, indeed, be the case that in adopting the new Constitution the governmental machinery of the old State is employed; but, in such a case, those governmental organs, when so utilized, are to be conceived as no longer the agencies of the old State, but as implements employed by the new body politic for the execution of its own legal will.

In fine, then, it must be held that, though an existing State, so long as it acts through the forms prescribed for constitutional amendment, may wholly change the character of its governmental organization, or may delegate the exercise of its most important powers, it cannot by its own act create a new sovereignty.[1]

The Nature of a Federal State. Applying the foregoing conclusions to the apparent creation of a new Federal State by the union of a number of States, we are necessarily led to hold that though the birth of the new sovereignty is practically synchronous with the adoption of the written articles of union, it cannot be said that such Federal State owes its creation to that act. If it be admitted that, as a matter of fact, a single sovereign State has come into being, its con-

[1] The author realizes that this fundamental principle of political theory is by no means adequately treated in the foregoing paragraphs. Requirements of space compel him, however, to refer the unsatisfied or unconvinced reader to his "Nature of the State," Chapters VI and X, where the topic is more fully discussed.

ditioning basis must be considered to have been the feeling of national unity that first created it a single political body out of a number of sovereign Peoples, and then gave to it an objective organization. The new State cannot, in other words, be held to have derived its sovereignty by grant from the formerly existing sovereignties, nor can such sovereignties be held to continue to exist after the new national sovereignty becomes a fact.

We are thus irresistibly led to the conclusions that not only cannot a so-called Federal State be based upon an agreement or compact between preëxistent States, but that it cannot be itself, in any strict sense, composed of constituent States. In all exactness, the term "Federal State" is thus an improper one.[1] A federal form of *Government* we may have, but not a Federal *State;* for a State is by its very nature a unity in that its essential attribute, its sovereignty, is necessarily a unity. There cannot be, therefore, any such thing as a State composed of States. Strictly speaking, therefore, the only correct manner in which the term "Federal State" may be employed is to designate a State in which a very considerable degree of administrative autonomy is given to the several districts into which the State's territory is divided. Conversely, we must hold that in all composite political organizations in which the individual members still retain their sovereignty, and therefore continue to exist as States, no National State is created. A Cen-

[1] Though thus technically incorrect, the author has felt himself constrained, by general usage, at times to employ the term "Federal State."

tral Government with very considerable powers may indeed exist, but only as the common agent of the several associated States, not as the organ of a distinct central sovereignty. Furthermore, the written articles of union, if such there be, cannot be regarded as a law or Constitution, but only as an international compact or treaty.

The foregoing analysis of the nature of sovereignty and the State enables us to say that the distinction between a National State with a federal form of government and a Confederacy of sovereign States is not based upon the *quantum* of powers, the exercise of which is vested in the Central Government; nor, necessarily, upon whether the commands emanating from the central legislature operate directly upon individuals or upon the individual Commonwealths; nor, finally, upon the difference between a Central Government with enumerated and one with unenumerated powers. The one absolute and finally determining criterion is: What authority has, in the last instance, the legal power of fixing its own legal competence, and, as a result, that of the others?

In the sovereign State of the federal governmental form, the legal right of secession on the part of the individual Commonwealths is of course excluded. From the strictly juristic standpoint, the Commonwealths derive their existence from the will of the national State. They have, therefore, no control over their own political status.

The doctrine of nullification, which concedes to the Commonwealth members of a federal union, individually or acting in concert, a right to refuse obedience

to, and prevent the enforcement within their respective limits of, such federal laws as to them seem unwarranted by the articles of union, is also clearly inapplicable in a true federal State. Even in a Confederacy of sovereign States the right to "nullify" general laws cannot be spoken of as a legal right. Each member of such a union being completely sovereign, may govern its action by its own will, and no other member may legally say nay. It is hardly conceivable that the assertion of such a power on the part of a particular confederated State will not lead to disruption of the union. For it can scarcely be imagined that the other members will consent to the avoidance by such State of the execution of a part of the general law, while they hold themselves bound to it. Such a condition of affairs would, in fact, result *ipso facto* in a destruction of the union to that extent, the sole end of the confederation being to secure a concert of action in matters of general interest. It would, indeed, be a just *casus belli* against the State so refusing obedience to the agreement in which it bound itself to common action. Jefferson, the author of the Kentucky Resolutions, himself asserted the propriety of a confederate government coercing a State when he wrote to Cartwright advising the Congress of the old Confederacy to send a frigate and compel a State to pay its *quota* of taxes; and in general those who in 1861 asserted that secession on the part of the individual States violated no legal obligation expressly repudiated the idea that States might refuse obedience to such federal laws as they objected to and still remain in the Union.

CHAPTER II

THE NATURE OF THE AMERICAN STATE

We are now in a position to consider the validity of the various views that have been held regarding the nature of the American State.

In the controversies which have been had as to the nature of our Union, the States' Rights school have held a single and logical theory, according to which it has been declared that the Constitution is, and was intended to be, the creation in 1789 of the several States acting as individual and sovereign political entities. Granting this premise, the conclusions which have been drawn from it as to the confederate nature of the Union and the legal right of secession have followed as logical and necessary consequences. All agreements between sovereign States necessarily partaking of a contractual character, a Constitution created by the union of the wills of several States cannot be other than of a non-legal or conventional nature. The States, therefore, which are united under it, it has been asserted by members of this school, are bound to abide by its provisions or to continue under it, only by practical or moral considerations. They are not, it has been declared, subject to it as to a legal superior, for that would be to make the creature superior to its creators.

To meet this argument, the advocates of national supremacy in this country have been led to propound a variety of theories and statements of fact. By some it has been alleged that, even if it be admitted that at the time of the adoption of the Constitution the States were severally sovereign, and were, in fact, the parties by which that instrument was established, still the record which we have of the intentions of those who drafted it, and of those who were influential in its ratification, reinforced by a rational interpretation of its own words, demonstrates that the States intended to, and actually did, in that agreement, surrender up and forever quit-claim every right or title to future sovereignty; which sovereignty was henceforth to be vested in the government and State therein provided for. This, to our surprise, is substantially the position assumed by one of the latest commentators upon our constitutional law, Mr. Roger Foster.[1]

The illogical character of this theory is sufficiently obvious. In the first place, it assumes what we have seen to be an impossibility, the voluntary subjection of a State to an absolute legal control of another power by an agreement between itself and other sovereign powers. In the second place, it considers the adoption of a written Constitution as creative of a State, whereas, in fact, as we have learned, a Constitution is necessarily the creation of a preëxistent State, and is merely the instrument wherein that State provides for its governmental organization and for the distribution of its political power.

[1] "Commentaries on the Constitution of the United States" (1895), Vol. I, § 15.

A second and more logical manner in which the position of the States' Rights school has been met has been by the assertion, either that the individual members of our Union never were severally sovereign and independent States, or that, if they ever were, they were not such in the years 1787–89, or that if they were then sovereign, it was not they, but the people of all the States as a single sovereign aggregate, who established our present Federal State.

That the States never were severally sovereign and independent bodies politic has been widely asserted by public men, as well as confidently stated by such constitutional-law writers as Story, Pomeroy, Von Holst, and Lieber, and, though less explicitly, by Cooley and Hare. Finally, in the comparatively recent work of Professor Burgess on "Political Science and Constitutional Law," we find taken substantially the same position. On page 100 of the first volume he says of the First Continental Congress that it "was the first organization of the American State." "From the first moment of its existence," he continues, "there was something more upon this side of the Atlantic than thirteen local governments. There was a sovereignty, a State, not in idea simply or upon paper, but in fact and organization."

The difficulty experienced by all these writers who maintain the sovereignty of the National Government from the time of the severance of our colonial connection with England, is to explain the status of the Union during the period when the Articles of Confederation were in force. The non-sovereign character of the Central Government established by these Arti-

cles is practically beyond dispute. It is not only apparent by their phraseology, but was so conclusively demonstrated by the logic of events, as to admit of no contradiction. This period is therefore usually spoken of, by those who hold the theory we have just been considering, as one during which the individual States had "usurped" the legitimate national sovereignty, but that, nevertheless, underneath, as a submerged but yet existent political entity, the National State still existed. Thus says Pomeroy: "However much the States may have exercised 'usurped' attributes of sovereignty during the unhappy confederation; however much the conception of one people acting as a unit may have been forgotten or abandoned amid the jealousies and destructive rivalries of the commonwealths claiming substantial independence; the people had now [1789] arisen, reasserted the original idea, repudiated the assumption of local supremacy and uttered their organic will in terms which we hope will have a meaning and power to the end of time." Von Holst says that the Continental Congress "exhorted the legislatures, by an act of public usurpation against the legal consequences of historical facts, to transform the Union into a league of States, and the legislatures recklessly responded to this demand." Professor Burgess maintains that during this confederate period "the American State ceased to exist in objective organization. It returned to its subjective condition merely, as idea in the consciousness of the people;" that "from the standpoint of political science, what existed now, as objective institutions, was a central government and thirteen local

governments. From the standpoint of public law, on the other hand, what existed as objective institutions, was thirteen States, thirteen local governments, and one central government. This was a perfectly unbearable condition of things in theory, and was bound to become so in fact. . . . There was here simply a struggle between the central government and the local governments about the distribution of governmental powers, which could only be settled by the word of the sovereign—the State. The State, however, was not organized in the confederate constitution; *i. e.*, it could not legally speak the sovereign command. . . . The State had no legal organization in the system."

It must be apparent that such reasoning as is contained in the above quotations is a playing fast and loose with political theory, and a vain attempt to uphold an untenable position. How can we speak of a government as a usurping one which had an admitedly *de facto* position, and was voluntarily established and maintained by the people organized under it? The condition of affairs under the Articles was undoubtedly an unsatisfactory one, but there was certainly no question of usurpation. But aside from the question of fact, how can Professor Burgess conceive of a State as ceasing to exist objectively and still maintaining a subjective existence, when the two are necessarily but different aspects of the same thing, which can be disassociated in thought only? Or, aside from this inherent impossibility, how can he conceive of such a state of affairs, when the unequivocal, voluntary, objective act of the people in adopting and

maintaining the Articles affords conclusive evidence that the subjective sentiment of national unity had ceased to exist, if, indeed, up to that time, it had ever existed?

We have usually been taught that the adoption of the Articles was a step—albeit an insufficient step—toward union; yet this school of thinkers which we have been considering would have us believe that the adoption of that instrument was a step backward,—the objective destruction of a union which had pre-existed.

As to that part of the argument of the writers we have just been considering which denies that the effect of the separation of the thirteen colonies from Great Britain was to transform them into thirteen severally sovereign States, it may simply be said that the testimony of history is overwhelmingly to the effect that, with practical unanimity, the people of those times held the contrary view, and that a reasonable interpretation of the facts supports them in their opinion. Concert of action there of course was, but coöperation did not create constitutional union any more than did the concert of action of the Allies in the Napoleonic wars operate to fuse into one political sovereignty the participating States. So evident, indeed, was the original sovereignty of the several thirteen States after 1776, that it was conceded by Webster, Madison, and Hamilton, and was, in fact, not once questioned, so far as we know, for nearly half a century after our present government was established.

However, the maintenance of the assertion that the States were sovereign prior to the adoption of the

Articles of Confederation, is, after all, of no great significance, for if it be true that the States were individually sovereign between 1781 and 1789, then, whether they became such in an illegal and usurping manner or not, the fact would still be that, at the time of the adoption of our present Constitution, they were the only bodies politic vested with the sovereign power. The fact, therefore, even if it could rightly be alleged, that there had been a prior sovereignty of the Nation, would have only a moral or argumentative effect in justifying the right of the people to act as a unit in 1789, and as demonstrating that, as a matter of fact, they did do so.

Granting then that the individual States were severally sovereign in 1789, how, if at all, is the national character of our present Constitution to be maintained? The best-known answer to this question is that rendered classic in the speeches of Webster, that, though the States existed in 1789 as thirteen sovereign bodies politic, and though the Constitution was formally ratified by the people acting through conventions convened for that purpose in and by each of such States, yet the act of adopting the Constitution was, after all, not the act of the several States, but of the whole people united into a political unity by that subjective feeling of nationality which is the ultimate foundation of every sovereign State. In other words, this theory is that at this time the National State existed subjectively in the minds of the people and was made objectively manifest in the creation of a National Government; and that existing state organs and political machinery were used merely for convenience

for the realization of that object. This view, it will be seen, differs from the one which holds that the individual States were not at that time sovereign, in that it makes the adoption of the Constitution a revolutionary act as regards the then *de facto* state governments.

The point to be observed in regard to this theory is, that, as ordinarily argued, it puts the controversy upon a plane where absolute demonstration, either for or against, is rendered impossible. The allegation that, though the people ratified in state conventions, they yet believed themselves to be acting and intended to act as a single national unit, is one which can be proved or disproved only by searching the minds of the people of that time. The question is thus made to turn upon the existence or non-existence of a mental state, a subjective condition purely. Now the only evidence which, in general, has been adduced upon this point is the records which we have of nationalistic and particularistic expressions of the statesmen of the time, together with what other written evidence may be produced to show what the people themselves thought was the character of the constitutive act which they were performing. Had there but been a substantial agreement of opinions at the time, or had the people been skilled in logical and legal distinctions in political philosophy, and gifted with a foresight as to the necessity of rendering the character of their acts perfectly explicit, and, lastly, had their intentions, as finally contained in the instrument of government which was adopted, been so unequivocally stated as to admit of but one construction, then, and only

then, such evidence might possibly be so exhaustively collected as to afford ground for a satisfactory, if not absolutely certain, decision in the matter. But it is scarcely necessary to say that such conditions did not exist. So long, therefore, as the argument is conducted along these lines, both sides are abundantly able to cite facts as well as expressions of opinion favorable to their views, without either of them being ever able conclusively to satisfy either their opponents or the impartial student.

From some sources the view has been advanced that the framers of our Constitution were well aware of the logical dilemma that, in any federal State, the sovereignty when traced to its final source is to be found in its entirety either in the central power or in the constituent States, but that they purposely avoided giving an explicit statement in the instrument which they drafted as to which horn of this dilemma they accepted. This is a view taken by Professor A. W. Small in his essay entitled "The Beginnings of American Nationality," in which he says, "The people of the United States simply dodged the responsibility of formulating their will upon the distinct subject of National sovereignty until the legislation of the sword began in 1861." This is also the view of the late President Francis A. Walker, as expressed in an article entitled "The Growth of American Nationality," published in 1895. In this he writes, "The issue was one which, if not purposely made doubtful, was purposely left doubtful, because any attempt to force the issue at that time would have meant nothing more or less than the

immediate and complete failure of any scheme of Union."

This theory is thus, it will be observed, a frank *non possumus,* as to whether or not a National State did actually exist or was created in 1789.

Attractive as is this theory in its solution, or rather avoidance, of the difficulties inherent in the analysis of the constituent act of 1789, it is, unfortunately almost, if not quite, unsupported by historical evidence. Surely if the real nature and importance of the distinction between a Confederation of States and a single, absolutely sovereign National State had been clearly perceived by those taking the leading part in the framing of the new federal instrument of government, and if, with this distinction in mind, a conscious, deliberate attempt was made to leave the matter unsettled, some one of them would have avowed it, or at least have made a note of it in his private writings. That there may have been a few prescient minds that saw that there was lacking in the proposed Constitution a decisive answer to the question as to where the ultimate sovereignty in the United States was henceforth to lie, we may admit. But that this fact was generally recognized by the leaders of the people in the constitutional and state-ratifying conventions, and that there was an agreement between these leaders to remain silent upon this point, is, considering the bitterness of the debates preceding the final ratification of the Constitution, practically inconceivable.

Some more satisfactory answer to this all-important question than the one just considered is, therefore,

needed. This more satisfactory answer is the following:

It has been generally held that if it be admitted that the States were sovereign in 1789, and that the people themselves believed the Constitution to be, and intended that it should be, a compact between the States, then a Confederacy must be conceded to have been established, and secession, consequently, a constitutional right. We do not believe that this necessarily follows, and for these reasons. It clearly appears from what we know of the thought of the period that the people generally, as well as the most influential of the public men, regarded the Constitution as a compact between the States. We find it repeatedly so stated by the most earnest advocates of a strong central government, both at the time of the adoption of the Constitution and during the first years which followed its ratification. Thus, to give a single instance, as typical of many, we find Madison in the thirty-ninth number of the "Federalist" declaring that "this assent and ratification is to be given by the people not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State,—the authority of the people themselves. The act, therefore, establishing the constitution will not be a national but a federal act." Indeed, the Constitution itself plainly enough says that "the ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution *between the States so ratifying*

the same.'' More unequivocal language than this it is difficult to imagine. In the light, then, of this express statement in the instrument itself and of numerous and unrepudiated contemporaneous expressions to the same effect, the fact would seem to be incontestable that the basis of the new National State was conceived by those establishing it to rest upon an agreement between the several ratifying States.

Notwithstanding, however, this general predication of a contractual basis for the new Constitution, there is equally positive proof that the people of the time intended to establish, and believed that they were establishing not simply a central governmental power that was to act as the common agent in certain matters for a league or confederation of sovereign States, but a National State under which no right, either of nullification of federal law, or withdrawal from the Union, was to be reserved to or by the States. To be sure, these two views are, and were, logically contradictory, and had the people of that time been political logicians, they would not have been able to accept them both. But this does not militate against the fact that, in truth, they did accept them both.

As is well known, the political thought of that time was saturated with, and completely dominated by, the doctrines of natural rights, popular sovereignty, and the legitimization of political authority by mutual agreement between the governed, or between them and their rulers. For proof of the universality with which these views were held, one need search no further than the preamble and bills of rights of the state constitutions of that time, the writings of men like

Jefferson, Madison, Jay, and Tucker, and the decisions of the courts, including the early opinions of the Supreme Court of the United States. Throughout all the writings of the period, and for a generation following, where not explicitly stated, this political philosophy was held as necessarily implied.

If, then, there was a practical consensus of opinion that a public will could be created by a union of individual wills,—that public rights could be based upon a surrender of personal rights of individuals who were originally severally sovereign,—if this were so, what could be more natural than that the people should believe it to be equally possible for a national sovereignty to be created through the mutual agreement of thirteen severally sovereign political personalities? The reasoning which supported the one view would be equally strong to sustain the other.

There is, of course, not the space here, nor is this the place, to detail again the various expressions of opinion which go to prove that this was the view taken of the character and effect of the act by which the Constitution was adopted. But we may take the time to point out what are the two strongest proofs that we are right upon this point.

In the first place as evidencing this, there is the fact that there was a very general agreement in opinion that the new government should obtain the assent of the Peoples of the States, acting in their original sovereign capacity in conventions convened for that purpose. It was conceded at that time by all, or almost all, that for the establishment of a league or confederacy, such as had been created by the Articles, the

existing state governments were fully competent, but that when it came to the establishment of a Constitution,—the creation of a new political sovereignty,—a legitimate basis could only be found in the popular sovereignty upon which all political authority was believed ultimately to rest. In the Constitutional Convention, on July 23, Madison said that "he considered the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a league or treaty, and a constitution." Rufus King declared a popular ratification to be the surest way of dispelling "all doubts and disputes concerning the legitimacy of the new constitution." In other words, it was argued, that if this popular ratification were obtained, the fact that the new Constitution was to rest upon the assent of a less number of States than that provided for by the existing Articles of Confederation, would not be material, for the original source of all political legitimacy would have been appealed to and its approval obtained. As Marshall said in McCulloch *v.* Maryland, "To the formation of a league such as was the Confederacy, the state sovereignties were clearly competent. But when 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all." This, then, being the generally accepted theory of that time, the fact that such a popular foundation

was sought, and generally conceded to be necessary, for the new Constitution, is in itself almost conclusive proof that a sovereign National State was intended to be created.

In further verification, however, of the fact of an intended nationality is the negative circumstance that nowhere in the debates in the Federal Convention, nor in the state-ratifying conventions, nor in the pamphlets which were put forth on both sides upon the question of ratification, did there occur a single assertion of the right of secession.[1] On the other hand, the opponents of the proposed Constitution attacked it as providing for the destruction of the individual States, and for the creation of a consolidated government; and men like George Mason, Richard Henry Lee, and Patrick Henry predicted the dire oppression of the Commonwealths by the federal power. George Mason in the Virginia Convention declared: "This paper [the Constitution] will be the great

[1] In its ratification of the constitution, Virginia declared: "Do, in the name and in the behalf of the people of Virginia, declare and make known, that the powers granted under the constitution, being derived from the people of the United States, may be assumed by them whensoever the same shall be perverted to their injury or oppression." New York in her ratification declared: "That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness." Rhode Island declared: "That the powers of government may be reassumed by the people, whensoever it shall become necessary to their happiness." Some writers, *e. g.*, Tucker, "Const. Law," p. 339, interpret these declarations as reservations of a legal right of secession from the Union. As a fact, however, it is clearly demonstrable that they were intended simply as declarations of the moral right of revolution in cases of oppression.

charter of America; it will be paramount to everything. After having once consented to it we cannot recede from it." Richard Henry Lee, in his letters written over the signature "The Federalist Farmer," asserted: "It is to be observed that when the people shall adopt the proposed Constitution it will be their last and supreme act. It will be accepted not by the people of New Hampshire, Massachusetts, etc., but by the people of the United States; and wherever this Constitution, or any part of it, shall be incompatible with the ancient customs, rights, the laws or the constitutions heretofore established in the United States, it will entirely abolish them and do them away." Surely it is reasonable to believe that, had it been generally held that under the proposed Constitution a legal right of withdrawal was still left the States, this belief would have been declared in answer to such emphatic utterances as these.

Not only, however, were there no assertions at this time of a right of secession, but there were specific declarations to the contrary. A conspicuous instance of this was in Madison's reply to the query of Hamilton as to the propriety of "propositions of amendments upon condition that if they are not adopted within a limited time, the States shall be at liberty to withdraw from the Union." Madison's reply was: "My opinion is that a reservation of a right to withdraw, if amendments be not decided on under the form of the Constitution within a reasonable time, is a conditional ratification; that it does not make New York a member of the new Union, and consequently that she could not be received on that plan. Compacts

must be reciprocal—this principle could not in such a case be preserved. The Constitution requires *an adoption in toto and forever.* It has been so adopted by the other States. An adoption for a limited time would be as ineffective as an adoption of some of the articles only. In short, any condition whatever must vitiate the ratification."

This letter of Madison's was read to the New York convention, whereupon that convention ratified the Constitution unconditionally. The contents of this letter of course became also well known to the people of the other States, and, so far as we know, gave rise to no protests, such as surely would have arisen had the doctrines that it declared been contrary to those generally held.[1]

In connection with the assertion that it was generally agreed, both by the supporters and opponents of the new Constitution, that a National State was to be brought into being, we must also remember that, as appears by overwhelming evidence, the men of those times were practically unanimously of the opinion that it was perfectly possible to create a genuine National State that would, within its own limited sphere, be absolutely and truly sovereign; and, at the

[1] The significant fact is to be noticed that in this very letter which contains this emphatic denial of this reserved right of withdrawal in the State, is employed a phraseology that clearly indicates the presence in Madison's mind of the idea that the States are to be the ratifying parties to the new instrument of government. If the adoption be conditional New York will not become "a member of the new Union;" "Compacts must be reciprocal;" "It has been so adopted by the other States," are the phrases used.

same time, to preserve the several member States as true States which would be, within their respective spheres, equally sovereign and independent. In other words, to the theorists of 1789 there seemed no difficulty whatever in a divided sovereignty, and therefore, in the existence of a sovereign National State composed of constituent sovereign States.[1]

We must believe that it did not wholly escape the constitutional fathers that, ultimately, there must be some single source of the political authority both of the National State and of its member States. They deemed, however, this logical necessity satisfied by asserting in general terms that all right to political rule is derived from the people, without clearly stating whether by the people they meant the citizen bodies of the thirteen States, severally considered, or the whole American *populus* conceived as a single body politic. Thus, instead of giving any real answer to the question as to the final location of sovereignty in America, they merely pushed the problem one step further back and there left it as undetermined as before. This, however, was not a conscious, deliberate evasion of the difficulty as Small and Walker would have us believe. It was a clear self-deception,—a self-deception from which Americans were very slowly released, for even after serious conflicts had arisen between the Federal Government and the individual Commonwealths, and the former had clearly demonstrated its paramountcy, both nationalists and particularists long continued to speak of a division of

[1] For the evidence as to the generalness with which this view was held, see Merriam's "History of American Theories," Chap. VII.

sovereignty between federal and state governments. It was not, indeed, until the time of the Calhoun-Hayne-Webster debate that the indivisibility of sovereignty was definitely put forward. Even this, however, did not put an end to the theory. It continued to figure in our political thought until the outbreak of the Civil War, when it received its last unfortunate application at the hands of Buchanan when he asserted that, though the individual States had not the legal right of secession, the National Government had not the constitutional power to prevent them from doing so.

By adopting the explanation which we have just given of the motives and intentions of those who framed and adopted our Constitution, we seem to be thrown into the peculiar position of maintaining that the people desired and thought that they were obtaining a result that we now know to have been a logical impossibility—namely, the creation of a legally indissoluble Union by an agreement between sovereign States—one in which not simply the exercise of sovereignty but the power itself should be divided between the National State and its member Commonwealths. What then, as a matter of fact, are we to say was the nature of the actual product? If this was simply a question as to which should determine, the intention, or the means employed, we should not hesitate to say that the intention should be controlling. If that *animus* was there, upon which is based the true origin of a State, then, by whatever means this subjective condition obtained objective manifestation, we should be justified in declaring

that a National State was created; and in asserting that, though the people thought themselves to be acting as States, yet, in truth, the fact that they were seeking the establishment of a political power which was to destroy the existence of those States as sovereign bodies, necessarily produced the result that the participation of the States in the establishment of the new government was no more than a formal one, and that, in reality, their governmental organs were used by a single People for the performance of a truly National act. But the difficulty is, as we have already learned, that though the people intended to create, and thought that they were creating a National State, they also believed that they were not sacrificing the sovereignty of their several Commonwealths.

These, then, being the facts, and remembering that the creating cause of a State is that there exists in a community a "General Will" demanding political unity, it plainly appears that the answer to the question whether or not there was created, or rather existed, in 1789 a single sovereign People, turns upon the point whether at that time there was a stronger desire for national unity than for the continued sovereignty of the several States. In other words, the question is: If the fact had been clearly presented to the people that sovereignty cannot be divided, and that, therefore, they must choose between National Sovereignty and absolute State Sovereignty, which would they then have selected? To such a hypothetical question there cannot of course be given an absolutely certain reply. We think, however, that the preponderating opinion of historians of all schools,

nationalistic and particularistic, is that had this alternative been thus sharply outlined in 1789, the proposed Constitution would have failed of ratification by a sufficient number of States to enable it to go into operation. For, as it was, it was only with the greatest difficulty that its adoption was secured. This being so, we are, as a consequence, almost forced to say that the adoption of the Constitution and the establishment of a government according to its provisions was not a demonstration of the fact that a truly sovereign, national State had come into being.

At first thought this seems to be a very important admission,—one that goes very far toward supporting the claims of the States' Rights School as made from time to time during our history since 1789. But let us see to what extent this is the necessary result. Recurring to our analysis of the nature of sovereignty, we remember that, though we say that the force that creates a State, and therefore its sovereignty, is the General Will of a People demanding political unity, the State itself cannot be said really to exist until this will has become objectively manifested, that is, has found expression in the creation of some sort of governmental organization through which its desires may be satisfied. So also, reasoning in the other direction, we say that so soon as a People ceases to yield general obedience to the commands of a given political organization, and thus in deed and fact no longer recognizes its sovereignty, and, indeed, renders obedience to the laws of another political power, the old sovereignty is destroyed and a new one has taken its place. In such a case, however peaceably and gradually the transition may have been effected, the change must be

held to have been illegal and revolutionary in character when looked at from the standpoint of the old State; for there is no legal means by which the sovereignty of one or several bodies politic may be transferred to a new political entity. In fine, sovereignty, though itself the source of all law, is not itself founded upon law. It is based wholly upon fact, and its existence has to be demonstrated as such. Bearing in mind, then, this fact, and granting that the Constitution at the time of its adoption, created, and was intended to create, a Confederacy, it may properly be argued that there soon came into being a national feeling which created a national sovereignty that was objectively realized both in explicit declaration and in fact. Adopting this reasoning it may be said that the circumstance that the Constitution was so indefinitely worded that it could be interpreted as creating a National State, without doing too much violence to the meaning of its terms, enabled the people, through Congress and the Supreme Court, to satisfy their desire for political unity without a resort to open revolutionary means. Still, it must be conceded by those who take this view, that however peaceably and gradually the transformation to a Federal State was effected, the change was necessarily revolutionary in character. It does not help them to point to the manner in which its steps were clothed in apparent legal form. In our next chapter, then, we shall consider some of the events following the inauguration of the new government which tend to demonstrate that, however confederate in character the Union may have been at the time of its creation, a National Federal State soon came into being.

CHAPTER III

THE DEVELOPMENT OF NATIONAL SOVEREIGNTY

We are warranted in assuming that, from the very beginning of the new régime, the great improvement both in political and commercial conditions must have tended to impress the people generally with the advantages of an effective central government. Such measures of national legislation as the Impost and Navigation Acts, the reënactment of the Northwest Ordinance, the assumption of state debts, the establishment of a National Bank, all adopted within a few years after the establishment of the new central authority, operated greatly to increase the actual influence and power of the Federal Government. Incidents such as the successful suppression of the so-called "Whisky Rebellion" in Pennsylvania must also have had a considerable weight in the same direction. None of these exercises of the federal power, however, with the possible exception of the last, influential though they may have been to evoke the sentiment that was needed to create and maintain a national State, involved any explicit assumption of a federal authority necessarily inconsistent with the continued existence of the sovereignty of the individual States.

For such decisive declarations we must turn to the decisions of the Supreme Court of the United States. Seizing upon three generally worded clauses of the Constitution this tribunal, presided over by justices, the majority of whom were nationalistic in sentiment, soon gave to the federal power such an interpretation as clearly to demonstrate that henceforth sovereignty in the American State was to reside in the Union. The three constitutional clauses thus utilized were the following:

1. "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." (Art. VI, Sec. 2.)

2. "The judical power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . . The 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." (Art. III, Secs. 1 and 2.)

3. "The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof." (Art. I, Sec. 8.)

The first of these clauses was made to mean that whatever exercise of federal power the Supreme Court of the United States should decide to be consti-

tutional, the people and governments of the individual States should accept as legally binding, and whatever acts of the States it should hold unconstitutional they should consider as null and void. The second of these clauses was made to give to the federal court full jurisdiction to consider all questions of conflict between the federal and state authorities. The third was employed to enable that tribunal to sanction the exercise by the Federal Government of a range of powers sufficient to enable it effectively to perform its functions as a sovereign, National State.

One of the very first laws passed by the federal legislature was the famous Judiciary Act which created the inferior federal courts authorized by the Constitution and outlined both their fields of jurisdiction and the appellate jurisdiction of the Supreme Court. To the importance of the twenty-fifth section of this Act which provided for a final review by that tribunal of all cases decided in the highest courts of the several Commonwealths in which should be drawn into question the relative competences of the Union and of the Commonwealths, and in which the decisions of the States' courts should be adverse to the federal power, we shall later refer.

A liberal construction by Congress and the Executive of the powers of the Federal Government began almost immediately after the adoption of the Constitution, as was especially shown in the establishment in 1791 of a National Bank and in the appellate jurisdiction granted the Supreme Court. The constitutionality of the exercise of these powers was vigorously denied by those who objected to such an increase

of federal power and influence, but the first open threat of resistance to the National Government was in 1793. This was brought about by the assumption by the federal Supreme Court of jurisdiction to hear and determine a suit brought against the State of Georgia by a citizen of another State, and the actual rendition by it of a judgment against that State (Chisholm *v.* Georgia, 2 Dallas, 419). Many of the States took immediate alarm at this decision, not simply because they had debts the collection of which might thus be enforced against them, but upon the political ground that thus to hold them amenable to suit was a practical denial of that sovereignty which they claimed still to possess. That they were fully justified in attaching this significance to the decision is shown in the words of Justice James Wilson, who in the opinion which he rendered in the case, said: "This is a case of uncommon magnitude. One of the parties to it is a State; certainly respectable, claiming to be sovereign. The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others, more important still; and may, perhaps, be ultimately resolved into one no less radical than this—'do the people of the United States form a nation?'" Answering this question, Wilson declared: "As to the purposes of the Union . . . Georgia is not a sovereign State."

After the rendition of this decision the State of Georgia declared her intention of refusing to allow it to be enforced, and passed a law threatening death

to any one who should attempt its execution. Actual collision between the state and the federal authority, however, was avoided by the adoption of a constitutional amendment declaring that the judicial power of the United States should not be construed to extend to suits brought against the States by citizens of other States.

From this dispute the Federal Government emerged clearly the winner, it being established that only by an express constitutional amendment were the States to be released from being dragged unwillingly to the bar of a federal tribunal.

In 1794 came the next threat of resistance to the Federal Government. A considerable number of the people of western Pennsylvania refused to pay the excise upon whisky levied by an act of Congress of 1791. At the call of the President of the United States the militia of Pennsylvania took the field, whereupon, overawed by this display of force, the resistance to the execution of the federal law melted away. Thus again was federal authority maintained.

In 1798–99 were issued by the legislatures of two of the States Resolutions asserting that the Federal Union was based upon a compact between the States, and very nearly, if not quite, asserting the doctrine that a State had the right to declare void and refuse obedience to laws which it should deem unwarranted by the terms of that compact. The effect of these Virginia and Kentucky Resolutions was, however, to strengthen the national theory, for no other State recognized their doctrines as correct, but, upon the contrary, most of the other Commonwealths by resolu-

tion explicitly declared them dangerous or erroneous. Furthermore, the very acts of Congress against which these Resolutions were directed were afterwards enforced in Virginia without resistance, and that, too, in a most offensive manner.[1]

In 1801 the strict constructionist Republicans under Jefferson came into power, but, so strong was the national drift that his administration witnessed the annexation of the vast Louisiana Territory and the enactment of the Cumberland Road Bill—both measures requiring for their constitutionality a very elastic interpretation of the powers of the Federal Government.

In 1803 came the decision of the Supreme Court of the United States in the famous case of Marbury *v.* Madison (1 Cr., 137), in which, for the first time, an act of Congress was explicitly declared unconstitutional and therefore void of legal force. The great significance of the decision consisted not simply in that it upheld the power of the federal judiciary as opposed to that of the federal legislature, but that it pointed out that the tribunal to which resort should be had for an authoritative and final decision in the case of a federal enactment of doubtful constitutionality was not to the member States of the Union but to the federal Supreme Court.

In this case the imperative character of the Constitution was declared in the following words: "That the people have an original right to establish for their

[1] For example, in the trial and conviction of Callender. For his alleged unjudicial conduct in this case the presiding federal judge, Chase, was afterwards impeached but acquitted.

future government such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion, nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And, as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislatures are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limitations may, at any time, be passed by those intended to be restrained?''

In the next year, 1804, the Supreme Court, in the case of The United States *v.* Fisher (2 Cr., 358), laid down in the clearest manner possible the doctrine that the Federal Government, in the exercise of the powers specifically granted to it, is not restricted to the employment of simply those means that are indispensably necessary, but may make use of any means that are calculated to assist in attaining an end specifically authorized by the Constitution. ''It would be incorrect and would produce endless difficulties,'' says the Court, ''if the opinion should be maintained that

no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said, with respect to each, that it was not necessary because the end might be reached by other means. Congress must possess the choice of means, and must be empowered to use any means which are, in fact, conducive to the exercise of a power granted by the Constitution."

Five years later, in 1809, was decided the case of The United States *v.* Peters (5 Cr., 115),—a case which involved a direct contest of power and authority between the Federal Government and the State of Pennsylvania. A vessel, the sloop *Active,* had been condemned and sold in 1777 as a prize by the admiralty court of Pennsylvania. Upon appeal to the Committee of Appeals of the Continental Congress this decision had been overruled and the state marshal forbidden to pay over the proceeds to the state court. Notwithstanding this order, however, the money was paid over, and ultimately found its way into the state treasury. In 1803 suit was brought in a federal District Court to recover this money from the estate of the state treasurer, Rittenhouse, then deceased, and judgment was obtained. Thereupon the legislature of Pennsylvania passed an act denying the authority of the federal court in the premises, and directing the state executive to prevent, by force, if necessary, the execution of the federal decree. Repeated efforts to obtain a peaceful settlement having failed, a writ of mandamus was asked for from the Supreme Court of the United States to compel the

district judge to enforce his judgment. In passing upon the request thus raised, Chief Justice Marshall clearly recognized that the very existence of the National Government as a competent central authority was involved. "If," he said, "the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under these judgments, the Constitution itself becomes a solemn mockery; and the Nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all, and the people of Pennsylvania, not less than the citizens of every other State, must feel a deep interest in resisting principles so destructive of the Union and in asserting consequences so fatal to themselves." "The act in question," continued the Chief Justice, "does not, in terms, assert the universal right of the State to interpose in every case whatever; but assigns, as a motive for its interposition in this particular case, that the sentence, the execution of which it prohibits, was rendered in a cause over which the federal courts have no jurisdiction. If the ultimate right to determine the jurisdiction of the courts of the Union is placed by the Constitution in the several state legislatures, then this act concludes the subject; but if that power necessarily resides in the supreme judicial tribunal of the nation . . . the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question." After examining and refuting the claim that the federal district court did not have jurisdiction, the Chief Justice declared that

"consequently the State of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause." "It will be readily conceived," he concluded, "that the order which this court is enjoined to make by the high obligations of duty and of law, is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty, and therefore must be performed. A peremptory mandamus must be awarded."

The preëminent importance of this decision of a case growing out of the first open resistance of a State to federal authority has justified the foregoing extensive quotation from it. In obedience to this order, the district judge issued his writ of attachment. When, however, it was attempted to be served, the marshal found the Rittenhouse residence surrounded by state militia which had been called out by the Governor in obedience to the act of the legislature. The marshal therefore withdrew and summoned a *posse comitatus* of two thousand men. Appeal was then made by the Governor of Pennsylvania to the President of the United States to prevent the execution of a judgment founded, it was declared, upon a usurpation of power. Madison, however, declined to interfere, and the Pennsylvania legislature thereupon gave way and the money was paid over. Later the Federal Government still further vindicated its authority by indicting, and securing the conviction of, the general of the Pennsylvania militia and his men who had resisted the service of the federal writ.

The State of Pennsylvania, thus defeated, suggested

that the federal Constitution be so amended as to provide that an impartial tribunal be established for the trial of disputes between individual States and the United States. Upon this proposal being sent to Virginia, both houses of the legislature of that State unanimously condemned it and declared that "a tribunal is already provided by the Constitution of the United States, to wit, the Supreme Court, more eminently qualified, from their habits and duties, from the mode of their selection, and from their tenure of office, to decide the disputes aforesaid, in an enlightened and impartial manner, than any other tribunal that could be created."

The facts of this famous case, together with the explicit utterances of the Supreme Court, certainly went very far toward demonstrating that already sovereignty lay in the United States.

In 1810 a state law was again declared unconstitutional and therefore void,[1] this time upon the ground that it impaired the obligation of contracts, a characteristic that has since operated to invalidate well on to a hundred state acts.

In 1819 was decided the case of McCulloch *v.* Maryland (4 Wh., 316), which, though it can scarcely be said to have involved the enunciation of any absolutely new constitutional principles is yet important; first, because of the liberality with which it was declared that the implied powers of the Federal Government should be construed; second, because of the explicitness with which it was asserted that a State may not interfere in any way, by taxation or other-

[1] Fletcher *v.* Peck, 6 Cr., 87.

wise, with the exercise by the Federal Government of any of its powers; and third, because of the reasoning by which these two principles were sought to be proved.

The principle of the loose construction of the powers of Congress was declared in the following language. After speaking of the powers expressly given to Congress by the Constitution, Marshall said: "It must have been the intention of those who gave these powers to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and, consequently, to be adapted to various crises of human affairs. To have prescribed the means by which government should in all future time execute its powers would have been to change entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those only without which the power given would be nugatory, would have been to deprive the executive of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. . . . 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, are consistent with the letter and spirit of the Constitution, are constitutional."

The case of McCulloch *v.* Maryland had arisen out of an attempt on the part of the State of Maryland to tax the United States Bank which the Federal Government had chartered to assist it in the conduct of its fiscal affairs. Having demonstrated the constitutionality of the establishment of this institution, the attempt of a State to control it, directly or indirectly, by taxing or otherwise, was explicitly denied by the Court in the following words: "The government of the United States, though limited in its powers, is supreme within its sphere of action. . . . The nation, on those subjects on which it can act, must necessarily bind its component parts. . . . The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. . . . The court has bestowed on this subject the most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."

Turning now to the reasoning by which the Court sustained the positions it took, we find a very strongly nationalistic interpretation given both to the process by which the federal Constitution was adopted and to the character of the government provided for by it. After adverting to the fact that the counsel for the State of Maryland had deemed it of importance, in the construction of the Constitution, to consider that instrument "not as emanating from the people, but as the act of sovereign and independent States," and the powers of the General Government as "delegated by the States, who alone are truly sovereign, and must be exercised in subordination to the States, who alone possess supreme dominion," Marshall declared: "It would be difficult to sustain this proposition. The convention which framed the Constitution was, indeed, elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States with a request that it might 'be submitted to a convention of delegates, chosen in each State, by the people thereof, under the recommendation of its legislature for their assent and ratification.' This mode of proceeding was adopted; and by the convention, by Congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely on such a subject, by assembling in convention. It is true they assembled in their several States, and where else could they have assembled? No political

dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments. From these conventions the Constitution derives its whole authority. . . . The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The Constitution when thus adopted was of complete obligation, and bound the state sovereignties."

In 1816 was decided by the Supreme Court of the United States the case of Martin *v.* Hunter's Lessee (1 Wh., 304), in which Justice Joseph Story prepared the opinion, and, in 1821, the case of Cohens *v.* Virginia (6 Wh., 264), in which Marshall spoke for the Court. These two cases turned upon the efforts of the State of Virginia to release herself from what she deemed the unconstitutional humiliation of having decisions of her highest court reviewed in the Supreme Court of the United States, when the decisions of her court were adverse to alleged federal rights. Appeals in such cases from the highest courts of the States to the federal tribunal had been provided for, as has been before noted, by the famous twenty-fifth section of the Judiciary Act passed in 1789.

The constitutionality of this section had been, and later still was, strenuously resisted by the upholders of so-called "States'-Rights,"[1] and well they might resist it, for to give to federal judges the final decision in all cases of conflict between state and federal rights, even when such conflicts were between citizens of the same State and litigated in the courts of that State, was certainly to ascribe a paramountcy to the National Government. Calhoun saw this clearly enough and declared: "The effect of this is to make the government of the United States the sole judge, in the last resort, as to the extent of its powers, and to place the States and their separate governments and institutions at its mercy. It would be a waste of time to undertake to show that an assumption that would destroy the relation of coördinates between the government of the United States and those of the several States—which would enable the former, at pleasure, to absorb the reserved powers and to destroy the institutions, social and political, which the Constitution was ordained to establish and protect—is wholly inconsistent with the federal theory of the government, though in perfect accordance with the national theory. Indeed, I might go further and assert that it is, of itself, all sufficient to convert it into a national, consolidated government."

"The government of the United States," said the counsel for Virginia in the case of Cohens *v.* Virginia, "operates directly upon the people, and not at all upon the state governments. The state governments

[1] See, for instance, Calhoun's "Discourse on the Constitution and Government of the United States," Works, I, 318–340.

are not subject to this government. The people are subject to both governments. . . . The appellate jurisdiction conferred by the Constitution on the Supreme Court is merely authority to revise the decisions of the inferior courts of the United States. . . . Appellate jurisdiction signifies judicial power over the decisions of inferior tribunals of the same sovereignty. . . . Congress is not authorized to make the supreme court or any other court of a State an inferior court. . . . The inferior courts spoken of in the Constitution are manifestly to be held by federal judges. The judicial power to be exercised is the judicial power of the United States; the errors to be corrected are those of that judicial power; and there can be no inferior courts exercising the judicial power of the United States other than those constituted and ordained by Congress. . . . If it had been intended to give appellate jurisdiction over the state courts, the proper expressions would have been used. There is not a word in the Constitution that goes to set up the federal judiciary above the state judiciary. . . . Can it be believed that it was meant that the greatest, the most consolidating of all the powers of this government, should pass by an unnecessary implication? ''

In both the cases of Cohens *v.* Virginia and of Martin *v.* Hunter's Lessee the Supreme Court flatly repudiated this reasoning. In the latter it declared: "It is the case . . . not the court, that gives the jurisdiction. . . . The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Consti-

tution may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power."

In the opinion rendered in the case of Cohens *v.* Virginia, in which the whole question had been reargued, speaking with reference to the attempt of Virginia to punish an individual for committing an act permitted by a federal statute, Marshall asserted the sovereignty of the National Government in the following emphatic language. "If it could be doubted," he declared, "whether from its nature it [the National Government] were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration that 'this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under 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.' This is the authoritative language of the American people, and, if the gentlemen please, of the American States. . . . The people made the Constitution and the people can unmake it. . . . But this supreme and irresistible power to make or to unmake resides only in the whole body of the people; not in any subdivision of them. The attempts of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated the power of repelling it. . . . The framers of the Constitution were indeed unable to make any provisions

which should protect that instrument against a general combination of the States, or of the people for its destruction; and, conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one State, whose tendency might be to arrest the execution of the laws; and this it was the part of wisdom to attempt. We think they have attempted it."

In 1824, in Osborn *v.* Bank of the United States (9 Wh., 738), the attempt of Ohio to tax the federal bank was declared unconstitutional. In 1829, in Weston *v.* Charleston (2 Pet., 449), a municipal tax on stock of the United States held by inhabitants of the city of Charleston was held improper. In 1824, in the case of Gibbons *v.* Ogden (9 Wh., 1), was begun that long line of decisions which has established the power of the United States to regulate interstate commerce free from state interference—an authority the exercise of which has done so much to increase the actual power and influence of the National Government. In this case a law of the State of New York was held void.

In 1823 a law of Kentucky was held of no force by the federal court (Green *v.* Biddle, 8 Wh., 1), and in 1830 a law of Missouri received similar treatment (Craig *v.* Missouri, 4 Pet., 410).

We may stop now for a moment to summarize the light that forty years of actual experience had thrown upon the question as to the character of the General Government established in 1789. Certainly it must be granted that the officially declared views and the realized facts had demonstrated the absolute sover-

eignty of the federal power so conclusively as properly to place that question outside of the sphere of debatable political theory. Not only had the supremacy of the General Government in the exercise of its express and implied powers been stated and enforced in the most unqualified manner, but, more important still, and in itself practically decisive of the question as to the location of sovereignty in our federal system, the principle had been authoritatively asserted and maintained that the settlement of all disputes as to the relative competences of the state and federal governments, whether originating in the state or federal courts, was placed finally and absolutely in the hands of the supreme judicial organ of the federal power. The reasoning and the conclusions of the Virginia and Kentucky Resolutions had been repudiated by the other States, and in one form or another the federal supremacy had been vindicated as against the efforts at interference, resistance, or protests of Pennsylvania, Kentucky, Virginia, Maryland, Ohio, New York, South Carolina, and Massachusetts.[1]

The only instance up to this time in which the federal power had been successfully resisted by the authorities of a State was that in which Georgia had refused, and had not been compelled, to be guided by federal treaties and law governing the rights of the Creek and Cherokee Indians living within her borders.

[1] Massachusetts' protests against the Embargo Act were disregarded. In M'Kim *v.* Vorhies, 7 Cr., 279, the attempt of a Kentucky court to enjoin the enforcement of a judgment of a federal court was repelled.

But this successful resistance to federal law was rendered possible not because of the actual or legal inability of the National Government to compel obedience to its commands, but because of the refusal of the President to take the steps necessary for the enforcement of the orders of the federal courts.

In 1828 was enacted by Congress the Tariff Act which received the name "Tariff of Abominations" and which was considered extremely oppressive by the Southern States. The dissatisfaction thus aroused caused numerous threats of resistance and even of disunion. In December of 1828 the legislature of South Carolina adopted a declaration of principles, or "Exposition" as it was called, which had been written by John C. Calhoun, and which explicitly announced the nullification doctrine. In several of the other States of the South the same doctrine was announced. In 1830 came the famous debate in the United States Senate between Webster and Hayne. In 1832 the people of South Carolina assembled in convention and issued "an ordinance to nullify certain acts of the Congress of the United States purporting to be laws." This ordinance went on to declare that "it shall not be lawful for any of the constituted authorities, whether of this State or of the United States, to enforce the payment of duties imposed by the said acts within the limits of this State," and concluding with the statement that "we do further declare that we will not submit to the application of force on the part of the federal government to reduce this State to obedience; but that we will consider the passage by Congress of any act authorizing the

employment of a military or naval force against the State of South Carolina, her constitutional authorities or citizens, or any act abolishing or closing the ingress or egress of vessels to or from the said ports . . . as inconsistent with the longer continuance of South Carolina in the Union; and that the people of South Carolina will henceforth hold themselves absolved from all further obligation to maintain or preserve their political connection with the people of the other States; and will forthwith proceed to organize a separate government, and do all other acts and things which sovereign and independent States may of right do."

In pursuance of this ordinance the legislature of South Carolina passed laws which, it was said at the time, "legislated the Federal Government out of the State of South Carolina."

Meanwhile South Carolina had sent her proclamation of nullification to the legislatures of the other States. Without exception, where an answer to it was returned, it was in condemnation of the principles enunciated. This was no less true of the Southern than of the Northern States. Virginia, though asserting her continued adherence to the doctrines of the Resolutions of 1798, declared that they did not sanction those put forward by South Carolina. North Carolina declared the doctrines of her sister State "revolutionary in character," and "subversive of the Constitution of the United States." Alabama characterized them as "unsound in theory and dangerous in practice—unconstitutional and essentially revolutionary;" and Mississippi stigmatized them as "con-

trary to the letter and spirit of the Constitution and in direct conflict with the welfare, safety, and independence of every State in the Union," and declared that she would "indignantly frown upon the first dawning of every attempt to alienate any portion of our country from the rest, or to enfeeble the ties which link together the various parts."

As is well known, the emphatic utterances and energetic actions of President Jackson compelled South Carolina to withdraw from the position she had assumed. Thus once again the Federal Government vindicated its supremacy.

From 1835 to the outbreak of the Civil War there can be no question but that the Supreme Court of the United States exerted a much less potent influence in solidifying and expanding the federal power than it had exercised during the thirty-five years preceding. During the two terms of office of Jackson, five vacancies occurred in the Supreme Court, among them that of the Chief-Justiceship to which Taney was appointed in 1835. The effect of the new appointments upon the views of the Court was shown almost immediately. In the case of Briscoe *v.* Bank of Kentucky (11 Pet., 257), which had been argued just before the death of Marshall, the issue by the bank of bills of credit had been held unconstitutional. A rehearing being granted, however, and the case coming on for argument under Taney, the action of the bank was sustained and the previous decision reversed. This decision marked the beginning of a new era in the history of constitutional interpretation. Up to this time the court had upon all possible occasions upheld

the General Government in the exercise of its powers, and had held the States strictly to the obligations imposed upon them by the Constitution; now, however, it began, if anything, to lean the other way. In Briscoe's case, departing from its former practice, by an extremely loose interpretation of a constitutional limitation that had been laid upon the States, it rendered practically nugatory one of the provisions of the Constitution. Other decisions, similarly favorable to States' Rights, followed. In the case of City of New York *v.* Miln (11 Pet., 102), a state law was sustained which might easily have been held an interference with the federal control of interstate commerce. In the Charles River Bridge Co. *v.* Warren Bridge Co. (11 Pet., 420), a doubtful State law was again upheld. In 1847 in a series of warmly contested cases known as the License Cases (5 How., 504) interpretations of the Commerce Clause favorable to the States were given. In Kentucky *v.* Dennison (24 How., 66), it was held that though the federal Constitution made it a duty of a State to surrender to another State a fugitive from justice from that State, there was no constitutional means by which the Federal Government could compel the performance of that duty. In all these cases the States were favored at the expense of the authority of the General Government. In 1845 Justice Story wrote to a friend: "I have been long convinced that the doctrines and opinions of the old court were daily losing ground, and especially those on great constitutional questions. New men and new opinions have succeeded. The doctrines of the Constitution, so vital to the country, which in former

times received the support of the whole court, no longer maintain their ascendency. I am the last member now living of the old court, and I cannot consent to remain where I can no longer hope to see those doctrines recognized and enforced." Again, writing to Justice McLean, he said: "There will not, I fear, ever, in our day, be any case in which a law of a State, or of Congress, will be declared unconstitutional; for the old constitutional doctrines are fast fading away, and a change has come over the public mind from which I augur little good."

In 1841, in Prigg *v.* Pennsylvania (16 Pet., 539), a state law attempting the regulation of the return of fugitive slaves was held unconstitutional and void on the ground that this subject was wholly withdrawn from the control of the States. Taney, however, though concurring with the majority in holding unconstitutional the particular law in question, took pains to assert that there was no constitutional incompetence on the part of the State to pass laws the intention and actual effect of which were to assist the Federal Government in the capturing and returning of fleeing negroes.

Regarding the attitude of the Supreme Court during this period, the important fact is to be noticed that, though it threw the weight of its influence upon the side of the States so far as concerned a liberal interpretation of the powers reserved to them by the Constitution, not once, in the slightest measure, did it during these years, any more than it had done in the years preceding, intimate that the actual legal and political supremacy was not vested in the National

Government. The position of Taney and of the court upon this point was clearly shown in the judgment rendered, and in the opinion delivered, in the case of Ableman *v.* Booth (21 How., 506), decided in 1859. The facts of this case were these: Booth had been tried in a lower federal court for a violation of the federal fugitive slave law of 1850, and had been found guilty and sentenced to imprisonment. The highest court of the State of Wisconsin, however, stepped in, disregarded this judgment, and released the prisoner. Not only this, but it went on to declare that its decision, thus rendered, was subject to no appeal and was conclusive upon all the courts of the United States; and when a writ of error from the United States Supreme Court directed to the Wisconsin court was issued, the clerk of the state court replied to it that he had been directed to make no return, and refused to make up and send a record of the case to the federal court. Thereupon the Attorney-General of the United States filed in the Supreme Court of the United States an uncertified record which it was ordered should be received as though returned by the clerk of the Wisconsin court. Having thus gotten the case before it, despite the resistance of the State, the decision of the Supreme Court thereupon was an emphatic condemnation of the State's action. "No State, judge, or court," declared Taney, who rendered the opinion of the court, "after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before him. And if the authority of the State, in form of judicial process or

otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference."

CHAPTER IV

SECESSION: COERCION OF STATES: RECONSTRUCTION

In the foregoing chapters there has been set forth the view that in 1789 the establishment of a national, sovereign State, as distinguished from a League of independent Commonwealths, was intended, and that though in form, and in the belief of its creators, deriving its life from a voluntary agreement between sovereign States, the union then effected was regarded as one from which its commonwealth members might not legally secede. But, though this was, as we believe, the view generally held at the time the new government was inaugurated, assertions of both a constitutional and an ethical right on the part of the States to withdraw at will were soon made. In the First Congress, Pierce Butler of South Carolina threatened secession. In 1795 plans for separation were begun in Kentucky and western Pennsylvania, but these latter were, as Alexander Johnston says, the product rather of frontier freedom than the result of a theory of state sovereignty.[1] In 1795 also there appeared in the "Connecticut Courant" a series of articles urging a separation of the northern from the southern States.

[1] Lalor's "Cyclopedia Pol. Science," Article "Secession."

In September, 1799, Jefferson prepared a draft of a reply which he thought should be made to the States that had repudiated the Virginia and Kentucky Resolutions, in which he said: "We are willing to sacrifice to this [the Union] every thing but the right of self-government in these important points which we have never yielded, in which alone we see liberty, safety, and happiness; that not at all disposed to make every measure of error or of wrong a cause of secession, we are willing to look on with indulgence, and to wait with patience, etc." At another time he wrote: "We should never think of separation but for repeated and enormous violations." In the above expressions the rightfulness of secession was certainly implied and its possibility suggested. It is a remarkable fact also that, in the first two formal analyses of the federal Constitution by lawyers, it was held that the right of secession had not been abandoned by the individual States. The first of these analyses or commentaries was by St. George Tucker, an eminent judge in Virginia and stepfather of Randolph of Roanoke, and was published as an appendix to the first volume of an edition of Blackstone's Commentaries which appeared in 1803. After developing the view that the Constitution is a compact between the States, he declared: "The Federal Government, then, appears to be the organ through which the United Republics communicate with foreign nations, and with each other. Their submission to its operation is voluntary; its councils, its engagements, its authority, are theirs, modified and united. Its sovereignty is an emanation from theirs, not a flame in which they have been con-

sumed, nor a vortex in which they are swallowed up. Each is still a perfect State, still sovereign, still independent, and still capable, should the occasion require, to resume the exercise of its functions, as such, in the most unlimited extent."

Tucker's opinions upon this point were repeated in 1825 by Rawle in his "View of the Constitution." In that work he said: "The States may wholly withdraw from the Union, but while they continue they must retain the character of representative republics." He went on to say, however, that this right of secession might only be exercised by the "people," that is, in constituent assembly, and not by the legislature, unless that body were expressly given that authority by the constitution of the State. And he added: "But in any manner by which a secession is to take place, nothing is more certain than that the act should be deliberate, clear, and unequivocal; and in such case the previous ligament with the Union would be legitimately destroyed."

In 1811 Representative Quincy declared upon the floor of the House that it was his deliberate opinion that should the bill providing for the admission of Louisiana as a State become a law, the Union would be virtually dissolved, and that not only would the States be thus released from all moral obligations, but that "as it will be the right of all, so it will be the duty of some to prepare definitely for a separation, amicably if they can, violently if they must." During the operation of the Embargo Act and the War of 1812 there were many threats of secession from the New England States, culminating in the assem-

bling of the Hartford Convention.[1] In this meeting the possibility of a dissolution of the Union was discussed, and in the report that was made its moral rightfulness in cases of extreme oppression was asserted, but it does not conclusively appear either that actual immediate secession was there urged, or the doctrine declared that secession was more than a revolutionary right.

In the period from 1838 to 1845 the opposition to the proposed annexation of Texas led to declarations in New England that such an act would justify secession; and, on the other hand, in the South, the threat "Texas or Disunion" was frequently heard. From this time on, threats of secession on the part of the Southern States became increasingly numerous, until in 1861 they were finally attempted to be put into execution.

From the foregoing paragraphs it will have appeared that the theory of secession, both as a constitutional and as a revolutionary right, and actual threats of its exercise, played a part in the constitutional history of the United States from the first years of its existence. This important point is to be noticed, however, that in no one instance did any department or public official of the Federal Government fail, in case of threatened or actual conflict between state and federal law or authority, to assert the supremacy of the Federal Government. Jackson, himself, who did indeed refuse in one instance to enforce a judgment of the Supreme Court of the United States in which a law or laws of the State of Georgia had been declared void, upheld in the most emphatic

[1] Cf. von Holst, "Const. Hist. U. S.," I, p. 190 *et seq.*

manner the federal authority at the time that resistance to it was threatened by South Carolina. He met the nullification ordinance of that State by immediately summoning General Scott and giving him orders to garrison strongly Fort Moultrie and Castle Pinckney, and have a sloop of war and revenue cutters sent to Charleston to enforce the collection of the duties levied by the act which South Carolina had declared null and void. "Proceed at once to execute these views," he said to Scott. "You have my *carte blanche* in respect to troops; the vessels shall be there." Calhoun he threatened to hang as high as Haman,—a threat which some historians have asserted was not without its influence upon that arch exponent of nullification. In Congress the obnoxious tariff act was somewhat changed, but not so as to exclude from it those provisions which South Carolina had declared rendered it unconstitutional, and, furthermore, upon the same day that this new tariff law was passed, the so-called "Force Bill" was enacted, giving to the federal executive the amplest power to execute federal laws within a State, despite the opposition of its people.

The Supreme Court, guided by Taney, though giving a strict interpretation to federal powers and a liberal interpretation to those of the States, and though stating in some of its opinions the doctrine that the authority of the General Government was derived by gift from the sovereign States,[1] emphati-

[1] For example: "The Constitution of the United States, with all the powers conferred by it on the General Government, and surrended by the States, was the voluntary act of the people of the several States, deliberately done for their own protection and safety against injustice from one another." Ableman *v.* Booth.

cally upheld, as we have seen, the federal supremacy in Ableman *v.* Booth. That Taney was no more a supporter of the secession doctrine than he was of the right of nullification we of course know. He remained a member of the federal Supreme Court until his death in 1864, never questioning the constitutionality of the efforts being made by the government in whose service he was, to overcome the resistance of the seceded States. What his views were regarding the legality of secession we also know from a letter written by him to President Jackson relative to the Hartford Convention, in which he said: "I am free to declare, had I commanded the military department where the Hartford Convention met, if it had been the last act of my life, I should have punished the three principal leaders of that party. I am certain that an independent court martial would have condemned them." Even the unfortunate position which he and his colleagues took in the Dred Scott case, is to be interpreted as born of a belief that thus might be settled once for all the controversy which was seen to be threatening the dissolution of the Union.

Considered, then, simply from the constitutional standpoint, it would appear that in alleging in 1861 a right of secession the statesmen of the southern States advanced a theory that the events of preceding years had rendered untenable, if, indeed, it had ever been tenable. So often and so emphatically had the supremacy of the United States over its members been demonstrated, that, whatever may have been the fact in 1789, it was then no longer an open constitutional question.

When, however, from the purely political phase of the question we turn to a consideration of its ethical aspects, the solution is not so evident.

The moral right of an aggregate of people constituting a part of the citizen body of a State to withdraw themselves, and the territory that they inhabit, from beneath the sovereignty of that State is one the existence of which is to be determined by the ultimate result to which such an act will lead. No body of individuals has an abstract, that is, an absolute right, to an independent political existence. However, as the author has had occasion to say in another place:[1] "There is an exceedingly strong presumption not only that a given people best knows its own interests and the means of advancing them, but that, stimulated by the consciousness of national independence, it will develop its latent potentialities in a manner that it will not, or cannot, do when subjected to an alien authority. But this presumption, however strong, is one that may be rebutted. . . . The interests of civilization are superior to those of any particular people. Judged from this general standpoint it may, therefore, often happen that the forcible subjection of one people to the political rule of another is justified."

Patriotism, when a rationally grounded, ethical sentiment, implies a confident belief upon the part of those who entertain it, that the best interests of the world are to be subserved by supporting the State to which their allegiance is given. It is the writer's own opinion that, at the time of the adoption of the Constitution, there existed such a strong belief in the

[1] Article "Government," "Encyclopedia Americana."

necessity for, and beneficence of, a Union that should embrace all of the American States, that, had one or two, or possibly three of the then sovereign States refused to come into the Union, or, having come in, had attempted to withdraw, the citizens of the other States would have felt themselves morally justified in supporting the National Government in an attempt to coerce the recalcitrant or seceding States in becoming or remaining members of the Union. Thus it is quite certain that, had Rhode Island persisted in her refusal to join with her sister States, she would have been coerced into doing so. If, however, early in its existence, the new Nation had been called upon to meet the secession of a whole section of her territory, embracing a comparatively considerable number of her commonwealth members, it is by no means certain that either an attempt would have been made to prevent it, or, indeed, that it would then have been the general opinion that it would be morally right to prevent it.[1] In 1861, however, conditions were quite different. During the seventy-two years since

[1] "That ever, at any period of our history since 1790, a single State—no matter how sovereign, even Virginia—could alone have made good, peaceably or otherwise, a withdrawal in face of her unitedly disapproving sister States, I do not believe. . . . But how would it have been at any given time with a combination of States, acting in sympathy,—a combination proportionately as considerable when measured with the whole as was the Confederacy in 1861? I hold that here again it was merely a question of time, and that such a withdrawal as then took place would never have failed of success at any anterior period in our national history." Charles Francis Adams in an address entitled "The Constitutional Ethics of Secession," delivered at Charleston, S. C., December 22, 1902.

1789, not only had the National Government greatly increased in power as compared with the individual States, but the sentiment of nationality had grown greatly in strength in the northern and northwestern States. In the southern States, however, it had made little progress. When, therefore, in 1861, with the withdrawal from the Union of the eleven southern States, it became necessary to decide once for all whether secession was justifiable, it was but natural that the two sections should not agree.[1] In the northern States the people generally gave their primary allegiance to the Nation. They therefore held as morally unjustifiable any attempt to disrupt it. In the southern States, allegiance to the individual State was paramount. The people of that section, therefore, were convinced of the immorality of any at-

[1] The question as to the side upon which lay the preponderance of moral right in the Civil War is of course complicated by the element of slavery. An examination of the much-disputed point as to the extent to which this element entered as a factor in this struggle will not be possible here. It may be said, however, that the people of the seceding States have uniformly taken the ground that with them it was not primarily for the perpetuation of slavery, but for the preservation of states' rights that they strove. Upon the other hand it is quite incontestable that it was the disputes that had been had regarding slavery, and the fear of possible future attacks upon that institution, that led the men of the South to put into execution that right of secession which they claimed as a matter of constitutional and moral right to possess; and, furthermore, that upon the part of the people of the North the purpose, at the beginning of the war, of restraining the further spread of slavery, and later, of absolutely destroying it, furnished to them an additional moral reason for maintaining unimpaired the Union.

tempt to compel their commonwealths, against their wills, to remain members of a superior National State. Each, therefore, felt justified in resisting the other's demands. Both felt that the Civil War was fought to maintain that sovereignty which they respectively believed morally entitled to their obedience.

At the time that the disaffection of the Southern States ripened into open rebellion against the Union Buchanan was President. He asked the opinion of his Attorney-General, J. S. Black, as to his authority to employ armed force to compel the Southern States to return to their allegiance to the Union and obedience to its laws. Black advised him that, according to the Constitution and existing federal statutes, the President had the right to employ armed force only in a defensive way to protect property belonging to the General Government, or as a means for aiding the federal courts in obtaining the execution of their decrees. When there were no federal courts to issue judgments and federal officials to execute them, he maintained a use of military force would be illegal. "Without the exercise of those functions which belong exclusively to the civil service, the laws cannot be executed in any event, no matter what may be the physical strength which the government has at its command," he declared. "Under such circumstances, to send a military force into any State with orders to act against the people, would be simply making war upon them. The existing laws put and keep the Federal Government strictly upon the defensive. You may use force only to repel an assault

on the public property and aid the courts in the performance of their duty."

In his annual message of December 3, 1860, Buchanan denied the constitutional right of the States to withdraw from the Union. "Such a principle," he declared, "is wholly inconsistent with the history as well as the character of the Federal Constitution. . . . Secession is neither more nor less than revolution. It may or may not be a justifiable revolution, but still it is revolution."

When, however, from the constitutional theory that the individual States had no constitutional right to secede, Buchanan turned to the question as to the means that he might legally employ to bring them back to an obedience to federal authority, he, following the opinion of his Attorney-General, declared that he was not authorized to use armed force for that purpose. As President of the United States he of course held himself bound "to take care that the laws be faithfully executed." "But what," he asked, "if the performance of this duty, in whole or in part, has been rendered impracticable by events over which he could have exercised no control? Such at the present moment is the case throughout the State of South Carolina so far as the laws of the United States to secure the administration of justice by means of the federal judiciary are concerned. All the federal officers within its limits through whose agency alone these laws can be carried into execution have already resigned. We no longer have a district judge, a district attorney, or a marshal in South Carolina. In fact, the whole machinery of the Federal Govern-

ment necessary for the distribution of remedial justice among the people has been demolished, and it would be difficult, if not impossible, to replace it." After going on to state that, under existing laws of Congress, he had the power to use the militia and employ the army and navy only as a *posse comitatus* to aid the courts, and after asserting that "this duty cannot by possibility be performed in a State where no judicial authority exists to issue process, and where there is no marshal to execute it, and where, even if there were such officers, the entire population would constitute one solid combination to resist him," Buchanan said: "The question fairly stated is, Has the Constitution delegated to Congress the power to coerce a State into submission which is attempting to withdraw or has actually withdrawn from the Confederacy? If answered in the affirmative, it must be on the principle that the power has been conferred upon Congress to declare and to make war upon a State. After much anxious reflection I have arrived at the conclusion that no such power has been delegated to Congress or to any other department of the Federal Government. It is manifest upon an inspection of the Constitution that this is not among the specific and enumerated powers granted to Congress, and it is equally apparent that its exercise is not 'necessary and proper for carrying into execution' any of these powers. So far from this power having been delegated to Congress, it was expressly refused by the Convention which framed the Constitution. It appears from the proceedings of that body that on the 31st May, 1787, the clause 'authorizing an exer-

tion of the force of the whole against a delinquent State' came up for consideration. Mr. Madison opposed it in a brief but powerful speech, from which I shall extract but a single sentence. He observed: 'The use of force against a State would look more like a declaration of war than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts, by which it might be bound.' Upon his motion the clause was unanimously postponed, and was never, I believe, again presented. Soon afterward, on the 8th June, 1787, when incidentally adverting to the subject, he said: 'Any government for the United States formed on the supposed practicability of using force against the unconstitutional proceedings of the States would prove as visionary and fallacious as the government of Congress,' evidently meaning the then existing Congress of the old Confederation. Without descending to particulars, it may be safely asserted that the power to make war against a State is at variance with the whole spirit and intent of the Constitution. Suppose such a war should result in the conquest of a State; how are we to govern it afterward? Shall we hold it as a province and govern it as by despotic power? In the nature of things we could not by physical force control the will of the people and compel them to elect Senators and Representatives to Congress and to perform all the other duties depending upon their own volition and required from the free citizens of a free State as a constituent member of the Confederacy. . . . The fact is that our Union rests upon public opinion,

and can never be cemented by the blood of its citizens shed in civil war. . . . Congress possesses many means of preserving it by conciliation, but the sword was not placed in its hand to preserve it by force."

The foregoing reasoning of Buchanan was defective in the following respects: In the first place, the interpretation given to the proceedings of the Constitutional Convention of 1787 and to the remarks of Madison was not a correct one. As a matter of fact, as the report of the proceedings of the Convention shows, the grant to the General Government of an express power to coerce recalcitrant States was finally abandoned, not because it was held, as Buchanan declared, that it would be improper and inexpedient to vest such a power in the Central Government of a federal state, but because it was demonstrated by Sherman, Mason, and Madison, that such a grant was unnecessary in that, in the first place, the federal judiciary was given full authority to declare void all unconstitutional acts of the States; and, in the second place, that, should there be a refusal of obedience to federal laws, or to the decisions of the courts, the coercion that would have to be applied would be directed against individuals and not against the States in which they lived or of which they might be citizens. Thus Ellsworth in the convention of his State, speaking with reference to this point, after asserting that coercive power should be possessed by the Central Government, went on to say: "The only question is, shall it be a coercion of law, or a coercion of arms? There is no other possible alternative. Where will those who oppose a coercion of law come

out; where will they end? A necessary consequence of their principles is a war of the States, one against the other. I am for coercion of law—a coercion which acts only upon delinquent individuals. The Constitution does not attempt to coerce sovereign bodies—States in their political capacity. No coercion is applicable to such parties but that of an armed force. If we should attempt to execute the laws of the Union by sending an armed force against a delinquent State it would involve the good and the bad, the innocent and guilty in the same calamity. But this legal coercion singles out the guilty individual and punishes him for breaking the laws of the Union."

To repeat, then, the proceedings of the Convention that formed, and of the Conventions that ratified, the Constitution, make it abundantly evident that it was intended that the new government should have full coercive authority in the matter of compelling obedience to its laws. It was not intended that the new government should have, and it was not believed that it did have, any authority to declare a State delinquent as a State, and to proceed against it as such by force; but it was intended that any or all of its citizens who might refuse obedience to federal law should be subject to such coercion as the General Government might see fit to apply, and be liable to such punishments as the laws of that government might impose. In other words, the fact was plainly seen at the time of the establishment of our National Government that in a Federal State, as distinguished from a mere Confederacy, by no possibility can a condition of

affairs arise in which it will be necessary or proper for the central power to employ force against one of its constituent Commonwealths as a political body. In a Confederacy, composed as it is of sovereign States, united with one another by a common treaty bond, the constituent States may as such resist the operation of general laws, and in such cases the coercion to be applied will properly be directed against them as States, and not against their citizens as individual violators of law. But in a sovereign Federal State the individual Commonwealths, as having a political status only as members of the Union, have not the legal power to place themselves, as political bodies, in opposition to the national will. Their legislatures, their courts, or their executive officials may attempt acts unwarranted by the federal Constitution or federal law, and they may even command that their citizens generally shall refuse obedience to some specified federal laws, or to the federal authorities generally, but in all such cases, such acts are, legally viewed, simply void, and all individuals obeying them subject to punishment as offenders against national law. The fact that their respective States have directed them to refuse obedience or to offer resistance to the execution of the federal laws can afford them no immunity from punishment, for no one can shelter himself behind an unconstitutional law, such a law, being, in truth, as we have seen, not a law at all, but only an unsuccessful attempt at a law.

From the foregoing, then, it must appear that Buchanan, in his annual message to Congress, was

guilty of an *ignoratio elenchi.* The real problem by which he was confronted, was not whether or not he should employ the armed force of the Union against recalcitrant States, but whether or not he should enforce federal laws within such States against any resistance that individuals might offer. As a matter of fact, indeed, at the time that this message was prepared and transmitted to Congress, no State had actually seceded, and it was not until December 20, that the first ordinance of secession—by South Carolina—was adopted. Preparations for secession had, however, begun, and the Southerners had already taken the position that any attempt on the part of the National Government to strengthen its position in Fort Moultrie would be construed as equivalent to an act of coercion against South Carolina.

For a time Buchanan negotiated with the Commissioners sent by the State of South Carolina, and even prepared an answer to their demands which by its terms and form seemed to imply that South Carolina had put itself in a position that would enable the President to negotiate or "treat" with her as with a foreign power. Attorney-General Black strongly objected to this as practically implying that a State might, by its own act, place itself outside of the Union. He thereupon sent to the President a memorandum in which he said: "I think that every word and sentence which implies that South Carolina is in an attitude which enables the President to 'treat' or negotiate with her, or to receive her commissioners in the character of diplomatic ministers or agents, ought to be stricken out, and an explicit declaration

substituted which would reassert the principles of the message. . . . Above all things it is objectionable to intimate a willingness to negotiate with the State of South Carolina about the possession of a military post which belongs to the United States. The words 'coercing a State by force of arms to remain in the Confederacy, a power which I do not believe the Constitution has conferred on Congress,' ought certainly not to be retained. They are too vague and might have the effect (which I am sure the President does not intend) to mislead the Commissioners concerning his sentiments. The power to defend the public property, to resist an assailing force which unlawfully attempts to drive out the troops of the United States from one of our fortifications, and to use military and naval forces for the purpose of aiding the proper officers of the United States in the execution of the laws—this, as far as it goes, is coercion, and may very well be called 'coercing a State by force of arms to remain in the Union.' The President has always asserted his right of coercion to that extent. He merely denies the right of Congress to make offensive war upon a State of the Union as such might be made upon a foreign government."

Buchanan modified his answer to the Commissioners of South Carolina according to these suggestions, whereupon they returned an angry answer. Upon receiving this Buchanan said: "It is now all over, and reinforcements must be sent."

This was practically the situation at the time that Lincoln became President. In his inaugural message he assumed the correct constitutional position that

the Federal Government could not wage public war against a State, not because of a lack of constitutional authority to maintain in every respect its supremacy, but because, from the very nature of the Union, a State, *qua* State, could not place itself in a position where coercion could be applied to it.

After an argument tending to show the sovereign character of the Union, and that it was intended to be perpetual, he declared: "It follows from these views that no State upon its own mere motion can lawfully get out of the Union; that *resolves* and *ordinances* to that effect are legally void, and that acts of violence within any State or States against the authority of the United States are insurrectionary or revolutionary, according to circumstances. I therefore consider that, in view of the Constitution and the laws, the Union is unbroken, and to the extent of my ability I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States. . . . In doing this there needs to be no bloodshed or violence, and there shall be none unless it be forced upon the national authority. The power conferred upon me will be used to hold, occupy, and possess the property and places belonging to the Government and to collect the duty and imposts; but beyond what may be necessary for these objects, there will be no invasion, no using of force against or among the people anywhere."

In taking this position, Lincoln had to treat the war that had begun as merely an insurrection in which the coercion and punishments were to be applied to

individuals. Thus he began his Proclamation of April 15, 1861, in which he called for seventy-five thousand of the militia of the States, by saying: "Whereas the laws of the United States have been for some time past and now are opposed and the execution thereof obstructed in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings;" and closed by commanding "the persons composing the combinations aforesaid to disperse and retire peaceably to their respective abodes within twenty days from this date."

As further showing the theory as to the nature of the contest that was held by the National Government is the fact that Congress did not "declare war" against the South, or, when the struggle was over, enter into a treaty of peace with the Southern Confederacy. It never once recognized that that government had or could have a *de jure* standing as a political power with which it might deal as with a foreign State. One after another, the surrender of his forces by each Confederate general was accepted as an act of war and thus the Confederacy left to collapse and disappear without any formal, official act to mark its demise.

Though the United States Government did not, and, constitutionally, could not, recognize the Southern Confederacy as a foreign power, it was almost immediately obliged, by the magnitude of the struggle, to treat the Southerners as belligerents and to conduct the struggle as a public war and not as a mere con-

test against violators of its municipal laws. Thus, only four days after the first call for troops, Lincoln, in declaring a blockade of the Southern ports, exercised an authority that, from the standpoint both of constitutional and of International Law was exercisable only in time of war. The so-called Confiscation Acts, providing for the confiscation of the property of those who aided the rebellion were conspicuous instances of the exercise on the part of the Federal Government of powers as a belligerent which it could not, constitutionally, have exercised simply as a sovereign. The title itself of the Confiscation Act of July 17, 1862, "An act to punish treason and confiscate the property of rebels," showed the double character of the claim of authority assumed by Congress.

This status of the Confederates as Belligerents was later recognized by the United States Supreme Court. In Ford *v.* Surget (97 U. S., 594) that Court said: "To the Confederate government was conceded, in the interest of humanity, and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belonged, under the law of nations, to armies of independent governments engaged in war against each other. . . . The Confederate States were belligerents in the sense attached to that word by the law of nations."

In a Proclamation of August 16, 1861, empowered so to do by the Act of Congress of July 13, 1861, the President in effect declared the war to be a territorial one. He declared that all the inhabitants of given districts, irrespective of the actual conduct of each,

should be considered and treated as enemies to the Union. "Whereas," said the President, "the insurgents in all the said States claim to act under the authority thereof, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States or in the part or parts thereof in which such combinations exist, nor has such insurrection been suppressed by said States, now, therefore, I . . . declare that the inhabitants of the said States . . . are in a state of insurrection against the United States." The Proclamation then went on to prohibit all commercial intercourse with the inhabitants of those districts.

The Confederates having been recognized as public armed enemies, the question soon arose as to whether Congress, while treating them as such in some matters, might also treat them as citizens or subjects as to others. In other words, whether the government of the United States might exercise the rights and secure for itself the advantages flowing from both positions. For example, might it properly treat Confederate property as contraband of war, and at the same time hang its owners, when captured, as guilty of treason against itself?

The Federal Government, by its acts, showed almost immediately that it held that an affirmative answer might be given to this question. In his Proclamation of April 19, establishing the blockade of the Southern ports, Lincoln declared that he would hold amenable to the laws of the United States for the prevention and punishment of piracy, any person who "under the pretended authority of the said States or under

any other pretense," should "molest a vessel of the United States or the persons or cargo on board of her." Some few captured Confederates were in fact tried and convicted in pursuance of this threat, but were not executed, Jefferson Davis, the President of the Confederacy, having threatened that, should they be hanged, a like penalty would be inflicted upon an equal number of captured Federals. By numerous other acts, the Federal Government took constant pains throughout the war to make it perfectly plain to all that it continued to regard the seceded States as members of the Union, and its inhabitants as its citizens. Thus those States were called upon to furnish their respective quotas of militia, the direct taxes were apportioned among them according to their populations as the federal Constitution required, and, later, their votes counted in the ratification of the thirteenth, fourteenth, and fifteenth amendments.[1] Furthermore, the acts of the legislatures of the seceded States, passed during the years 1861 to 1865, in so far as they had not a treasonable aim or effect, were recognized by the federal courts as valid and were as such enforced. Thus in Williams *v.* Bruffy (96 U. S., 176) Justice Field declared without dissent from any of his colleagues: "While holding that there was no validity in any legislation of the Confederate States which this Court can recognize, it is proper to observe that the legislation of these States stands on very different grounds. . . . As far as the acts of the States

[1] The difficulty which the Federal Government had in Reconstruction times in maintaining consistently this position will be later adverted to.

did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, they are, in general, to be treated as valid and binding." It will be observed that in the above care was taken to declare that under no circumstances could a legal validity be ascribed by the Federal Government to the acts of the Central Government of the Confederacy. The continued existence of the Southern States as States of the Union it did recognize, and, indeed, according to the theories upon which the war was waged, felt itself bound to recognize, and therefore, their acts, so far as constitutional, it had to accept as valid; but the Confederacy it could not recognize as being a government with the power to issue commands that it could receive as laws, for it denied the legal competence of the individual States to create such a political being.

So far as International Law is concerned it would seem that a sovereign State struggling to suppress an insurrection against itself, may assume both of these positions and exercise the rights flowing therefrom. When we come, however, to the constitutionality of the exercise by the Federal Government of these belligerent rights at the same time that it was maintaining its position as sovereign, we find the legality of the acts of the Federal Government not so readily conceded. Upon the floors of Congress as well as in the press, the debates were extremely bitter. The whole question finally came up for judicial settlement in the so-called Prize Cases (2 Black, 635) and the case of Mrs. Alexander's Cotton (2 Wall., 404). In these cases the constitutionality of the acts of Congress

was squarely upheld. In the opinion rendered in the lower court, the correctness of which was affirmed by the Supreme Court, Judge Sprague declared: "Some have apprehended that if the conflict of arms is to be deemed war, our enemies must have, against the government, all the immunities of belligerents. But this is to overlook the double character which these enemies sustain. They are at the same time belligerents and traitors, and subject to the liabilities of both. These rights coexist and may be exercised at pleasure. . . . Civil war, *ex vi termini*, imports that sovereign rights are not relinquished, but insisted on. The war is waged to maintain them." In affirming the decisions and accepting the reasoning of the lower courts in the Prize Cases the Supreme Court of the United States declared: "It is a proposition never doubted that the belligerent party who claims to be sovereign may exercise both belligerent and sovereign rights."[1]

RECONSTRUCTION

THE Federal Government had sufficient difficulty in maintaining even a semblance of constitutional form during the prosecution of the Civil War, but when, at the cessation of hostilities, it was confronted by the problem of reconstructing the state governments of the people lately in rebellion and placing the whole Union upon a permanent peace footing, it found itself beset with a still severer constitutional problem,—or rather with a constitutional problem which, though

[1] Citing Rose *v.* Himely, 4 Cr., 241.

simple in itself, when solved in the manner most obviously pointed out by logical consistency, led to practical results that could not for a moment be accepted. Shortly stated, the difficulty was this: If, as the Federal Government had all along claimed, the ordinances of secession enacted by the Southern States had been mere nullities, and therefore, those States had, from the strictly legal standpoint, never been out of the Union, then, hostilities having ceased, and the citizens and authorities of those States having declared their loyalty to the Union and readiness again to fulfil their constitutional obligations, there was, it would seem, no constitutional objection that could be interposed to prevent them from doing so, and thus at once beginning again the exercise of those political and other privileges that the federal Constitution grants equally to all the commonwealth members of the Union. The chief among these rights were of course the right to send representatives to Congress, to participate in the election of the President, to have federal laws and federal administration applied within their respective limits in a manner no different from that in which it is applied in all the other States, and, finally, to be left at liberty to exercise, free from federal interference, all those rights that were reserved to them by the federal Constitution.

The foregoing was exactly the position assumed by the lately rebellious States. If, their leaders declared, the war was one against individuals, and not against States, with what constitutional right could the Federal Government after the war impose penalties not upon individuals but upon the States?

The force of this argument was clearly seen, but to have acted upon it would of course have been to render the terrible struggle that had been waged unsatisfactory in its results. The actual disruption of the Union would have been prevented, but no guarantees would have been obtained that at another and more favorable time the attempt at separation would not be repeated. Furthermore, and equally important, such a course would have left both the legal white minorities and the helpless blacks wholly at the mercy of the populations of those States, which, though conquered, were not convinced either of the unconstitutionality or of the impolicy of the action they had attempted; and, therefore, as simply yielding to superior force, could not be expected to entertain a lively sense of affection for, or obligation to, those who had either not assisted in or had actually striven to prevent, the realization of their desires, and, as they still believed, their rights.

To avoid the Southern, Democratic, or "Restoration" theory, as it was called, four views as to the constitutional status of the conquered States were advanced, according to three of which, if accepted, the Federal Government would be given a comparatively free hand in imposing such requirements as it might see fit as conditions precedent to the readmission of the lately rebellious States to the privileges of full membership in the Union. To these four theories were given the names, "Presidential," "State Suicide," "Conquered Province," and "Forfeited Rights" theories respectively.

According to the "Presidential" theory, that is to

say, that theory which was first attempted to be put into execution by Lincoln and later accepted, in principle at least, by Johnson, it was held that the Union was legally indestructible, and that, therefore, the Southern States had never been out of the Union. But though not ceasing to be States, it was held that they no longer had constitutional governments. According to this theory, then, so long as this remained the case, the States had no constitutional rights, simply for the reason that they had no organs through which they might be claimed and exercised. The first aim of these States should therefore be, it was argued, to reëstablish governments, republican in form and loyal to the Union. In the performance of this task the General Government, it was declared, might constitutionally lend its aid, but might not impose a controlling will.

According to the "State Suicide" theory of Sumner, the ordinances of secession, though powerless to take the States out of the Union, had had sufficient vitality to cause the States adopting them to commit political *felo de se*. Thus, such States, being reduced to a non-state or territorial status, became subjected to that complete jurisdiction which the Constitution gives Congress over the territories. Therefore, Sumner held, that body might impose any conditions that it might see fit before again erecting them into States.[1]

[1] Hurd, in his "Theory of Our National Existence," and Brownson, in his "American Republic," by developing a peculiar theory as to the location of sovereignty in the United States, were able to ascribe to the ordinances of secession the same effect as that given to them by Sumner.

The "Conquered Province" theory, the most extreme doctrine of all, was fathered by Thaddeus Stevens. According to his view, the States of the South were to be treated as conquered provinces, and as such, to be subjected to whatever penalties Congress and the President, acting under the ample powers of war, might see fit to impose.

Last of all was the "Forfeited Rights" or "Congressional" theory of Reconstruction. According to this view, the States lately in rebellion had remained States and continued in the Union, but, by their rebellion, had forfeited those constitutional rights to which otherwise they would be entitled by the federal Constitution. Therefore, it was declared, Congress might judge when, and under what conditions, the rights thus forfeited might be returned.

For the purpose of this constitutional study it will not be necessary to trace the history of the manner in which the "reconstruction" of the Southern States was finally effected, nor to speak of the constitutional contest waged between the federal executive and federal legislature. As a summary, however, we may say that "the war was begun under the theory of 'restoration,' and that this theory was persistently maintained by the democrats to the end; that the presidential theory was developed by Lincoln in 1863, and carried out by Johnson in 1865, but fell back under the hands of the latter into a modification of the restoration theory; that the Sumner and Stevens theories received no formal ratification from any quarter; but that Congress . . . was pressed by the force of contest with the presidential theory into a

plan of its own in 1867, consisting of the Davis-Wade plan, increased by the suffrage features of the Sumner theory, and the whole based on a modification of the Stevens theory of the suspension of the Constitution."[1]

As regards the abstract constitutionality of the five reconstruction theories mentioned, there can be no question but that the Southern Democratic or Restoration theory was the one most nearly in consonance with the general constitutional theory upon which the North had declared and waged the war.[2]

The constitutional objections to the presidential theory, aside from the question as to whether it should be applied by the executive or by the legislature, were not serious. It was not unreasonable to maintain that the lately rebellious States were without governments qualified to exercise the constitutional rights that were claimed, and, this being so, it was well within the province of the Federal Government to lend its advice and even armed forces to the loyal minorities in those States for the purpose of aiding

[1] Quoted from the article "Reconstruction" in Lalor's "Cyclopedia of Political Science," by the late Alexander Johnston.

[2] At the special session of Congress in 1861, a Joint Resolution passed by very large majorities in both Houses defined the object of the war as follows: "That this war is not prosecuted upon our part in any spirit of oppression, nor for any purpose of conquest or subjugation, nor for the purpose of overthrowing or interfering with the rights or established institutions of those States, but to defend and maintain the supremacy of the Constitution and all laws made in pursuance thereof, and to preserve the Union with all the dignity, equality, and rights of the several States unimpaired; that as soon as these objects are accomplished, the war ought to cease."

them to establish governments that might fairly be termed loyal to the Union. Therefore it would seem that no constitutional objection lay to the proclamation of President Lincoln in which he said that when one tenth of the loyal voters should establish a state government that was republican in form, such government would be recognized by him as the true government of that State, and the State thereupon admitted to all the rights guaranteed it by the federal Constitution. As to the right, however, of the President himself to determine, as he did in his proclamation, when and under what circumstances citizens of the States in question should be qualified to hold office, there would seem to be constitutional objection. Also it might very well be asked whether any government established by simply one tenth of the adult males of a community could be said to be republican in character. To this point we shall return later on when we come to consider the meaning of that clause of the Constitution which provides that the United States shall guarantee to each State a government republican in form.

The "State Suicide" theory of Sumner as well as the "Conquered Province" theory of Stevens are to be regarded as having been wholly illogical and inconsistent with that view of the nature of the Union upon which the war had been fought; the former because it could not be granted that a State was able, by any act of its own, to change its constitutional and political status *in* the Union any more than it could take itself *out* of the Union; the latter because the principles applicable to conquered territory have ref-

erence only to foreign territory subdued by force of arms. Manifestly a State cannot make a conquest of its own territory; and, if the States could not secede, they could not become foreign.

The "Forfeited Rights" or "Congressional" theory of Reconstruction was, in a way, a compromise between the Presidential theory on the one hand and the theories of Sumner and Stevens on the other, but in so far as it departed from the former and instead of simply aiding the inhabitants of the Southern States themselves to establish loyal, republican governments, imposed conditions that were not, and could not constitutionally be, required of the other States in the Union, it was clearly inconsistent with the general northern theory as to the character of the Union. Aside, moreover, from the invalidity of the argument that the States, as States, might "forfeit" any of their constitutional rights any more than that they could commit suicide, Congress was led, in the application of the theory, into the grossest of inconsistencies, recognizing the Southern Commonwealths as effective members of the Union for some purposes—as for instance, for the ratification of constitutional amendments—while denying it as to others; and declaring governments forced by the bayonet upon unwilling peoples as republican in form. Upon a narration of these facts, however, we do not need to enter.

Repeated efforts were made to get the Supreme Court of the United States to pass upon the constitutionality of the various acts passed by Congress for the reconstruction of the Southern States, but with-

out complete success. In a general way the court accepted as valid the Congressional theory, but never passed definitely upon the constitutionality of the acts of Congress that were passed for putting that theory into practice. In all the cases that were brought before it the court evaded a definite decision, either by declaring the questions involved political in nature, and therefore as not subject to its jurisdiction, or by finding a way to decide them upon some ground that made it unnecessary to consider the validity of the acts that were impugned. Upon several occasions, however, the Court did not hesitate to repudiate in the most emphatic manner the doctrine that the States had been outside of the Union, or that they could possibly, by any constitutional act of theirs, ever become so. In the famous case of Texas *v.* White (7 Wall., 700) both the right, or rather the power, of a State to take itself out of the Union, and the status of the States during the reconstruction period were brought squarely before the Court. Soon after the war, but before its government had been recognized by Congress as satisfactorily reconstructed, the State of Texas brought suit in the Supreme Court of the United States under that clause of the federal Constitution which gives to the federal Supreme Court jurisdiction of suits prosecuted by a State against citizens of another State. But unless Texas were at that time a State of the Union she, of course, had no standing as a suitor before the federal court. That Court had thus to pass *in limine* upon the questions of secession and reconstruction. Upon the former of these points the Court declared as follows: "The Union of

the States never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared to 'be perpetual.' And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be more indissoluble, if a perpetual union, made more perfect, is not? But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence or of the right of self-government by the States. Under the Articles of Confederation, each State retained its sovereignty, freedom, and independence, and every power, jurisdiction and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in Union,' there would be no such political body as the United States (Lane County *v.* Oregon,

7 Wall., 76). Not only, therefore, can there be no loss of separate and independent autonomy to the States through their Union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States. When, therefore, Texas became one of the United States, she entered into an indissoluble relation. . . . The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. . . . The union between Texas and the other States was as complete, as perpetual and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through the consent of the States.

"Considered, therefore, as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union."

Having thus determined that the State of Texas was, and always had been, a State in the Union, since the time of her admission thereinto in 1845, the Court next addressed itself to the question whether at the time the suit was brought it was, notwithstanding its "unreconstructed" condition, in a position to claim the privileges secured to States by the federal Constitution, and among them, in particular to the right to bring an original suit in the Supreme Court of the United States. As to this the Court said: "In order to the exercise, by a State, of the right to sue in this Court, there needs to be a state government, competent to represent the State in its relations with the National Government, so far at least as the institution and prosecution of a suit is concerned. And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. . . . No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and, in affiliation with a hostile confederation, waging war upon the United States, Senators chosen by her legislature, or Representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this Court. All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. . . . These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of reëstablishing the broken

relations of the States with the Union. . . . The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. . . . When the war closed there was no government in the State except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. . . . There being, then, no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. . . . Whether the action then taken was, in all respects, warranted by the Constitution, it is not now necessary to determine." The acts of the President, the Court then went on to say, were done in pursuance of his powers as Commander-in-chief of the army, and were but provisional and were so regarded by Congress. As regards the acts of Congress the Court said that nothing in the case required it to pronounce judgment upon the constitutionality of any particular provision of them, the fact that it appeared that the government that brought the suit had been recognized by Congress as the actually existing government of the State, being sufficient to give it jurisdiction.[1]

[1] Justice Grier rendered a dissenting opinion in which he maintained that whatever may have been the theory, Texas had, as a fact, been outside of the Union, and had been so decided to be by Congress. "It is a question of fact, I repeat, and of fact only," he declared. "Politically, Texas is not a State in this

In Knox *v.* Lee (12 Wall., 557) the Court said, speaking through the mouth of Justice Bradley: "The doctrine so long contended for, that the federal Union was a mere compact of States, and that the States, if they chose, might annul and disregard the acts of the national legislature, or might secede from the Union at their pleasure, and that the General Government had no power to coerce them into submission to the Constitution, should be regarded as definitely and forever overthrown. This has finally been effected by the national power, as it had often been before by overwhelming argument. . . . The United States is not only a government, but it is a National Government, and the only government in this country that has the character of nationality."

In Keith *v.* Clark (97 U. S., 454), decided in 1878, the Supreme Court again emphatically asserted the legal conclusion that the seceding States had never been out of the Union. Referring to Tennessee, the Court declared: "This political body has not only been all this time a State and the same State, but it has always been one of the United States,—a State of the Union. Under the Constitution by virtue of which Tennessee was born into the family of States, she had no lawful power to depart from that Union. . . . She never escaped the obligations of that Constitution, though for a while she may have evaded their enforcement."

Before either of the cases of Texas *v.* White, and

Union. Whether rightfully out of it or not is a question not before the Court." With Justice Grier Justices Swayne and Miller concurred.

Keith *v.* Clark was decided, an attempt was made to have the reconstruction acts held unconstitutional by the Supreme Court, by asking for an injunction restraining the President from enforcing them. The federal court, however, decided that it could not grant a restraining order against the Chief Executive under the circumstances, the matters involved being political and not judicial in character (Mississippi *v.* Johnson, 4 Wall., 475).

CHAPTER V

THE SUPREMACY OF FEDERAL LAW

THE foregoing pages have sufficiently shown that the Federal Government has no power to coerce a State, as a State. They have also shown that the National State, because of its absolute sovereignty over all the land and people of the United States, and because of its paramountcy over all its political subdivisions, has full power to protect any right and to enforce any law of its own at any time, and at any place within its territorial limits, any resistance of private individuals, or state officials, acting with or without the authority of state law to the contrary notwithstanding. Having the authority, the United States has the right to declare illegal, to fix and enforce by its own tribunals a penalty upon any resistance opposed to its agents when acting within their official spheres, and, if necessary, to prevent by its own armed forces such interference when threatened or overcome it when actually attempted.

The possession by the National Government of this general right has been uniformly asserted by the Supreme Court, throughout the whole period of its existence, whenever such an assertion has been necessary. Thus in 1824, in the case of Osborn *v.* Bank of U. S. (9 Wh., 738)—a case to which we have already

referred in another connection—Chief Justice Marshall met the argument that the suit, being against one of its officials and based upon acts committed by him in his official capacity, was in fact a suit against the State of Ohio, one, therefore, which, under the Eleventh Amendment, the Court was without authority to try, by declaring: "A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the [National] Government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a State, alleging the authority of a law, void in itself, because repugnant to the Constitution, may arrest the execution of any law in the United States. It maintains that if a State shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the [National] Government. . . . The question, then, is whether the Constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union from the attempts of a particular State to resist the execution of those laws." That Marshall answered this question in the affirmative need not be said.

Again, after the Civil War, the Court said, when

confronted by the proposition that because the United States was without any general criminal law jurisdiction it might not punish criminally individuals who had violated certain of its laws relating to congressional elections: "It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent" (*Ex parte* Siebold, 100 U. S., 371).

Finally in the Debs case (*In re* Debs, 158 U. S., 564), a case growing out of the great railway strike of 1894, the plenitude of the federal power was emphatically stated. Speaking of the right of the National Government to protect, by armed force if necessary, interstate commerce and the transportation of the mails, the Court said: "If all the inhabitants of a single State or even a great body of them should combine to obstruct interstate commerce or the transportation of the mails, prosecution of such offenses had in such a community would be doomed in advance to failure.

And if the certainty of such failure was known and the National Government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the Nation in these respects would be at the absolute mercy of a portion of the inhabitants of a single State. But there is no such impotency in the National Government. The entire strength of the Nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportations of the mails. If the emergency arises, the army of the Nation and all its militia are at the service of the Nation to compel obedience to its laws."

A corollary, that necessarily follows from the general principle we have been discussing, is that no State can declare and punish as criminal, acts authorized by federal law. This has not been directly denied by the States, since the Civil War at least, but it has been most strenuously asserted by them that when an offense has been committed against one of their laws, and the one committing it has been apprehended and brought to trial before their courts, he is not entitled to have his case removed at once to the federal courts simply by setting up as a defense that his act was done in pursuance of an authority delegated him by the General Government. The right to set up this defense has not been denied by the States, nor have

they claimed that, should the decision of their courts be adverse to him upon this point, he may take an appeal from their highest tribunals to the Supreme Court of the United States. But they have asserted that when an act has been committed which is criminal by their laws, it is, primarily, an offense against their peace, and as such cognizable only in their own courts, and therefore that though, as has been just said, a right of appeal from their highest courts to the United States Supreme Court upon the point of federal authority must be allowed, the trial of the offense may not as a matter of right be removed by the accused one from the state court in which it is begun to one of the lower federal courts.

A leading case upon this point is that of Tennessee *v.* Davis (100 U. S., 257), decided in 1879. The famous Force Act of 1833, passed at the time of South Carolina's attempted nullification of the United States tariff law, provided that "when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under, or acting by authority of, any revenue law of the United States, now or hereafter enacted, or against any person acting by or under authority of any such officer, or on account of any act done under color of his office," the case, at the defendant's instance, might be at once removed from the state to the federal courts for trial. Davis, a federal revenue officer, killed a man, was arrested therefor, and, when brought to trial, applied for removal to a federal court under this act. The State of Tennessee, however, denied the constitutionality of this grant of right. Jus-

tice Strong, in rendering the opinion of the United States Supreme Court upon this point, prefaced his discussion of this point by saying: "A more important question can hardly be imagined. Upon its answer may depend the possibility of the General Government's preserving its own existence. As was said in Martin *v.* Hunter's Lessee (1 Wh., 363), 'the General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers.' It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the law of the State, yet warranted by the federal authority they possess, and if the General Government is powerless to interfere *at once* for their protection—if their protection must be left to the action of the state courts—the operations of the General Government may at any time be arrested at the will of one of its members. The legislature of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution,

and the exercise of acknowledged federal authority arrested. We do not think such an element of weakness is to be found in the Constitution."

In this case Justices Clifford and Field dissented, their dissent being based upon the argument that though Congress might, beyond all doubt, pass such laws as it should deem necessary for the protection of its agents, and might for that purpose define the acts that should be considered crimes, and give to the inferior federal courts jurisdiction to try those charged with committing them, yet, until there has been such specific federal legislation, the United States circuit and district courts could not constitutionally take or be given jurisdiction, for the reason that no federal statute has been violated. "Unquestionable jurisdiction to try and punish offenders against the authority of the United States," they declared, "is conferred upon the circuit and district courts; but the acts of Congress give those courts no jurisdiction whatever of offenses committed against the authority of a State. Criminal homicide, committed in a State, is an offense against the authority of the State."

The majority doctrine in the Davis case has, however, never been overruled. The federal authority justified by it has indeed, in later cases, been exercised in ways still more radical when looked at from the standpoint of the reserved rights of the States. In the Neagle case (*In re* Neagle, 135 U. S., 1) it was held that, without express statutory authorization, the general authority of the President to see that the laws of the Union are faithfully executed empowers him to appoint a deputy marshal to protect a federal

judge whose life is threatened; and that upon such deputy being arrested and brought to trial in a state court upon the charge of murder for a homicide committed while acting within the line of the duty thus assigned him, he is entitled to have his case removed to the federal courts. In the still more recent case of *In re* Waite (81 Federal Reporter, 359), a federal pension agent, convicted in a state court of fraud, and the conviction affirmed by the highest court of the State, was released by a *habeas corpus* by a federal district judge.

In Tinsley *v.* Anderson (171 U. S., 101), decided in 1898, however, the Supreme Court of the United States, though reaffirming the doctrine previously laid down that though the federal courts have power, by writ of *habeas corpus,* to inquire into the cause of the restraint of the liberty of any person by a State when the justification of federal authorization is set up for the act complained of, goes on to say that the federal courts should not, except in cases of peculiar urgency, exercise that power, but should leave such persons to pursue their remedy by writ of error from the federal Supreme Court after the adjudication of their cases in the State's highest courts.

The preceding paragraphs have been devoted to an exposition of the principles in accordance with which the United States government has demonstrated its constitutional competence to meet every form of resistance to its authority whether offered by an individual or individuals, and whether supported or unsupported by state authority. In one single particular, however, it would seem that the federal courts

are at present without that legal power which the position of the United States before the world as a sovereign, national State demands. This single deficiency consists in its inability either itself to furnish, or to compel the States to furnish, legal redress to resident aliens for injuries to life or property suffered by them at the hands of American citizens. The commission of such acts, though giving rise to valid complaint on the part of the nations whose subjects are injured, are, according to existing American law, offenses against the laws of the individual States within whose borders they occur. As such they are not punishable in the courts of the United States, and thus in a number of instances the National government has felt obliged to confess to foreign nations that it is without the legal authority to furnish that legal redress which they have demanded.[1]

It would seem, however, that this incompetency on the part of the Federal Government is statutory rather than constitutional. That is to say, there would seem to be no valid constitutional objection to an act of Congress giving to the federal courts cognizance of all offenses for which the United States may, according to the Law of Nations, be held responsible to foreign powers. In fact, the passage of such a law has been more than once suggested to Congress

[1] As a matter of fact the United States has never admitted it to be a principle of international law that it may be held responsible to foreign powers in these cases. The equity of their demands it has, however, several times recognized by appropriating pecuniary indemnities to the families of those killed, as, for example, in the Spanish riots case in 1851 and in the Italian lynching case at New Orleans in 1891.

by the President. A decision of the Supreme Court which by analogy would probably sustain such legislation is that rendered in United States *v.* Arjona (120 U. S., 479). Arjona, the defendant, was indicted under an act of Congress of 1884 providing for the punishment of persons counterfeiting the securities of foreign governments. Upon the constitutionality of this act being questioned upon the ground that, though the United States had the implied right to declare criminal the counterfeiting of its own bonds and notes, it had not the power thus to protect those of other powers, the Supreme Court, in its opinion, said: "The National Government is . . . made responsible to foreign nations for all violations by the United States of their international obligations, and because of this Congress is expressly authorized 'to define and punish . . . offenses against the law of nations.' . . . Consequently a law which is necessary and proper to afford this protection is one that Congress may enact because it is one needed to carry into execution a power conferred by the Constitution on the government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the States. Therefore, the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another Nation and which the law of nations has imposed on them as part of their international obligations. This, however, does not prevent a State from providing for the punishment of the same thing, for here, as in the case of counterfeiting the coin of the

United States, the act may be an offense against the authority of a State, as well as that of the United States.'' [1]

[1] Cf. on this whole subject the essay by J. I. Chamberlain, "The Position of the Federal Government of the United States in Regard to Crimes Committed against the Subjects of a Foreign Nation Within the States;" also Reports of American Bar Association for 1891, 1892, 1893; Congressional Record, 52d Congress, 1st Session, 1892; Annual Message of President, December, 1901.

CHAPTER VI

FEDERAL CONTROL OF STATE GOVERNMENTS

In what has gone before, the sovereignty of the United States as opposed to and inconsistent with the continued sovereignty of its individual commonwealth members has been sufficiently declared. Whatever doubt there may have been as to this before the Civil War, the result of that gigantic struggle left no room for subsequent disagreement, and the unequivocal assertions of the federal courts simply registered conclusions that no one thereafter could rationally question. Starting, then, from this fundamental fact that, looking at the matter from a purely legal standpoint, the individual Commonwealths constitute simply governmental or administrative districts of the United States, we shall now proceed to consider the degree of autonomy secured them by the federal Constitution. This subject we may conveniently divide into two parts. First, we may examine the degree of control that the Federal Government may constitutionally exercise over the form of governments that the several States may establish for themselves; and, secondly, the extent to which the General Government may supervise or control the exercise by the States of those powers that are reserved to them.

First, then, as to the control that may be constitutionally exercised by the United States over the forms of governments of its constituent units.

Speaking generally it may be said that, providing its government be republican in form, each State of the Union may establish such governmental organs as it sees fit, and apportion among them its executive, legislative, and judicial powers according to its own judgment as to what is expedient and proper.

The federal Constitution provides that "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislatures, or of the executive (when the legislature cannot be convened) against domestic violence." (Art. IV, sec. 4.)

In form, the first clause of this section would appear to be for the benefit of the States and to impose a duty upon the Federal Government, and such undoubtedly would be its effect should a foreign power attempt to impose a government of any sort whatever upon the people of one of the States against their will; or should a domestic revolution result in the establishment in power of a government not sanctioned by law or not freely agreed to by the electorate. In fact, however, as we have already seen, and as will presently be more particularly spoken of, this clause was so interpreted during reconstruction times as to give to the Federal Government an almost unlimited power of control for several years of the domestic affairs of those States that had been in rebellion against its authority.

It will be noticed that the Constitution does not itself define the term "republican form of government." It has, however, always been an accepted rule of construction that the technical and special terms used in the Constitution are to be given those meanings which they had at the time that instrument was framed. This is but reasonable, for, in default of anything to the contrary, those who drafted the Constitution are to be presumed to have intended the words which they used should have the meaning they knew them to have. For a definition, then, of "republican government" we must discover what such a political form was considered to be in 1787. Certainly we may say that the governments of the thirteen original States as they existed at the time the Constitution was drafted must have been considered as illustrating the republican type. Furthermore, the constitutions of all those States which have been admitted to the Union since 1787 must be regarded as having been impliedly declared republican by Congress at the time of the giving of its assent to their entrance into the Union. The late Judge Cooley, in his "Principles of Constitutional Law,"[1] has perhaps defined the term as satisfactorily as any one. "By a republican form of government," he says, "is understood a government by representatives chosen by the people; and it contrasts on the one side with a democracy, in which the people or community as an organized whole wield the sovereign powers of government, and, on the other side, with the rule of one man as King, Emperor, Czar, or Sultan, or with that

[1] Chap. XI.

of one class of men, as an aristocracy."[1] "In strictness," Judge Cooley goes on to say, "a republican government is by no means inconsistent with monarchical forms, for a King may be merely an hereditary or elective executive while the powers of legislation are left exclusively to a representative body freely chosen by the people. It is to be observed, however, that it is a republican *form* of government that is to be guaranteed; and in the light of the undoubted fact that by the Revolution it was expected and intended to throw off monarchical and aristocratic forms, there can be no question but that by a republican form of government was intended a government in which not only would the people's representatives make the laws, and their agents administer them, but the people would also, directly or indirectly, choose the executive. But it would by no means follow that the whole body of people, or even the whole body of adult and competent persons, would be admitted to political privileges; and in any republican

[1] In some of the courts of the States direct legislation laws (referendum) have been held unconstitutional on the ground that their effect is to establish a democratic in the place of republican, representative government. Thus, for example, in Rice *v.* Foster, 4 Harr., 479, the Court of Delaware declared: "Although the people have the power, in conformity with its provisions, to alter the Constitution, under no circumstances can they, so long as the Constitution of the United States remains the paramount law of the land, establish a democracy or any other than a republican form of government;" and the giving of a direct legislative power to the electorate, the court went on to hold, was, in effect, to establish a democracy. In Maynard *v.* Board, 84 Mich., 228, the court suggested that "cumulative" voting is inconsistent with a republican form of government.

State the law must determine the qualifications for admission to the elective franchise."

The only instance in which the Federal Government had been called upon, before the Civil War, to construe this guaranty clause was in connection with the matter of Dorr's Rebellion in Rhode Island in 1841. The salient facts of this incident were these. The constitution under which the people of Rhode Island had lived since the separation from England provided for a very limited suffrage. With the development of more democratic ideas this condition of affairs became very unsatisfactory to those who were thus denied the right to vote. Numerous attempts were made to have the constitution amended, but these were always defeated by the small oligarchy of legal voters who did not wish to see their special privileges extended. Finally, in 1841, mass meetings of the discontented were held, and without any instruction or permission from the existing government the citizens were directed to elect, by a universal manhood suffrage, delegates to a constitutional convention. This was done, and at that convention a constitution was framed that later was adopted by a clear majority of the adult resident citizens of the State. Thereupon, the convention, meeting again, declared: "Whereas, by return of the votes upon the Constitution, it satisfactorily appears that the citizens of this State, in their original sovereign capacity, have ratified and adopted said Constitution by a large majority; and the will of the people, thus decisively known, ought to be implicitly obeyed and faithfully executed; We do therefore resolve and de-

clare that said Constitution rightfully ought to be, and is, the paramount law and Constitution of the State of Rhode Island and Providence Plantations; and we further resolve and declare for ourselves and in behalf of the people whom we represent, that we will establish said Constitution and sustain and defend the same by all necessary means." Attempts were actually made to put into operation the government provided for in the instrument thus declared in force, Dorr being elected Governor under it.

All of the above acts, it will be observed, were unsanctioned by any law of the old *de facto* government. Upon an appeal being made by that government to the Federal Government for aid, the President of the United States recognized that government as the *de jure* government of the State and took steps to extend the aid that was requested. By this federal executive action two important facts were established with reference to the "guaranty" clause of the federal Constitution. The first of these was that, according to this clause, the Federal Government was obligated to protect the several States not only against the attempts of foreign powers to impose upon them governments not of their own choosing, but against revolutionary action on the part of their own citizens. The second was that it was thus decided that it is not a violation of the provision that a state government shall be republican in form that it rested upon the legal will of a minority of its adult male citizens. In effect it was determined that the old government of Rhode Island being accepted as republican in form at the time that the State became a member of the

Union, it could not be changed by any extra-legal means against the desire of those who by the old instrument were given the sole power of expressing the legal will of the State. This last clause "against the desire of those who by the old instrument were given the sole power of expressing the legal will of the State," is advisedly added, for, as repeated instances have shown, the Federal Government has not felt itself obligated under the guaranty clause to see to it that none of the state constitutions are ever amended or replaced by new instruments except in strict accordance with the provisions governing constitutional changes existing at the time the changes are made. When such changes, even though brought about in a manner not formally constitutional, have been accepted as valid by the old governments, the Federal Government has not felt itself obligated to interfere. But when, as was the case in Rhode Island, the revolutionary change is strenuously resisted by those exercising authority under the old instrument of government, the Federal Government, upon appeal to it, or possibly upon its own initiative, will almost surely consider itself called upon to recognize and support the old government.

Precedent has also established the principle that where there is a dispute in a State as to the *de jure* character of a particular organ of that government, as for example as to which of two individuals has been elected as chief executive, or which of two courts or legislatures is entitled to authority, the Federal Government will not ordinarily interfere, being governed by the presumption that each state govern-

ment has within itself the means of deciding such contests. In some cases, however, it becomes indirectly obligatory upon the General Government to decide the matter. This occurs when the action of state organs, the standing of which is in dispute, requires recognition or enforcement by the federal authorities. Thus, for instance, should each of two contesting state legislatures select and send Senators to Congress, it would be necessary for the United States Senate to decide which of the electing bodies was endowed with authority to act on that behalf for the State.

The case of Luther *v.* Borden (7 How., 1), decided by the Supreme Court in 1845, arose out of the following facts. Borden, acting under the authority of the old government of Rhode Island, had broken into the house of Luther who was at the time engaged in attempting to establish the government provided for by the Constitution that had been adopted in the popular, extra-constitutional manner spoken of above. Upon being sued in trespass by Luther, Borden justified himself by the plea that he was acting under the authority of the legal government of the State. Luther, upon his side, denied the *de jure* character of that government, and, therefore, its legal competence to empower Borden to exercise the authority he did. Thus the question as to which of the two governments was at that time the legal government of the State seemed squarely presented to the Court. That tribunal, however, did not feel itself obliged to pass upon the point, holding that the power to determine such a matter had been given by the Constitution to Congress, and by that body had been handed over, to the

extent at least of determining when the Federal Government should interfere, to the President. In the case at bar the President had recognized the legality of the old government and the propriety of this decision the Court declared it could not consider.[1]

When dealing with the subject of the readmission of the Southern States to federal privileges, we adverted to the fact that, acting under the authority assumed to be given it by the guaranty clause, Congress assumed an almost complete control over the

[1] "Under this article of the Constitution," said the Court, "it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can be determined whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. . . . So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the Federal Government to interfere. But Congress thought otherwise. . . . By this act (of February 28, 1795) the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. . . . And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress."

reconstruction of governments in those States. There can be no question, however, but that in doing so an interpretation was given to that clause which it is very difficult, upon strict principles of construction, to justify. Practical exigencies may have necessitated the federal authority that was exercised, but that violence was done to the meaning of this clause must be admitted. A fair interpretation of this clause would have given to the Federal Government at the most nothing more than the right to assist the citizens of the several States in establishing and maintaining governments republican in form and loyal to the Union. When this clause was discussed in the Constitutional Convention of 1787 it was explained by one member that its object was "merely to secure the States against dangerous commotions, insurrections, and rebellions;" and Madison, writing in the "Federalist," said: "It may possibly be asked what need there could be of such a precaution, and whether it may not become a pretext for alteration in the state governments without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the General Government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that if the General Government should interpose by virtue of this constitutional authority, it will be of course bound to pursue the authority. But

the authority extends no further than a *guaranty* of a republican form of government, *which supposes a preëxisting government of the form which is to be guaranteed.*[1] As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican constitutions; a restriction, which, it is presumed, will hardly be considered as a grievance."

Instead, however, of guaranteeing existing governments in the Southern States, or of assisting their citizens in establishing republican governments, the Federal Government, in pursuance of the various Reconstruction Acts passed by Congress, went on itself to assume the practical control of the establishment of new governments which they imposed upon the States against the will of the great bulk of their citizens. Furthermore, Congress even then refused to admit the States to a full enjoyment of constitutional rights until they had amended their constitutions in certain specific ways, and ratified the Fourteenth and Fifteenth Amendments to the federal Constitution. In so doing, not only was violence done to the guaranty clause, but the States in question were deprived of that equality with the other States of the Union to which they were constitutionally entitled.

[1] Italics our own.

CHAPTER VII

FEDERAL AND STATE AUTONOMY

THE general principle governing the exercise of governmental powers in the American State is that the powers of the Federal Government and those of the individual States shall be kept as distinct and independent as possible. Thus, as differing from almost all, if not all, of the other federal States of the world, there is provided in the American State a complete governmental machinery fully equipped with its own officials for the exercise of the powers of the Central Government, and, distinct therefrom, an equally complete governmental machinery in each of the constituent Commonwealths for the performance of their several functions.

This separation of the federal and state authorities and magistracies is maintained by the enforcement of the following rules:

First, no individual Commonwealth is permitted in any way to interfere with the operation of a federal governmental organ when operating within its constitutional province; nor, on the other hand, may the United States interfere in any way with the exercise by a State of any one of its constitutional powers.

When, however, there is an apparent conflict of powers, the conflict, as we have already learned, is considered, in the last instance, by the federal Supreme Court; and where the conflict is shown to be real, the State has to yield to the United States.

Secondly, it is held that though it is constitutional for the United States to permit or even to request a state official to perform a federal service, such state official cannot be compelled to do so. The same is true as to the performance by a federal official of a state duty. The reason for this rule has been declared to be that otherwise it would be theoretically possible for the one government so to burden with its own duties the officials of the other government as seriously to interfere with the proper performance by those officials of the duties laid upon them by their own governments.

That a State may not interfere with a federal agency was settled once for all by the decision of the Supreme Court in McCulloch *v.* Maryland. This case was all the stronger in that the federal agency, with whose activity it was alleged that Maryland had attempted to interfere by taxing it, was not an agency absolutely essential to the National Government nor expressly provided for by the Constitution. The power to establish a National Bank was at most only an implied one, and, in fact, its constitutionality was very widely denied, and years after this, a bill providing for the establishment by the National Government of a similar institution was vetoed by President Jackson upon the ground of its unconstitutionality. But in this case Maryland had not only denied the

constitutionality of the bank but had taken the position that, even were it constitutional, she had, under the general power reserved to her of taxing all property situated within her territorial limits, the right to tax such branches of the bank as might be located within her borders. Thus, in this case, the State of Maryland did not claim that she might directly and deliberately interfere with the operation of a federal law, but that the exercise by her of an otherwise legitimate authority could not be declared unconstitutional simply upon the ground that, indirectly, or by remote possibility, its effect was, or might be, to interfere with the exercise of a legitimate federal power. In other words, the State took the ground that, though, as occupying spheres of authority distinct from that of the Union, the States might not directly interfere with the exercise of the constitutional powers of the General Government, yet, while acting within their reserved spheres of authority, the States were as independent and sovereign as was the Union while operating within its constitutional sphere; and that, therefore, their direct interests, within such spheres, might not properly be subordinated to the merely indirect interests of the Union. This position the Supreme Court declared an invalid one. The reasoning of Marshall, who rendered the opinion, was as follows: "The sovereignty of a State," he declared, "extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstra-

ble that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States to a government whose laws, made in pursuance of the Constitution, are declared to be supreme." Then, after referring to the fact that the power to tax might be used to destroy, he continued: "That there is a plain repugnance in conferring on one government power to control the constitutional measures of another, which other with respect to those very measures is declared supreme over that which exerts the control . . . [is a] proposition not to be denied. . . . If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial processes; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States. . . . The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power by taxation, *or otherwise,* to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."

In subsequent cases, following out the principle

thus laid down, the Supreme Court has declared that the States may not tax the salary or emoluments of an officer of the United States (Dobbins *v.* Commissioners of Erie Co., 16 Pet., 435), nor United States bonds (Weston *v.* Charleston, 2 Pet., 449), nor interstate commerce (Brown *v.* Maryland, 12 Wh., 419).

Attempts have been made to push this freedom of federal officials from state interference to an extent which, if logically followed out, would place them almost wholly outside of the control of the ordinary laws of the State. Thus it was asserted that a State might not even tax the private property of a federal official, though this property were in no way concerned with the exercise of his federal duties by that official. But this extension of the principle the Supreme Court refused to sanction. In National Bank *v.* Commonwealth (9 Wall., 353) it declared: "It certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of state legislation. The most important agents of the Federal Government are its officers, but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is that the agencies of the Federal Government are only exempted from state legislation, so far as the legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a prin-

ciple founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a federal officer may not be taxed; he may be exempted from any personal service which will interfere with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the [federal] banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the State incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."

In the case of the Union Pacific Ry. *v.* Peniston (18 Wall., 5) the Court again laid down the following principle according to which should be judged the constitutionality of state taxation laws the effect of which might be more or less remotely to affect federal agencies. "It cannot be," the court said, "that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the State all power to tax persons or property. Every

tax levied by a State withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The States are, and they ever must be, coexistent with the National Government. Neither may destroy the other. Hence the federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise. . . . It is therefore manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they are intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers.'' [1]

[2] The respective spheres of the federal and state governments have been most carefully worked out by the courts in connection with the subject of interstate commerce with a result perfectly in accord with the principle above stated. Thus it has been held that the control of interstate commerce being given to the Federal Government, the States may not interfere either by way of taxation or by an exercise of their so-called "Police Powers." They may, however, it has been decided, tax simply as property those instruments of interstate commerce that are located within their respective territorial limits. Also it has been held that

Just as it has been held that the State may not interfere with the operation of a federal organ or the exercise of his duty by a federal official, so, reciprocally, it has been held that the United States may not arbitrarily interfere with a state official or with the operation of a state organ. Such an interference has been held justified only when necessary for the efficient performance of some constitutional duty of its own.

It will be seen that though every effort is made to keep the governments of the States and of the Union as free as possible from the interference of the one by the other, the two governments do not stand upon exactly the same plane of authority; for whereas a State may not, even in the direct and ingenuous exercise of one of its constitutional powers, interfere indirectly with a federal officer or organ, the Federal Government may interfere directly with a state agency if by so doing the efficient exercise of one of its own constitutional powers be advanced. Thus the Supreme Court held in Veazie Bank *v.* Fenno (8 Wall., 533) that in order to regulate the currency of the country, the United States might, under its right to regulate the currency of the country, constitutionally levy a tax upon the circulating notes of state banks for the purpose of driving them

the value of such property for taxation may be determined by the use to which it is put, namely, for the interstate transportation of persons and merchandise (Adams Express Co. *v.* Ohio State Auditor, 165 U. S., 194). Every attempt upon the part of the States to do more than this, however, and to interfere with the actual carrying on of interstate commerce, has been defeated by the federal courts.

out of existence, even though it had previously declared in one of the decisions of that Court itself, that the States had the constitutional right to charter such banks (Briscoe *v.* Bank of Kentucky, 11 Pet., 257).

But here also the Supreme Court has declared that the principle shall not be extended to an illegitimate extent. In the case of Collector *v.* Day (11 Wall., 113) it held that the Federal Government could not levy an income tax upon the salaries of state officials, and in justifying its decision took the ground that a distinction is to be made between those agencies of the States, the existence and free operation of which are essential to their efficient operation, and those which, though of value to them, are not essential to their welfare. The former, it held, might not be interfered with by the General Government, but the latter might. In the opinion rendered in this case attention was called to the fact that in the case of Veazie Bank *v.* Fenno, the existence of this distinction was suggested, the Court saying in that case with reference to the question whether there might not be a tax on a state agency that Congress could not constitutionally levy: "We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for the legitimate purposes of state government, are not proper subjects of the taxing power of Congress." And in Collector *v.* Day the Court said: "If the means and instrumentalities employed by that [the General] 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. It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation,—as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?''

This relation of the federal power to state governmental instrumentalities has been further illustrated in the matter of the Federal Government's right of Eminent Domain, it having been held that the General Government has an implied right of eminent domain which it may exercise within a State with or without that State's consent (Monongahela Navigation Co. *v.* U. S., 148 U. S., 312; Chappell *v.* U. S., 160 U. S., 499), but that it may not, in so doing, take for its own use land or other property employed by the State in performance of its essential governmental functions.

Though, as we have seen, it is a general principle of the American Constitutional system that the fed-

eral and state governments shall interpret and enforce their own laws respectively, there is one important exception to this rule. This exception is that to the federal courts is given by the Constitution jurisdiction of all suits between two or more States, between a State, as plaintiff, and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects. Thus it happens that the federal courts, obtaining jurisdiction simply because of the character of the parties, are very frequently called upon to decide cases involving the construction and enforcement of state laws, and are thus called upon, as it were, to take the place of the state judicial tribunals. From the very beginning, however, the federal courts, when so acting, have considered themselves as but *quoad hoc* agents of the States and as such have almost uniformly held themselves obligated to follow in their construction of the state laws the interpretations given to them by the courts of the State that enacted them. Thus the Judiciary Act of 1789 declared (Sec. 34): "The laws of the several States except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in the trials at common law in the courts of the United States in cases where they apply." And in Elmendorf *v.* Taylor (10 Wh., 152) Marshall said: "The judicial department of every government, where such a department exists, is the appropriate organ for construing the legislative acts of that government.

. . . On this principle the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws, and treaties of the United States." Again, in Shelby *v.* Guy (11 Wh., 361) the Supreme Court declared: "Nor is it questionable that a fixed and received construction of their respective statute laws in their own courts makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that this admission may at times involve us in seeming inconsistencies, as when States have adopted the same statutes and their courts differ in their construction. Yet that course is necessarily indicated by the duty imposed on us to administer, as between certain individuals, the laws of their respective States according to the best lights we possess of what those laws are." In Green *v.* Neal (6 Pet., 291) it was held that where a state court had changed its former construction of law, the federal courts, upon a subsequent case coming before them should do likewise and thus keep ever in accord with the latest decisions of the state courts.

There are, however, certain classes of cases in which the federal courts have not held themselves bound to follow state precedents, and have thus built up for themselves what may be called a federal common law as to the subjects concerned. Thus they have followed this practice as to general principles of criminal law,

commercial law, and equity jurisprudence. Also the federal courts upon a few occasions have declined to follow the last decisions of the state courts reversing former decisions, when to do so would have been to render void contracts entered into upon the faith of the first decisions.[1]

[1] Cf. Gelpcke *v.* Dubuque, 1 Wall., 175, and McCullough *v.* Virginia, 172 U. S., 102.

CHAPTER VIII

FEDERAL AND STATE POWERS

FROM the control that the Federal Government may constitutionally exercise over the *form* of the governments of the several States, we now turn to a consideration of the general principles in accordance with which the *powers* of government are divided between the federal and state governments.

In the American State the totality of governmental powers is divided into the following classes:

1. The powers, the exclusive exercise of which is delegated to the General Government.

2. The powers—commonly called "concurrent"—that may be exercised by the General Government, but which, when not so exercised, may be exercised by the individual States.

3. The powers, the exercise of which is prohibited to the General Government.

4. The powers, the exclusive exercise of which is reserved to the several States.

5. The powers, the exercise of which is prohibited to the States.

From the above it will be seen that the powers of the Federal Government are embraced within the first

two classes—the distinction between the two classes being merely that the exercise of the powers of the first class is exclusively vested in the General Government, while those of the second may, in default of federal exercise, be made use of by the States.

Some of the powers granted by the Constitution to the general government are expressly denied to the States. As to the exclusive character of the federal jurisdiction over them there cannot be, of course, any question. It has, however, been often a matter difficult of determination whether or not various of the powers given to the United States, but not expressly made exclusive or denied to the States, are so exclusively subject to federal control that no exercise of them by the States is under any circumstances permissible. Shortly stated, the Supreme Court has guided itself in these cases by the following principle. As regards generally the powers granted to the National Government it has held that there is a difference between those which are of such a character that the exercise of them by the States would be, under any circumstances, inconsistent with the general theory or national polity of the Constitution, and those not of such a character. As regards this latter class, the Supreme Court has held that as long as Congress does not see fit to exercise them, the States may do so. Any laws thus passed by the States are, however, of course subject to abrogation at any time by the enactment by Congress of laws governing the same subjects.[1]

[1] By the enactment of a federal law a state law governing the same subject is not nullified but merely suspended during the

In the early case of Sturges *v.* Crowninshield (4 Wh., 122) Chief Justice Marshall, in reference to the matter of bankruptcy, laid down this distinction of which we have been speaking, between the exclusive and concurrent powers of the Federal Government. But it is especially in connection with the subject of Interstate Commerce that the principles governing this distinction have been most carefully worked out. In Houston *v.* Moore (5 Wh., 1) Justice Johnson said: "The Constitution containing a grant of powers in many instances similar to those already existing in the state governments, and some of those being of vital importance also to state authority and state legislation, it is not to be admitted that the mere grant of such powers in affirmative terms to Congress, does, *per se,* transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the States, unless where the Constitution has expressly, in terms, given an exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States. The example of the first class is to be found in the exclusive legislation delegated to Congress over places purchased by the consent of the legislature of the State in which the same shall be, for forts, arsenals, dock-yards, etc.; of the second

existence of the federal statute. Upon the repeal of the federal statute, the state law again operates without any reënactment by the State.

class, the prohibition of a State to coin money or emit bills of credit; of the third class, as this court have already held, the power to establish a uniform rule of Naturalization (Chirac *v.* Chirac, 2 Wh., 259), and the delegation of admiralty and maritime jurisdiction (Martin *v.* Hunter, 1 Wh., 304). In all other cases not falling within the classes already mentioned, it seems unquestionable that the States retain concurrent authority with Congress, not only upon the letter and spirit of the eleventh (tenth?) amendment of the Constitution, but upon the soundest principles of general reasoning."

So, later, in Cooley *v.* Board of Wardens (12 How., 300), the court declared: "The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject matter. If they are excluded it must be because the nature of the power thus granted to Congress requires that a similar authority should not exist in the States."

Still later, in Cardwell *v.* American River Bridge Co. (113 U. S., 205), the court, after quoting a number of cases, says: "These cases illustrate the general doctrine now fully recognized, that the commercial power of Congress is exclusive of state authority only when the subjects upon which it is exerted are national in their character and admit and require uniformity of regulations affecting alike all the States, and that when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the States may provide for their regulation and management until Congress intervenes and

supersedes their action." Applying this principle, the Supreme Court has held that the States may legislate regarding such matters as pilotage, wharves, harbors, etc.; but may not, even though Congress has not acted, take any steps that in effect will operate to hinder or regulate the carrying on of interstate commerce itself. "The power of Congress," has said the Court in Brown *v.* Houston (114 U. S., 622), "is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States coming or brought within its jurisdiction. All laws and regulations are restrictive of natural freedom to some extent, and where no regulation is imposed by the government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that the commerce shall be free and untrammeled, and any regulation of the subject by the States is repugnant to such freedom."

It will have been noticed that in speaking of the powers possessed by the General Government, the term "delegated" has been used, whereas, in speaking of the powers possessed by the States, the word "reserved" has been employed. This has been done advisedly, the fundamental principle governing the division of powers between the General Government and the States being that the former possesses only

those powers that are by the Constitution granted to it, whereas the States are to be construed as entitled to exercise all powers except those expressly or by implication denied to them by the Constitution. Thus the General Government is commonly spoken of as one of enumerated and the state governments as governments of unenumerated powers.

This distinction would in all probability have been recognized and adopted by the Supreme Court as a logical corollary from the general character of the Constitution, had there been no express direction in that instrument itself to such effect. Out of superabundant caution, however, the Tenth Amendment was adopted, which 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 phrase "or to the people" covers those powers which, though constitutionally exercisable by the States, for aught the federal Constitution has to say, are by their own state constitutions denied to their respective governments. Thus the federal and the state constitutions differ in this important respect that the grants of the former operate to endow the General Government with powers that it would not otherwise possess, whereas the provisions of the latter in the main operate to deprive the governments which they create of powers they otherwise would possess.

Except when expressly limited,—as, for instance, where the power which is given to levy taxes is restricted by the provisions that "all duties, imposts, and excises shall be uniform throughout the United

States," that "no tax or duty shall be laid on articles exported from any State," that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken," and that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another,"—a power granted to Federal Government is construed to be absolute in character. Thus it follows that, though the presumption is *contra* when the question is as to the possession of a power by General Government, the presumption is in its favor when the question is as to whether a power which is admitted to be a federal one is absolute or limited.

Express and Implied Powers. Though the Federal Government is one of enumerated powers, it is one that has from the very beginning been construed to possess not simply those powers that are specifically or expressly given it, but also those necessary and proper for the effective exercise of such express powers. After enumerating the various powers that Congress is to possess, the Constitution declares (Art. I, Sec. 8), "[The Congress shall have power] to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof." Furthermore, it will be noticed that in the Tenth Amendment, above quoted, the powers reserved to the States or to the people are not those not *expressly* delegated to the United States, but simply those not dele-

gated. This is significant in view of the fact that in the corresponding section in the Articles of Confederation the word "expressly" is carefully inserted.[1]

From the very beginning the Supreme Court of the United States has declared that the powers thus impliedly granted the General Government as necessary and proper for the exercise of the powers expressly given, are to be liberally construed. The words "necessary and proper" it early held were not to be interpreted as endowing the General Government simply with those powers indispensably necessary for the exercise of its express powers, but as equipping it with any and every authority the exercise of which may in any way really assist the Federal Government in effecting any of the purposes the attainment of which is within its constitutional sphere. Thus in the case of United States *v.* Fisher (2 Cr., 358), decided in 1804, Marshall declared: "It would be incorrect and would produce endless difficulties if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means which are in fact conducive to the exercise of a power granted by the Constitution."

[1] 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."

The classic statement, however, of the scope of the "implied" powers of Congress is of course that made by Marshall in the opinion which he rendered in the case of McCulloch *v.* Maryland and which we have already quoted in Chapter III of this work.[1]

Reviewing the effect of this decision, it is seen that the words "and proper" as used in the phrase "necessary and proper" are construed not as declaring that a means selected by Congress shall be proper as well as necessary—that is, indispensable—for carrying into effect a specified power, but as qualifying and extending the force of "necessary" so as to render constitutional the selection of any means that may be appropriate, that is, may in any way assist the General Government in the exercise of its constitutional functions. It need not be said, of course, that the question as to whether or not the particular means selected is the best possible means that might have been adopted is one for Congress to answer. All that the courts have to consider in passing upon its constitutionality is as to whether it is calculated in any appreciable degree to advance the constitutional end involved.

One further important fact regarding the implied powers of Congress is to be noticed. This is that it has been held that a power when employed as incidental to the exercise of an express power may be used free from a constitutional limitation under which it would rest if exercised as an express power. Thus in Veazie Bank *v.* Fenno (8 Wall., 533) and Head Money Cases (112 U. S., 580) the Supreme Court decided that the power of taxation when used simply as

[1] See p. 44 f.

a means for regulating commerce and currency, is not subject to the constitutional limitations under which it would rest if exercised for the purpose of raising a revenue. In the Head Money Cases the court declared, relative to a per capita tax levied by Congress upon persons, not citizens of the United States, coming to this country: "If this is an expedient regulation of commerce by Congress, and the end to be obtained is one falling within the power, the act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax. In the case of Veazie Bank *v.* Fenno, the enormous tax of eight per cent. per annum on the circulation of state banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created. . . . It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple."

Common Defense and General Welfare. Article I, Section 8, of the Constitution declares that the Congress shall have the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States."

The view has at times been advanced by those who desire to magnify the powers of the Federal Government that instead of construing this section as simply the grant of an authority to raise revenue *in order to* pay the debts and provide for the common defense and general welfare of the United States, it should

be interpreted as conferring upon Congress two distinct powers; namely: (1) the power of taxation; and (2) the power to provide for the common defense and general welfare. And, under the latter of these two grants, it has been argued that the Congress has the authority to exercise any power that it may think necessary or expedient for advancing the common defense or the general welfare of the United States. It scarcely needs be said that this interpretation has not been accepted by the courts. Were this view to be accepted the government of the United States would at once cease to be one of enumerated powers, for it would then be possible to justify the exercise of any authority whatsoever upon the ground that the general welfare would thereby be advanced. As Hare correctly says in his "American Constitutional Law," "a government authorized to provide for the common defense and general welfare is virtually absolute, because it must determine what means are requisite for the end in view, and its decision must necessarily be binding on the courts." [1]

Arguing in a somewhat similar manner, some have attempted to render the General Government virtually absolute by discovering in the words of the Preamble to the Constitution [2] a comprehensive grant of power. The Supreme Court has, however, never accepted this

[1] P. 242.

[2] "We the People of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

view. The only force that may properly be given the Preamble is correctly stated by Story. "The Preamble," he says, "never can be resorted to, to enlarge the powers conferred on the General Government or any of its departments. It cannot confer any power *per se,* it can never amount by implication to an enlargement of any power expressly given. It can never be the legitimate source of any implied power when otherwise withdrawn from the Constitution. Its true office is to expound the nature, and extent, and application of the powers actually conferred by the Constitution and not substantively to create them." [1]

Most dangerous, however, of all the views that have been advanced to magnify the powers of the United States is that which ascribes to it so-called "inherent sovereign rights"—rights, that is, not implied in the grant of any of its express powers, but flowing from the fact of its sovereignty. This theory has played a certain part in our constitutional history for many years, but was especially pressed during the period following the Spanish-American War and before the decision of the recent Insular Cases. Thus, Senator Platt of Connecticut declared in the Senate, December 19, 1898, that the United States "possesses every sovereign power not reserved in its Constitution to the States or to the people; that the right to acquire territory was not reserved, and is, therefore, an *inherent sovereign right;* that it is a right upon which there is no limitation and with regard to which there is no qualification; that in certain instances the right may be inferred from specific clauses in the Constitution,

[1] "Commentaries on the Constitution," Sec. 462.

but that it exists independent of the clauses; that in the right to acquire territory is found the right to govern it; that as the right to acquire is a sovereign and inherent right, the right to rule is a sovereign right not limited in the Constitution."[1]

So, also, Senator Foraker of Ohio declared in the Senate, July 1, 1898, in response to a question as to the constitutional source whence he derived the power of the United States to annex foreign territory, that "the power was to be found inherent in our sovereignty—attached to it necessarily as a part of our sovereignty as a nation," and "was also to be found in the Constitution—expressly conferred upon Congress by that provision of the Constitution which authorizes Congress to provide for the general welfare." When asked if he called this doctrine the "higher law," he replied: "The proposition is that it is inherent in sovereignty to do whatever sovereignty may see fit to do, and among other things to acquire territory."[2]

There can be no question as to the constitutional unsoundness, as well as of the revolutionary character, of the theory advanced in the foregoing quotations. 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] See "Congressional Record," XXXII No. 11, pp. 321–323.

[2] Of substantially the same character are the arguments of Gardiner ("Our Right to Acquire and Hold Foreign Territory," Putnams, 1899) and of Magoon, Law Officer, War Department ("Report on the Legal Status of the Territory and Inhabitants of the Islands Acquired by the United States during the War with Spain." Doc. 234, 56th Cong., 1st Session).

Taney, in denying to the President the right to authorize a suspension of the writ of *habeas corpus,* explicitly repudiated the doctrine. "Nor can any argument be drawn," he said, "*from the nature of sovereignty,* or the necessities of government for self-defense in times of tumult and danger. The Government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the Constitution and neither of its branches can exercise any of the powers of government beyond those specified and granted" (*ex parte* Merryman, Campbell's Reports, 246).

Unfortunately, however, the Supreme Court has not always been so careful in denying the propriety of an argument based upon the inherent sovereign rights of the National Government. It has never explicitly justified the exercise of a power by the Federal Government upon this ground, but, *obiter,* has several times used language suggesting its validity. Thus, in the case of Knox *v.* Lee (12 Wall., 557), Justice Bradley said: "The United States is not only a Government but it is a National Government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments. . . . Such being the character of the General Government it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong

to every government as such, and as being essential to the exercise of its functions. If this proposition be not true, it certainly is true that the government of the United States has express authority in the clause last quoted, to make all such laws (usually regarded as inherent and implied) as may be necessary and proper for carrying on the government as constituted and vindicating its authority and existence."

Assertions of a similarly general character are also to be found in the opinions rendered in the cases of Mormon Church *v.* United States (136 U. S., 1) and Jones *v.* United States (137 U. S., 202). These declarations of the Supreme Court in all of these cases were, however, as has been said, *obiter dicta,* the decisions rendered not being based upon them; and it is to be observed that in the recent Insular Cases no support was given to the theory.

A constitutional principle that is itself perfectly valid but which is sometimes confused with the one we have just been discussing, or rather adduced as a support for it,[1] is that which holds the United States impliedly equipped with all the powers necessary and proper for maintaining its international rights and fulfilling its international obligations. Inasmuch as exclusive control of foreign relations has been by the Constitution expressly intrusted to the United States, it follows as a proper implication that it is endowed with commensurable powers.[2] But this is a very different doctrine from that which justifies the exercise

[1] *E. g.*, by Senator Platt in the speech above referred to.

[2] See United States *v.* Arjona, 120 U. S., 479; Chinese Exclusion Cases, 130 U. S., 581.

of a power by the United States without reference to any authority specifically given, but simply upon the ground that it is an "inherent sovereign right."

Turning now from the consideration of the *powers* of the Federal Government to an examination of the *limitations* imposed by the Constitution upon its authority, we find that these, like its powers, are of two kinds, express and implied. The implied limitations include, first, all those which arise from the fact that the Government of the United States is one of enumerated powers, that is to say, one that may not exercise any power not expressly or impliedly given it; and secondly, those which arise from the fact that the Constitution looks to a preservation of the several States in the autonomy that is allotted them, and that, therefore, the Federal Government may not unnecessarily interfere with the free operation of state governments either by way of imposing upon them the performance of federal duties, or by unduly restraining their freedom of action.[1]

The express limitations upon the powers of the Federal Government are in part limitations upon the manner of exercise of powers expressly given, as, for example, that direct taxes shall be apportioned among the several States according to their respective populations, that naturalization, bankruptcy, and tariff laws shall be uniform throughout the United States, etc.; and in part absolute prohibitions upon the exercise, in any manner, of the powers specified. These absolute prohibitions are to be found, in the main, in Section 9 of Article I and in the first eight Amendments.

[1] This point will be more fully discussed in the next chapter.

From the very first it has been construed by the Supreme Court that the prohibitions contained in these Amendments apply only to the United States. This was first authoritatively declared by Marshall in the case of Barron *v.* Baltimore (7 Pet., 243), decided in 1833. In his opinion rendered in that case, Marshall said: "The plaintiff . . . insists that the [Fifth] Amendment being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State as well as that of the United States. . . . The question thus 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 promote their interests. The powers they conferred on the 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 governments 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 persons."

The correctness of this decision has never been questioned either by the federal or state courts. However, as we shall notice in a later chapter, the argu-

ment has been made, but not accepted as valid by the Supreme Court, that that clause of the Fourteenth Amendment which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," should be so construed as to render the provisions of the first eight Amendments operative upon the States.

In regard to these first eight Amendments it may be said that it was only an excess of caution that required their incorporation in the Federal Constitution. Inasmuch as the United States was to have only the powers expressly or impliedly given it, it would have been, in the absence of such express limitations, without the authority to exercise the powers that these amendments enumerate.[1]

[1] Indeed, in the eyes of some, of Hamilton at least, there were affirmative reasons why these limitations should not be expressly stated. In the "Federalist," No. 84, after showing that Bills of Rights were "stipulations between Kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince," whereas in constitutions "the people in reality surrender nothing," Hamilton proceeds: "I go further and affirm, that bills of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed Constitution, but would be even dangerous. They would contain various exceptions to powers not granted; and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? . . . Men disposed to usurp . . . might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against the liberty of the

Having described, in general terms, the manner in which the powers and limitations of the General Government are determined, little needs to be said regarding the powers and limitations of the States. The States have, of course, as specifically provided in the Tenth Amendment, all powers except those delegated —expressly or impliedly—to the United States, and those prohibited to them by the Constitution. The powers expressly prohibited to the States are those mentioned in Section 10 of Article I, and in the Thirteenth, Fourteenth, and Fifteenth Amendments. The implied prohibitions are those arising from the supremacy of national laws. This subject will be further touched upon in the next chapter which will deal with the mutual independence of the federal and state governments.

press afforded a clear implication that a right to prescribe proper regulations concerning it, was intended to be vested in the National Government."

CHAPTER IX

COERCION OF STATE ACTION

THE right of the United States Government to prevent, by force if necessary, the individual States from in any way interfering with the execution of federal laws within their borders has already been discussed. The somewhat different question as to the powers possessed by the General Government to compel, in a positive way, the performance by the States of duties laid upon them by the federal Constitution has now to be considered.

Generally speaking, it is a matter for the United States or for an individual State itself to determine whether or not it will exercise a power that is granted or reserved to it. Thus, for instance, Congress has never fully exercised the legislative powers granted it, and, on the other hand, no one of the States has ever employed all the powers reserved to it. Indeed, without exception, all the States have by their own constitutions removed from the competence of their legislatures many powers that, so far as the Federal Constitution is concerned, they might properly employ. But when from rights we turn to duties the question is a different one.

A considerable number of duties are specifically, or by implication, laid upon the United States by the Constitution. Thus, in general, it may be said that Congress has imposed upon it the obligation of passing such laws as are necessary to make effective the various provisions of the Constitution. For example, the grant of judicial power to the United States would be valueless without congressional action determining the constitution of the Supreme Court, creating a system of inferior federal courts and fixing their several jurisdictions, and executive action in the appointment of the necessary justices and other judicial officers. So also the various executive departments of the Federal Government owe their creation and maintenance to legislative and executive action. Again, the creation of new States out of territories requires the affirmative action of the legislative branch of the Federal Government. As to all these, and many other duties that are laid upon the different departments of the Federal Government, there can be no question but that however great a moral obligation there may be for their exercise, there is no legal means of compelling their performance. Should Congress neglect to create inferior federal tribunals, or should it arbitrarily refuse to admit as a State a territory that has advanced far beyond the stage that would justly entitle it to statehood, there would be no legal means of enforcing action. Here, as in many cases of possible abuse of power, the compelling or restraining forces that have to be depended upon are public opinion, the suffrage, and, in some few instances, impeachment.

If, then, this be the condition of affairs as regards

the duties laid by the Constitution upon the several departments of government of the United States, what is the situation as regards those duties, the performance of which is expressly or impliedly imposed by the Constitution upon the peoples and governments of the individual States?

First, let us see what are some of these affirmative duties. The more important of them are the following:

First, the Constitution declares that: "No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." This clause, of course, refers to fugitive slaves, and therefore has been without significance since the adoption of the Thirteenth Amendment. The history of the manner in which its enforcement was attempted and the judicial decisions occasioned thereby, however, throw considerable light upon the general question which we are now considering of the power of the United States to compel the affirmative performance of duties by the States.

Secondly, the Constitution declares that: "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

Thirdly, the States have laid upon them the duty of

playing their constitutional part in the establishment and maintenance of the Federal Government by selecting Representatives and Senators for Congress, and participating in the election of the President.

Fourthly, by federal law there is given in certain cases a right of appeal to the Supreme Court of the United States from the highest courts of the States. In other cases, also, there is granted to the defendants a right of removal to the superior federal courts of suits brought against them in the state courts. Such state courts have therefore laid upon them certain duties in connection with the perfecting of such appeals, as, for example, the preparation and certifying of the "records" of the cases in which an appeal or removal is sought.

Fifthly, the Constitution provides that no State shall pass any law impairing the obligation of contracts. Stated positively, this of course means that all individuals shall have the right to obtain enforcement of all legal agreements.

By briefly considering, in each of the above classes of duties, the power of the Federal Government to compel their performance by the States, and by combining the conclusions reached, we shall be able to obtain a satisfactory knowledge of the relations that exist between the Union and its member States in matters of this sort.

First, then, as to the surrender of fugitive slaves.

With reference both to fugitive slaves and fugitives from justice, the fact may be mentioned that, according to United States Constitutional Law, there would have been, in the absence of the express provision of

Article IV, Section 2, no legal means whatever whereby one State might obtain from another the surrender of fugitives from itself, should that other State refuse its consent and assistance. This result would follow from the general principle that, except in so far as the federal Constitution expressly provides otherwise, the member States of the Union occupy a position, as regards one another, exactly similar to that in which sovereign, independent States stand toward one another. The laws and judiciary of the one have no operation, *ex proprio vigore,* within the territorial limits of any one of the other States, and its officers are likewise destitute of authority outside of its own borders.

In the case of Prigg *v.* Pennsylvania (16 Pet., 539) the law relative to the surrender of fugitive slaves was first authoritatively laid down. In that case, Justice Story, in rendering the opinion of the Court, referred to the fact that "Historically, . . . the object of this [fugitive slave] clause was to secure to the citizens of the slave-holding States the complete right and title of ownership in their slaves, as property, in every State in the Union into which they might escape from the State where they were held in servitude." This, then, he says, being a right guaranteed to them by the Constitution, it is the duty of the Federal Government to see that they obtain it. But, he continues, if it be left to the individual States, many of which are opposed to slavery, to enact and enforce the laws necessary to make the right effective, it is almost certain that they will not do so, and thus the people of the slave-owning States will be deprived not only of their guaranteed rights, but of one

of those very rights, the promise of which was an essential inducement to them to come into the Union. Therefore, said Story, speaking for the majority of the Court, a federal law is just and proper, for, as he says, the language of any clause should be interpreted "in such a manner, as, consistently with the words, shall fully and completely effectuate the whole rights of it." He then continues: "The clause is found in the national Constitution, and not in that of any State. It does not point out any state functionaries, or any state action to carry its provisions into effect. The States cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the States are bound to provide means to carry into effect the duties of the National Government nowhere delegated or intrusted to them by the Constitution."

It will be observed that by this decision the Supreme Court declared that as a matter of fact when the Constitution declared that persons held to servitude in one State escaping into another should be delivered up, the affirmative legal duty of seeing that this was done was laid upon the National Government and not upon the States at all. Upon them was laid only the duty, and that but an implied one, of not hindering the performance by the Federal Government of its duty.

A fact to be noted regarding the federal law, the constitutionality of which was asserted in this case, is that it provided that fugitive slaves, when arrested by their owners or their agents, should be taken before a federal court, or a state magistrate, and upon proof,

etc., taken back to the States from which they had fled. In the arguments addressed to the Court, and in the opinions rendered by all its justices, except McLean, it was conceded that that provision of the federal statute which declared that fugitive slaves might be taken before state magistrates, had not, and could not constitutionally be made to have the effect of imposing a duty upon such state officials which might be enforced should they refuse its performance. In his opinion, McLean declared: "It seems to be taken as a conceded point in the argument that Congress had no power to impose duties on state officers, as provided in the above act. As a general principle this is true. . . . Congress can no more regulate the jurisdiction of the state tribunals than a State can define the judicial power of the Union. The officers of each government are responsible only to the respective authorities under which they are commissioned." "But," McLean went on to ask, "do not the clauses in the Constitution in regard to fugitives from labor and from justice give Congress a power over state officers, on these subjects?" Answering this question, he asserted as his own opinion that where the Constitution imposes a positive duty on a State, or its officers, to surrender fugitives, Congress may prescribe the mode of proof and the duty of the state officers. But, even though taking this position, which it may be said, parenthetically, the Supreme Court has never upheld, McLean himself said that should this power of Congress be resisted by a State there would be no means of coercing it.

The case of Prigg *v.* Pennsylvania was decided in

1842. Besides upholding the constitutionality of the federal law, it denied the power of the States to pass any laws regulating the rendition of fugitive slaves, even though intended in good faith to aid in the capture and surrender to their proper masters of these pieces of property. In 1843 Massachusetts and Vermont passed laws which expressly prohibited their respective officers from performing any of the duties required of them by the federal fugitive slave law; and in 1847–48 Pennsylvania and Rhode Island followed suit. In 1850 Congress enacted a new fugitive slave law the execution of which was placed wholly within the hands of federal officials. Thereupon a considerable number of the Northern and Western States passed laws which not only denied the use of their jails, forbade the judges to issue writs or give any assistance whatever to claimants of fugitive slaves, but made provision for counsel for apprehended negroes, declared them entitled to the writ of *habeas corpus*, required a jury to establish their identity, and imposed heavy penalties upon all persons who should be shown to have forcibly seized or falsely laid claim to negroes as their slaves. Vermont indeed had, and kept, upon her statute book a law that was, in terms, directly nullificatory of the federal act, declaring that any person who might have been held as a slave, and who should come into the State, should be free.

From the surrender of fugitive slaves we turn now to the subject of extradition of fugitives from justice.

The same article of the Constitution that provides for the surrender of fugitive slaves provides also, as we have seen, that "a person charged in any State

with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." The legislative and judicial history of this clause has, however, been quite different from that of the fugitive slave clause.

In the case of Kentucky *v.* Dennison (24 How., 66), decided by the Supreme Court in 1860, the whole subject of the respective powers and duties of the state and federal governments in respect to this matter of extradition of criminals, came up for adjudication. Congress had passed a law declaring that, upon request from the State from which the fugitive has escaped, "it shall be the duty of the executive authority of the State" to cause the fugitive to be seized and delivered to the agent of the demanding State. Dennison, the governor of Ohio, refused the request of the Commonwealth of Kentucky to surrender a fugitive from her borders. Thereupon a mandamus was asked from the federal court to compel him to do so. This writ the Supreme Court refused to issue, the argument of Taney, who prepared the opinion of the Court, being as follows: The duty of providing by law the regulations necessary for carrying into effect this right to extradition, he said, manifestly belonged to Congress. Furthermore, he declared, the duty that was laid upon the governors of the States by the Constitution, and by the law that Congress had passed, was a mere ministerial duty, and, therefore, one the performance of which might ordinarily be

compelled by the courts. Thirdly, it was certain that the words "it shall be the duty," when employed in ordinary acts of legislation, imply an assertion of the right to command and coerce obedience. "But," said Taney, "looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the Court is of opinion the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the State; *nor is there any clause or provision in the Constitution which arms the government of the United States with this power.* Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it. . . . It is true that Congress may authorize a particular state officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal."

This judgment of the Court in Kentucky *v.* Dennison brings into very clear light the completeness with which the federal and state governments, when acting within their respective constitutional spheres, are kept independent of each other; for here was a

case in which an express duty had been laid by the federal Constitution itself upon the States, and yet the General Government was held powerless to compel its performance.

As regards, now, the election of Representatives, Senators, and Presidential Electors by the States, it may be said that the States never have actually refused to act. Their power to refuse, and the impotency of the Federal Government in such a case to compel them to act, has, however, been several times asserted, and, so far as the writer knows, has never been denied. Indeed it would be very difficult to suggest any possible legal means by which such action could be affirmatively compelled. In the case of Cohens *v.* Virginia, to which reference has already been made in connection with the matter of appeals from state courts to the United States Supreme Court, Barbour, arguing in behalf of the position which had been taken by Virginia, declared: "Whenever the States shall be determined to destroy the Federal Government, they will not find it necessary to act, and to act in violation of the Constitution. They can quietly accomplish the purpose by not acting. Upon the state legislatures it depends to appoint the Senators and Presidential Electors, or to provide for their election. Let them merely not act in these particulars, the executive department and part of the legislature ceases to exist, and the Federal Government thus perishes by a sin of omission not of commission." To this position Webster alluded in his speech in reply to Calhoun, and endeavored to minimize its importance from the States' Rights standpoint. "I hear it

often suggested," he said, "that the States, by refusing to appoint Senators and Electors, might bring this government to an end. Perhaps this is true; but the same may be said of the state governments themselves. Suppose the legislature of a State, having the power to appoint the governor and the judges, should omit that duty, would not the state government remain unorganized? No doubt, all elective governments may be broken up by a general abandonment on the part of those intrusted with political powers, of their appropriate duties." Moreover, as a matter of fact, as Webster went on to show, in a certain very important sense the federal Constitution relies, for the maintenance of the government which it establishes, upon the plighted faith not of the States, as States, but upon the several oaths of their individual citizens, in that all members of a state legislature are obliged, as a condition precedent to their taking their seats, to swear to support the federal Constitution, and from the obligation of this oath no state power can discharge them. Thus, said Webster, "no member of a state legislature can refuse to proceed at the proper time to elect Senators to Congress, or to provide for the choice of Electors of President and Vice-President, any more than the members of this body [Senate] can refuse, when the appointed day arrives, to meet the members of the other House, to count the votes for those officers, and ascertain who are chosen. In both cases, the duty binds, and with equal strength, the conscience of the individual member, and it is imposed on all by an oath in the very same words. Let it then never be said, Sir, that it is a matter of discre-

tion with the States whether they will continue the government, or break it up by refusing to appoint Senators and Electors. They have no discretion in the matter. The members of the legislatures cannot avoid doing either, so often as the time arrives, without a direct violation of their duty and their oaths; such a violation as would break up any other government."

The correctness of the reasoning of Webster may be granted, and yet the fact remains that however great a moral obligation there may be upon the individual members of the several state governments to take such action as is necessary to equip the Federal Government with the officials necessary for its operation, there exist no legal means, by an issue of mandamus or otherwise, to compel such action when refused.

But though the United States government is impotent to enforce action in the matters of which we have been speaking, the Constitution gives it the power to determine the manner in which such action shall be taken, if taken at all. Article I, Section 4, of the Constitution provides that, "The times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations except as to the places of choosing Senators."

Congress has exercised the authority granted it by this clause to but a comparatively slight extent; and, even when exercised, its power has been employed not so much by way of establishing positive regulations of its own, as by the appointment of marshals and supervisors of elections to see to it that the state laws are

applied with fairness to all qualified voters. This right of oversight, has, however, been resisted by some of the States upon the ground that, though the United States may establish regulations of its own, appoint officials to execute them, and compel the officials of the State as well as private citizens to conform to them, it has no right or power to control state officials in the execution of the laws enacted by their own States, even though those laws relate to the election of members of the National Legislature.

This controversy reached a judicial settlement in the case of *Ex parte* Siebold (100 U. S., 371), decided in 1879. This suit arose out of the arrest of certain state-appointed judges of elections who were charged with interfering with and resisting supervisors and deputy marshals holding appointment from the Federal Government. In behalf of the defendants it was maintained that the federal officials had been without constitutional authority, and, therefore, that the resistance offered them was not a legal offense. In deciding the case, the Court said: "It is objected that Congress has no power to enforce state laws or to punish state officers, and especially has no power to punish them for violating the laws of their own State. As a general proposition, this is undoubtedly true; but when, in the performance of their functions, state officers are called upon to fulfil duties which they owe to the United States as well as to the State, has the former no means of compelling such fulfilment? Yet that is the case here. It is the duty of the States to elect Representatives to Congress. The due and fair election of these Representatives is of vital importance

to the United States. . . . The objection that the laws and regulations, the violation of which is made punishable by the Acts of Congress, are state laws and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. . . . The state laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress."

By the recognition of this last implication, the whole difficulty of the case was of course removed, for if there had been a violation of what were in fact federal laws, of course the federal legislature had the power of imposing penalties for their violation, and the federal courts had the power of applying them.[1] In *Ex parte* Yarborough (110 U. S., 651), the doctrine declared in Siebold's case was reaffirmed, the Court saying, "If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the General Government, it must have the power to protect the elections from violence and corruption."

[1] In a strong dissenting opinion Justice Field took the ground that in granting to the Federal Government the authority to enact laws regulating the elections of Senators and Representatives, the intention of the framers of the Constitution had been simply to authorize the General Government to legislate in case the state government refused to take any steps whatever. As he said: "The act was designed simply to give to the General Government the means of its preservation against a possible dissolution from the hostility of the States to the election of Representatives, or from their neglect to provide suitable means for holding such elections." As evidence that this was the intention, Madison's remarks in the Constitutional Convention and Hamilton's in the "Federalist" were cited.

We turn now to the subject of the power of the United States to compel the performance by the States of such duties as are necessarily laid upon them in connection with the perfecting of appeals from their courts to the Supreme Court of the United States, and with the removal to federal tribunals of certain classes of cases originally brought before their own judges. As regards both of these matters it may be said that it would appear that the General Government is powerless to compel action on the part of the state officials, unless it be held that the preparation of a record is a purely ministerial act, that is, one involving the exercise of no discretion.[1] As a matter of fact, all that has been done in the past when the state tribunals have refused to do their duty, that is, to prepare and certify the record of the case that is to be appealed or removed, has been for the Federal Government to proceed as though the state courts had done what they should, take jurisdiction, and enforce the judgments, notwithstanding the remonstrances or resistance that the States have made. Thus when the Supreme Court of Wisconsin refused to prepare and send to the federal Supreme Court the record of the case of Ableman *v.* Booth, the federal Supreme Court, being notified of this refusal, contented itself with an uncertified record which it ordered to be treated as though it had been prepared and sent to it in due form by the state court.

In the matter of removal of cases from state to federal courts the principles and practice are substantially similar. Thus, as stated by the late B. R. Curtis in his excellent manual, "The Jurisdiction of the

[1] See *post*, p. 178.

United States Courts," "The theory is that if a proper bond, and a petition stating a proper case for removal, are filed in the state court, thereupon the case is removed, although the state courts may refuse to make an order for removal, and may proceed with the cause (Marshall *v.* Holmes, 141 U. S., 589). In such a contingency, the defendant's remedy is a writ of error to the United States Supreme Court after a final decision has been made in the highest court of the state to which the suit can be carried. The defendant may defend the suit in the state court, or not, as he chooses; and he does not, by defending the suit in the state court, forfeit his right to remove it. Thus it might happen that both the state court and the [federal] Circuit Court should be trying the same suit at the same time, although 'comity' would in most cases prevent this result. Neither court has power to stop proceedings in the other."[1]

States cannot put restrictions upon the removal of cases from their courts to federal tribunals any more than they can prevent it. This was declared in a case arising under a statute of the State of Wisconsin which provided that insurance companies of other States desiring to do business within its limits should sign a written agreement that they would not remove to the federal courts any suit brought against them in the State's courts. One of these companies, having

[1] Pp. 197–198, ed. 1896. Curtis adds: "But the Circuit [federal] Court can issue a writ of *certiorari* commanding the state court to send a copy of the record in any cause to the Circuit Court; and if the clerk should refuse to do so, he becomes liable to fine and imprisonment. So far as the writer is aware there has been no case in which this penalty has needed application.

removed a case to the federal courts notwithstanding its agreement not to do so, the Wisconsin courts, ignoring the fact of its removal, proceeded with the case and rendered judgment against the company. The Supreme Court of the United States, however, upon appeal to it, declared the judgment void upon the ground that the agreement itself not to remove was illegal, as no one could bind himself in advance not to exercise a right guaranteed to him by the Constitution any more than he could barter away his life or freedom (Home Insurance Co. *v.* Morse, 20 Wall., 445). When, however, in a later case, the Supreme Court of the United States was asked to issue an injunction forbidding the Secretary of State of Wisconsin to revoke the license of an insurance company that had violated its agreement not to remove, that court held that it could not thus control the action of a state official, even though his action were apparently based upon an improper ground. The Court said: "The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding which is not the subject of inquiry in determining the validity of a statute" (Doyle *v.* Continental Insurance Co., 94 U. S., 535). In other words, it was held that the right both of granting and of revoking a license to a foreign corporation to do business within a State belonging to the proper officer of that State, it was not within the competence of a federal court to determine whether that power was exercised for a good or bad reason or for no reason at all. But when in a still later case there was drawn

into question the operation of a statute of Iowa which declared that upon the violation by a foreign insurance company of its agreement not to remove a case to the federal courts, its license should *thereby* become void, the federal Supreme Court held that the violation of an illegal agreement could not of itself operate to work a revocation of the company's license. If revoked at all it would have to be by the act of a competent state official, and not, *ipso facto,* by the exercise of a constitutional right (Barron *v.* Burnside, 121 U. S., 186).

In the various phases of the suability of the States of the American Union, the extent of their amenability to compulsory processes issued by the Federal Government has been very clearly determined.

The Eleventh Amendment declares that "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." This leaves it still open to the federal courts to entertain suits brought by one State against another; and, under the exercise of its original jurisdiction, a number of such suits have been adjudicated. Most of these have been in reference to suits regarding boundaries. There is, however, now pending a suit brought by the State of South Dakota against the State of North Carolina to compel the defendant State to pay the interest and principal of certain of its bonds owned by the plaintiff. This case differs from that of New Hampshire *v.* Louisiana (108 U. S., 76), in which suit was brought by the

plaintiff State as trustee for some of its citizens, and in which the Supreme Court held that, New Hampshire having no real interest of its own, the suit was virtually one against a State by citizens of another State, and, as such, barred by the Eleventh Amendment.[1] Though not expressly disqualified by the Eleventh Amendment from assuming jurisdiction in suits instituted against a State by one of its own citizens, the Supreme Court has declared, in Hans *v.* Louisiana (134 U. S., 1), that, by implication from the political character of the States, as well as from the known sentiments leading up to the Eleventh Amendment, they are not subject to such a judicial process.

At the same time, however, that the Court declared this conclusion as to the non-suability of a State either by its own citizens or citizens of other States, it took the precaution to say: "To avoid misapprehension it may be proper to add that, although the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subject of judicial cognizance unless the State consents to be sued, or comes itself into court; yet, where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under the contracts, may be judicially resisted; and a law impairing the obligation of con-

[1] Since this was written this case has been decided, the court holding the suit a proper one and granting judgment against the defendant State (South Dakota *v.* North Carolina, 24 Supreme Court Reporter, 269).

tracts under which such property or rights are held is void and powerless to affect their enjoyment."

Acting under the right thus declared of preventing a State, or rather the officials of a State, from acting under laws unconstitutional, either because impairing the obligation of contracts, or taking property without due process of law (forbidden by the Fourteenth Amendment), the federal courts, while declaring themselves unable to secure to private individuals an enforcement of their claims against States, have nevertheless been able to extend their protecting power to prevent the States from taking action upon their part to enforce against individuals and against its federal officials claims not supported by valid laws.

The following are instances illustrating this. In the case of Osborn *v.* Bank of United States (9 Wh., 738) an injunction was asked to restrain the Auditor of the State of Ohio from covering into the state treasury certain funds of the federal bank, taken possession of by him in payment of a tax levied against the bank by the State. The direct interest of the State in the suit was thus apparent and admitted, but the Supreme Court held that the suit was in fact against its official Osborn, and that, inasmuch as he was attempting to proceed under authority of an alleged law that was in fact unconstitutional and void (because an interference with a federal instrument of government), he could not justify himself and an injunction would therefore lie.

In United States *v.* Lee (106 U. S., 196) the principle thus applied to an official of one of the States was enforced against the agents of the Federal

Government itself. Acting under orders of the President, which he had no legal authority to give, the Arlington estate of General Lee had been taken possession of by agents of the National Government. Upon suit in ejectment being brought by the heirs of Lee against those federal officials who were in possession of the property, the United States, through its Attorney-General, made appearance in the case and set up the fact that such property was claimed by itself, and that the defendants held it as its own agents. Notwithstanding this, and notwithstanding also the fact, as was pointed out in the minority opinion, that a government was able to hold property only through its agents, the Supreme Court gave judgment for the plaintiffs, holding that no official, federal or state, might justify himself by appealing to any law or order that was not constitutional.[1]

In the case of Louisiana *v.* Jumel (107 U. S., 711) the question was raised as to the authority of the Supreme Court to compel a State to pay the holders of certain bonds their face value and interest out of a fund then in the state treasury. In declining to issue the necessary order, the Court, while admitting the contractual obligation on the part of the State, said: "The relief asked will require the officers against whom the process goes to act contrary to the positive orders of the supreme political power of the State. . . . In the Arlington case it was held that the officers of the United States, holding in their official capacity the possession of lands to which the United States had

[1] In Tindal *v.* Wesley, 167 U. S., 204, the same rule was applied to the States.

no title, could be required to surrender their possession to the rightful owner, even though the United States were not a party to the judgment under which the eviction was to be had. Here, however, the money in question is lawfully the property of the State. It is in the manual possession of an officer of the State. The bondholders never owned it. The most that they can claim is that the State ought to use it to pay their coupons, but, until so used, it is in no sense theirs." Furthermore, the Court went on to say: "The remedy sought, in order to be complete, would require the Court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal, and interest were paid in full, and that, too, in a proceeding to which the State, as a State, was not and could not be made a party." Referring to Osborn *v.* Bank of United States, the Court said: "No one pretended [in that case] that if the money had actually been paid into the treasury, and had become mixed with the other money there, it could have been got back from the State by a suit against the officers. They would have been individually liable for the unlawful seizure and conversion, but the recovery would be against them individually for the wrongs they had personally done, and could have no effect on the money which was held by the State."

In the Virginia Coupon Cases every conceivable

phase of the subject was fought out by the State and its creditors. Thus in Antoni *v.* Greenhow (107 U. S., 769) the Supreme Court refused a mandamus to compel a state officer to receive in payment of taxes certain coupons which the State had promised so to receive. But when, upon the coupons being tendered and refused, the state officials proceeded to attempt to collect the taxes for the payment of which the coupons had been tendered, the Court, in Poindexter *v.* Greenhow (114 U. S., 270), held that officer subject to a suit for trespass, for acting under a state law that was unconstitutional because in violation of the contract which the State had made. The immunity of the Eleventh Amendment, said the Court, "is undoubtedly a part of the Constitution of equal authority with every other, but no greater, and to be construed and applied in harmony with all the provisions of that instrument. That immunity, however, does not exempt the State from the operation of the constitutional provision that no State shall pass any law impairing the obligation of contracts; for it has long been settled that contracts between a State and an individual are as fully protected by the Constitution as contracts between two individuals. It is true that no remedy for a breach of the contract by a State, by way of damages as compensation, or by means of process to compel its performance, is open, under the Constitution, in the Courts of the United States, by a direct suit against the State itself on the part of the injured party, being a citizen of another State or a citizen or subject of a foreign State. But it is equally

true that whenever, in a controversy between parties to a suit, of which these courts have jurisdiction, the question arises upon the validity of a law by a State impairing the obligation of its contract, the jurisdiction is not thereby ousted, but must be exercised with whatever legal consequences to the rights of the litigants may be the result of the determination."

There is but one exception to the general principle that the federal courts will not assume the right affirmatively to order state officials to perform official acts, and this is when the acts in question are commanded by valid laws and are of a purely ministerial character; that is, acts involving the exercise of no judgment or discretion. Thus in The Board of Liquidation *v.* McComb (92 U. S., 531) the Supreme Court said: "It has been well settled that when a plain, public duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain a personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. . . . In either case, if the officers plead the authority of an unconstitutional law for the nonperformance or the violation of his duty, it will not prevent the issuing of the writ." This principle, thus stated, the federal courts have a number of times applied to state officials. Thus in the case of Hartman *v.* Greenhow (102 U. S., 672) the Supreme Court enforced a contract of the State of Virginia by com-

pelling one of its officers to receive coupons of certain of its bonds in payment of taxes, although there then existed upon the statute books of the State, a law, which the Supreme Court held unconstitutional, forbidding their receipt.

CHAPTER X

FEDERAL SUPERVISION OF STATE DUTIES

In the foregoing pages there has been set forth in some detail the principles which govern the question of the extent to which the Federal Government may compel the performance by the governments of the individual States of duties constitutionally laid upon them. We turn now to a topic which, while closely related to the one of which we have been speaking, is yet distinct from it. This topic is the extent of the legal power of the National Government to examine state laws and supervise their execution with a view to seeing that they do not infringe in any way upon the rights secured to individuals by the federal Constitution and laws. The subject now to be considered is thus the negative power of the United States Government to prevent the violation of federal rights by the States, and not the positive power, the extent of which we have just examined, of compelling the performance by the States of their constitutional duties.

Prior to the adoption of the Fourteenth Amendment in 1868 the laws of the individual States, so long as they related to subjects over which the States had the right of legislation, were not subject to examination in federal courts with a view to ascertaining

whether they deprived any one of life, liberty, or property without due process of law, or denied to any one equal legal protection. The first nine amendments to the federal Constitution which enumerated the fundamental rights of individuals that might not be violated were, from the beginning, construed to limit not the States but the Federal Government only. Until, therefore, the Fourteenth Amendment was adopted there was, so far as the federal Constitution and laws were concerned, nothing to prevent the several States from enacting laws which denied to their own citizens the equal protection of the laws, or deprived them of life, liberty, and property without due process of law. The only limitation laid upon the States by the Constitution was that they should enact no bills of attainder, no *ex post facto* laws, or laws impairing the obligation of contracts. As a matter of fact, indeed, all of the States had by their own constitutions taken from their legislatures the power to enact laws upon certain specified topics, and forbidden them to violate certain declared principles of justice and right. But the adoption of these constitutional limitations was purely voluntary upon their part.

In 1868, however, as one of the results of the Civil War, the Fourteenth Amendment was adopted, which, after declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," goes on to provide that "no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

For a number of years after the adoption of this Amendment it was by no means certain but that the effect of the above-cited provisions would be to endow the United States Government with additional powers so great as fundamentally to alter the very nature of the Union itself. There can be no question but that the clauses of the Amendment that we have quoted were easily susceptible of an interpretation that would have given them this result, and that, at the time they were framed and adopted by Congress and ratified by the necessary number of state legislatures, there were very many who believed that they would, and desired that they should, work this revolutionary change in the American Constitutional system.[1] Fortunately, however, as all must now believe, the Supreme Court was able and was led to give to these words a construction that robbed them of such an effect. This it did in the following manner.

In 1875 Congress passed a so-called Civil Rights Act, fixing generally the penalties to which state officials should be subject for depriving any citizen of the United States of any of the rights secured him by the Thirteenth and Fourteenth Amendments, and declaring specifically that negroes should receive the same

[1] See especially the debates attendant upon the passage of the Civil Rights Bill of 1866, the doubts as to the constitutionality of which led to the adoption of the Fourteenth Amendment. See also the dissenting opinion of Justice Field in the Civil Rights Cases, 109 U. S., 3, in which Justices Swayne, Bradley, and Chief Justice Chase concurred.

treatment at public inns, hotels, railways, theaters, etc., as that enjoyed by white persons. The importance of this act lay in the fact that by passing it Congress indicated that it interpreted the Fourteenth Amendment as giving it power not simply to punish persons who should deprive others of any of the rights mentioned in that Amendment, but itself to determine specifically what those rights should be. If this were to be accepted as the correct interpretation of the power of Congress under this Amendment, it was clear that the reserved powers of the States would henceforth be at the mercy of the federal legislative body; for thus the way would be opened to Congress, should it see fit, to convert by its statutes all private rights into federal rights and as such exclude them from state regulation or violation.

In the case of *Ex parte* Virginia (100 U. S., 339) that portion of the Civil Rights Act which forbade state officials to deny to any one the equal protection of the law was held constitutional, the Court saying: "The prohibitions of the Fourteenth Amendment are addressed to the States. . . . A State acts by its legislature, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of life, liberty, or property without due process of law, or denies or takes away the equal protection of the laws, violates the consti-

tutional inhibition; and as he acts in the name of and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning." In Strauder *v.* West Virginia (100 U. S., 303) the Supreme Court held unconstitutional and void an act of West Virginia which excluded negroes from juries.

In the Civil Rights Cases (109 U. S., 3), however, the Supreme Court declared unconstitutional a portion of the Civil Rights Act of 1875 and laid down a doctrine that very considerably lessened the power of Congress under the Fourteenth Amendment. The doctrine thus declared was that the invasion of rights by private individuals was not a subject concerning which Congress might legislate. The prohibitions of the Amendments being leveled at the States, Congress, the Court asserted, might legislate only regarding the violation of those Amendments by the States. "This," said the Court, "is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights. . . . Until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the right of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said Amendment, nor any proceedings under such legislation can be called into activity." Continuing,

the Court said: "If this legislation [the Civil Rights Act] is appropriate for enforcing the prohibitions of the Amendment, it is difficult to see where it is to stop. Why may not Congress, with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the States may deprive persons of life, liberty, and property without due process of law, and the Amendment itself does suppose this, why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and the theaters?"

In the famous Slaughter House Cases (16 Wall., 36), decided in 1873, the Supreme Court laid down the doctrine which has never since been departed from that the words "privileges and immunities of citizens of the United States," as used in that clause of the Fourteenth Amendment which forbids their abridgment by the States, refers simply to such special privileges and immunities as the citizen possesses by reason of his national citizenship, and that, therefore, the abridgment by a State of such privileges and immunities as its citizens enjoy simply by virtue of their state citizenship, is not prohibited. It need not be said that this was a decision equal in importance to, if not greater than that rendered in the Civil Rights Cases. To have so construed the clause in question as to make it cover *all* the rights of citizenship, state and federal alike, would practically have been to transfer to the Federal Government almost the entire

police power of the States—that broad power in the exercise of which probably nine tenths of the State's statutes are passed and which Cooley defines as "The whole system of internal regulation by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as it is reasonably consistent with a like enjoyment of rights by others."[1] It is no wonder, therefore, that when called upon to decide between the two possible constructions the Court said: "We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearings upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this Court during the official life of any of its present members."

By referring to the "history of the times" at which the last three amendments were adopted, the Court found in them all one underlying purpose which was "the freedom of the slave race, the security and firm establishment of that freedom and the protection of the newly made freeman and citizen from oppressions of those who had formerly exercised unlimited dominion over him." This being the main and controlling motive that dictated these Amendments, the

[1] "Constitutional Limitations," p. 572.

majority of the Court refused to give them, however general their terms, another and far more radical meaning. That there was, immediately after the Civil War, a strong sentiment in favor of a stronger National Government, the majority of the Court did not deny; but they declared, "however pervading this sentiment, and however it may have contributed to the adoption of the Amendments we have been considering, we do not see in those Amendments any purpose to destroy the main features or the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the nation."

In result, the effect of the decision of the Supreme Court in the Slaughter House Cases was to decide that that clause of the Fourteenth Amendment which prohibits the States from abridging the privileges and immunities of citizens of the United States, imposes absolutely no new limitations upon the States, for prior to the adoption of the Amendment of which it constituted a part, the States were confessed by all to be without constitutional power to abridge federal privileges or immunities.[1]

[1] In the recent case of Maxwell Dow, 176 U. S., 581, decided in 1900, the claim was examined and negatived that the privileges and immunities secured against federal infringement by the first

Although by the decision in the Slaughter House and subsequent cases in the Supreme Court, the command laid upon the States to respect federal privileges and immunities has been shorn of all but declaratory significance, and the general police power confirmed in the Commonwealths, the other prohibitions of the first section of the Fourteenth Amendment have been so construed by the Supreme Court as to give to the Federal Government a very extensive supervisory jurisdiction over state legislation which it did not possess prior to 1868. Whenever the claim has been made that a state law has worked a deprivation of life, liberty, or property without due process of law, or has resulted in a denial to any person of the equal protection of the laws, the federal courts have assumed jurisdiction, and, when the claim has been made good, have declared the statutes involved void.[1]

It would carry us beyond the scope of this volume to show in any detail the manner in which this additional right of federal supervision over state legislation has been exercised. It is appropriate to say, however, that the phrase "equal protection of the laws"

ten Amendments are to be regarded as federal privileges and immunities which, according to the Fourteenth Amendment, may not be altered or denied by the States. This point had previously been raised in the Spies case (*Ex parte* Spies, 123 U. S., 131) but not passed upon.

[1] In the Slaughter House Cases, the Court declared relative to the clause providing for the equal protection of the laws: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." As a matter of fact, however, this *obiter dictum* has been repeatedly overruled.

has not been construed to secure to all persons in the United States the benefit of the same laws and remedies, but only to provide that no one within a State's jurisdiction shall be deprived of legal rights or subjected to legal burdens to which all other persons or similar classes of persons are entitled. Furthermore, it may be added that the term "due process of law" has been defined as simply "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of legal rights."[1] Thus it has been held that due process of law does not necessarily involve the right to a trial by jury in civil suits at common law, or even to a presentment of a grand jury in cases of felony and capital crimes. "Apparently," said Justice Field in a dissenting opinion in a state court (Carleton *v.* Rugg, 149 Mass., 550), "any mode of proceeding duly established by a State which provides for an impartial trial, and does not violate the fundamental principles of general jurisprudence, would be due process of law within the meaning of that instrument [the Constitution]." And the Supreme Court itself has said: "If the laws enacted by a State be within the legitimate sphere of legislative activity, and their enforcement be attended with observance of those general rules which our system of jurisprudence presents for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law" (Mo. Pacific R. R. *v.* Humes, 115 U. S., 512).

[1] Pennoyer *v.* Neff, 95 U. S., 714.

CHAPTER XI

THE POWER OF THE UNITED STATES TO ACQUIRE TERRITORY

In the chapters that have gone before the effort has been made to set forth the constitutional relations subsisting between the Union and its commonwealth members. From the very beginning, however, the American constitutional system has included other political units than the States. These units are Territories, Dependencies, and a Federal District or seat of National Government.[1] To a consideration of the constitutional questions incident to the annexation and government by the National Government of the territories and peoples of which these political elements are composed, we shall now turn. This will involve a discussion of the following points: (1) The constitutional power of the United States to acquire territories; (2) The modes in which and purposes for which they may be acquired; and (3) Their constitutional status. First then as to

The Constitutional Power of the United States to Acquire Territory. At the time of the adoption of the

[1] The term "Dependency" can hardly be said to have been as yet accepted as a technically correct term, and possibly never may be. In default, however, of a better word the term will be here provisionally employed.

Constitution and the establishment thereunder of the present National Government, the territory subject to the sovereignty of the United States consisted of the respective territories of the thirteen original States and vast reaches of lands to the west, that lying north and west of the Ohio River being known as the Northwest Territory. These areas had been originally ceded to the old Confederation by the States and governed according to the provisions of the famous Northwest Ordinance of 1787. Upon the establishment of the new government in 1789 they were turned over to it.[1] Contemporary opinion and the practice of many years showed the existence of the idea that from these lands new States were to be formed as fast as the development of their populations and resources should warrant. Until that time they were to be under the exclusive control of the Federal Government. The provisions inserted in the new Constitution bearing upon this point are the following: "New States may be admitted by the Congress into this Union" (Article IV, Sec. 3, Clause 1); "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States" (Article IV, Sec. 3, Clause 2).

No express power is given the United States by the Constitution to acquire additional territory. In 1803, however, the vast Louisiana Territory was purchased from France and annexed to the Union; in 1819 Florida was obtained from Spain; in 1845 the State of

[1] To this new government Georgia and North Carolina also later ceded their western lands.

Texas was annexed; in 1846 the Oregon Territory was obtained through discovery, occupation, and convention with England; in 1848 and 1853 additional territory was obtained by cession from Mexico; in 1856 the annexation of the Guano Islands was authorized by a congressional statute; in 1867, Alaska, the first territory non-contiguous to the United States, was obtained by purchase from Russia; in the same year Midway Island was taken possession of by the President; in 1898 the Hawaiian Islands were annexed; in 1898, as a result of the Spanish-American War, the islands of Porto Rico, the Philippines, and Guam came under the sovereignty of the United States; and in 1900 three of the Samoan Islands were acquired.[1]

From what grant of power we may now ask did the United States Government derive the authority thus to increase its territory?

When, in 1790, North Carolina made a cession to the United States of its title to western territory, this was accepted by Congress in the act of April 2, 1790, without constitutional question. This, it will be observed, however, involved only a transfer of title from a State to the Nation and not an annexation of territory foreign to the United States. The acquisition of the Louisiana Territory was, however, of this latter character, and Jefferson, then President, felt, and expressed, as we know, most serious doubts as to the constitutionality of the act, though upon grounds of political expediency he urged that the treaty providing for it be ratified, and, if necessary, a constitu-

[1] The term "Insular Possessions" has been officially applied to the islands owned by the United States.

tional amendment giving to the National Government the necessary power be adopted. Writing to John C. Breckenridge, he declared: "The Constitution has made no provision for holding foreign territory, still less for incorporating foreign nations into the Union. The Executive, in seizing the fugitive occurrence which so much advances the good of the country, has done an act beyond the Constitution. The Legislators, in casting behind them metaphysical subtleties and risking themselves like faithful servants, must ratify and pay for it and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves, had they been in a situation to do it."

Jefferson stood by no means alone in his doubts as to the constitutional power of the United States to acquire foreign territory, but these doubts were not sufficiently general to lead the people to give expressly, by constitutional amendment, that right, the implied existence of which was questioned, and since that time both political and judicial precedent have established beyond all uncertainty the implied existence in the National Government of the necessary authority in this matter.

The express grants of authority which have at different times been referred to as including by implication the right on the part of the United States to acquire foreign territory are the following:

1. The power to declare and carry on war (Art. I, Sec. 8, Clause 11).

2. The power to make treaties (Art. II, Sec. 2, Clause 2).

Besides these sources not a few have argued the possession by the United States of this authority because of its "inherent sovereignty." This theory, though given a certain support by several *obiter dicta* of the Supreme Court,[1] is, as earlier explained, an invalid one. To concede to the National Government powers neither expressly granted nor implied from those expressly granted, but as founded simply upon its sovereignty, is, in effect, to make of that government a government of unenumerated instead of enumerated powers. As was declared by Taney in denying that the President had the power to authorize the suspension of the writ of *habeas corpus:* "Nor can any argument be drawn from the nature of sovereignty. . . . The government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the Constitution, and neither of its branches can exercise any of the powers of government beyond those specified and granted."[2]

Turning now to the proper view which holds the power to annex territory an implied one, we find that the Supreme Court has upon different occasions ascribed it to each of the two express powers that we have mentioned. In American Insurance Co. *v.* Canter (1 Pet., 511) Marshall declared: "The Con-

[1] American Insurance Co. *v.* Canter, 1 Pet., 511; Mormon Church *v.* United States, 136 U. S., 1; United States *v.* Huckabee, 16 Wall., 414; Jones *v.* United States, 137 U. S., 202. Cf. Gardiner, "Our Right to Acquire and Hold Foreign Territory," p. 6; Magoon, "Report on Legal Status of the Territory," etc., H. Doc. 234, 56th Cong., 1st Session, p. 3.

[2] *Vide* Tyler, "Life of Taney," p. 651.

stitution confers absolutely upon the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or treaty." This dictum is approvingly quoted in one of the recent so-called Insular Cases (De Lima *v.* Bidwill, 182 U. S., 1), decided in 1901.[1]

In addition to the above sources it has been argued by some, and even intimated on one or two occasions by the Supreme Court, that the power to acquire new territory may be found in the right of Congress to admit new states to the Union. Not only, however, is reference to this source for authority unnecessary, but, when appealed to, would not seem to yield to the National Government as ample powers as are furnished it when the treaty and war powers are relied upon.[2]

According to the general principles of International

[1] To the same effect see Mormon Church *v.* United States, 136 U. S., 1.

[2] "If it [the power of annexation] is to be implied only from the latter power [the right to admit new States], it would seem quite reasonable to hold that it could be exercised in any case only for the purpose of creating a new State out of the acquired territory, and there would be no power to govern it except for that purpose; but the right of Congress to admit the acquired territory as a State or States, or to refuse to do so, according to its own judgment and discretion, is universally admitted, and, therefore, it would seem to follow that the power to acquire and govern cannot be derived from the power to admit, for, if it did, all territory acquired by either of the methods stated would have to be converted into a State or States. It may be said that no territory ought to be acquired which cannot be ultimately fitted for admission as a State or States—but this is a political and not a judicial question."—Address of John G. Carlisle before the American Bar Association, 1902.

Law, every sovereign State has the right to acquire territory by discovery and occupation. Whether or not, however, the United States has that right, when considered from the viewpoint of its own Constitution, is not at once as obvious. However, the Supreme Court has in effect recognized as valid an exercise of this right by the United States. This it did under the following circumstances.

In 1856 Congress, by a statute which was reënacted in the Revised Statutes, declared that whenever any citizen of the United States should discover a deposit of guano on any island, rock, or key not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and should take possession thereof, such island, rock, or key might, at the discretion of the President "be considered as appertaining to the United States." Furthermore, the act went on to declare, all crimes committed on such island, rock, or key should be punishable according to United States law in the federal courts. Upon one Jones being convicted of murder under the provisions of this statute he took an appeal to the Supreme Court upon the ground that the federal law and federal court could not take cognizance of acts committed on the island in question because that island was not constitutionally a part of the United States. In overruling this plea the Supreme Court spoke as follows: "By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name and by its authority or

with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, as catching and curing fish, or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning Guano Islands. . . . Who is the sovereign, *de jure* or *de facto,* of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances'' (Jones *v.* United States, 137 U. S., 202).

This case thus not only practically upheld the right of the United States to acquire territory by discovery and occupation, but came very near to applying, if not explicitly stating, the principle, which we believe to be a dangerous if not an invalid one, that the United States may exercise a power not enumerated in the Constitution, provided it be a power generally possessed by sovereign States. It may possibly be argued, however, that the right thus to acquire territory may be upheld, and was intended in the Jones case to be upheld, as a power impliedly included within the general power given the Union to control all matters subject to regulation by the law of nations.

CHAPTER XII

THE MODES IN WHICH, AND PURPOSES FOR WHICH, TERRITORY MAY BE ACQUIRED BY THE UNITED STATES

Constitutional Modes of Acquiring Territory. Having shown the constitutional power of the United States to acquire territory whether by treaty, conquest, or discovery and occupation, we now approach the question as to the modes by which this federal authority may be exercised.

A history of the territorial expansion of the United States show that territories have been annexed in three different ways: (1), by Statute, (2), by Treaty, and (3), by Joint Resolution.

The process of extending American sovereignty by simple statute and executive action authorized thereby, was illustrated, as we have just seen, in the case of the Guano Islands.

The annexation of territory by treaty has been the method most usually employed. Thus the Louisiana Territory, Florida, Alaska, the Mexican cessions, the Samoan Islands, Porto Rico, and the Philippines were obtained in this manner.

In some cases the United States was in actual effective military possession of the territories thus acquired for some time prior to the treaties that provided for

their transfer to the United States. The Supreme Court has uniformly held that during this period of military possession, but before formal transfer by treaty, the lands in question remain foreign territory. Thus in Fleming *v.* Page (9 How., 603) the Court said: "A war . . . declared by Congress can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, it may demand the cession of territory as the condition of peace in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expense of the war; but this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. . . . He may invade the hostile country and subject it to the sovereignty and authority of the United States; but his conquests do not enlarge the boundaries of this Union nor extend the operations of our institutions and laws beyond the limits before assigned to them by the legislative power."

This principle, thus laid down, has been reaffirmed in the recent Insular Cases in which was determined the constitutional status of the islands obtained from Spain.[1]

[1] Dooley *v.* United States, 182 U. S., 222. President McKinley was criticized, and with justice, for issuing on December 21, 1898, that

In two instances, that of Texas in 1845, and Hawaii in 1898, the sovereignty of the United States has been extended over new territory by means of a Joint Resolution of the Houses of Congress. In the case of Texas an attempt had been made to annex the State by treaty, but this requiring a two thirds favorable vote in the Senate, had failed. Thereupon the same end was secured by a Joint Resolution which needed but a simple majority vote in each of the two branches of the national legislature, with, of course, the approval of the President. This resolution provided that "Congress doth consent that the territory properly included within and rightfully belonging to the republic of Texas may be erected into a new State to be called the State of Texas with a republican form of government to be adopted by the people of said republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of the Union." Upon Texas taking the action called for by this clause, Congress later by Joint Resolution declared Texas one of the States of the American Union.

The peculiarity of the annexation of this State was

is, on a date prior to the ratification of the treaty with Spain ceding the Philippines, an executive order in which he declared: "With the signature of the treaty of peace between the United States and Spain by their respective plenipotentiaries at Paris on the 10th instant, and as the result of the victories of American arms, the future control, disposition, and government of the Philippine Islands are ceded to the United States. In fulfilment *of the rights of sovereignty thus acquired,*" etc. The treaty was not ratified by the treaty-making power of the United States until the following February, and did not go into effect until April 11, 1899.

not simply that it came under American sovereignty by Joint Resolution but that it became at once one of the States of the Union, and thus never had the transitional territorial status. This fact, indeed, gave additional constitutional support to the action of Congress in the matter, for to that body is given by the Constitution the right to admit new States into the Union, and therefore its admission of Texas to fellowship with the other American commonwealths might easily be construed as a legitimate exercise of that power.

The acquisition of the Hawaiian Islands was another instance of the extension of the United States sovereignty by a simple Joint Resolution of the two branches of Congress. In this case, however, the action taken was rendered more difficult of constitutional justification by reason of the fact that the islands were not, as was Texas, admitted as a State or States of the Union, but were simply annexed as a territory. The admission of Texas to the Union was not, therefore, a good precedent, any more than was the annexation of the Guano Islands and Midway Island, for the reason that those lands were unoccupied and unclaimed by any other State and were taken possession of by the United States in pursuance of the general right enjoyed by a sovereign State under the law of nations to acquire territory by discovery and occupation.

The question as to the constitutionality of the annexation of Hawaii has, however, never been raised in the courts, but should it be done, the Supreme Court will almost surely decline to pass upon it, that tribunal

having declared, as will be remembered, that "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government" (Jones *v.* United States, 137 U. S., 202).[1]

Purposes for which Territory may be Acquired. At the time that the Philippine Islands were acquired by the United States, and for several years thereafter, the argument was made by some who were opposed to this "imperialistic" policy that the United States had not the constitutional power to acquire territory except for the purpose of obtaining the material from which new member States of the Union might be created within a reasonable period of time; and that, therefore, an unconstitutional act was committed by annexing islands which, both by reason of their distance from America and the character of their populations plainly could not be expected to become qualified for statehood within any period of years the length of which could be even approximated. Senator Hoar declared in the Senate that he had been unable

[1] Upon the constitutional questions involved in the annexation of Hawaii see Senate Report, No. 681, 55th Cong., 2nd Session, and Speech of Hon. S. R. Mallory in the U. S. Senate, July 1, 1898. It is barely possible that should the Supreme Court consent to pass upon the point, it would sustain the action of Congress as legislation "necessary and proper" for "defence," for "regulation of commerce," or for carrying into effect some others of the duties expressly laid upon Congress by the Constitution.

to find a single reputable authority more than twelve months old for the opposite doctrine. Upon the contrary, he and others of the same view were able to cite numerous declarations not only of public men, but of Congress and even of the courts during past years to the effect that American constitutional law did not contemplate the holding by the United States for an indefinite length of time of dependent territories to which statehood could not be granted. Of the foregoing claim this much must be admitted; namely, that beyond all probable doubt those who framed and adopted the federal Constitution did not anticipate, and therefore cannot be said deliberately to have provided for, the time when the United States should extend its sovereignty over territories not intended ultimately for statehood. Nor can it be said that a different view was held upon this point by practically any one until comparatively recent times. But in admitting this, the conclusion that the annexation of such territory was an unconstitutional act does not follow. For in the first place, as has been repeatedly declared by the Supreme Court, it is not enough to say that a particular case was not in the minds of those who framed and adopted the Constitution in order to hold an act unconstitutional. One must go further and show that had the particular case been suggested to those framers and adopters of the Constitution, they would so have modified its language as to exclude it. Thus, as the Court declared in the famous Dartmouth College Case: "The case being within the words of the rule, must be within its operations likewise, unless there be something within its literal

construction so obviously absurd or mischievous, or repugnant to the general spirit of that instrument as to justify those who expounded the Constitution in making it an exception" (Dartmouth College *v.* Woodward, 4 Wh., 518). In the second place, even were this principle of constitutional construction not sufficiently broad to uphold the federal power in question, there would be applicable two principles, each of which would prevent the Supreme Court from passing upon this point. The first of these principles is the one recently mentioned that the question of *de facto* and *de jure* sovereignty is one regarding which the courts hold themselves bound by the determination of the executive and legislative branches of government; the second is that the motive of an act, except for the purpose of solving an ambiguity in its application, is not a proper subject for judicial examination, and that therefore, in the case of an annexation of territory, it would not be proper for the court to seek to learn whether or not ultimate statehood was intended to be granted the lands and peoples obtained. Indeed, as we shall see, as regards the contiguous continental territories of the United States, it has been uniformly held that the grant to them of statehood lies wholly within the discretion of Congress, and that no legal means exist for compelling action should that body arbitrarily refuse for an indefinite length of time to grant this privilege to a deserving territory.

CHAPTER XIII

THE CONSTITUTIONAL STATUS OF TERRITORIES: THE POLITICAL RIGHTS OF THEIR INHABITANTS

THE topic to which we have given the title "The Constitutional Status of the Territories" is divisible into two parts, the one relating to the political or governmental rights of their inhabitants; the other to their private or civil rights. These we shall consider separately. First, then, as to the powers of the Federal Government over the government of such territories as are subject to its sovereignty but are not embraced within the boundaries of any of the States.

This federal authority has been derived from two sources: (1) The express power given to Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," and (2) The implied power to govern derived from the right to acquire territory. Both of these sources have been recognized by the Supreme Court. Thus in Sere *v.* Pitot (6 Cr., 332), decided in 1810, Marshall, after referring to the former source of authority, said: "Accordingly we find Congress possessing and exercising absolute and undisputed power of governing and legislating for the territory of Orleans." So also in Clinton *v.* En-

glebrecht (13 Wall., 434) the same deduction was drawn from this same source. It was early recognized, however, that this clause might possibly have been intended merely to give to Congress a necessary control of its public lands as property, and indeed, its phraseology is scarcely such as one would think the framers of the Constitution would naturally have employed in making a grant of general governmental powers. Thus in the same case (Sere *v.* Pitot) in which the express power "to make all needful rules and regulations" is relied upon, the doctrine is also asserted that "the power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory."

In American Insurance Co. *v.* Canter (1 Pet., 511) the Supreme Court declared that: "Whatever may be the source whence the power [to govern territories] is derived, the possession of it is unquestioned;" and in Murphy *v.* Ramsay (114 U. S., 15) the question was declared "no longer open to controversy"—that it had "passed beyond the stage of controversy into final judgment."[1] In Mormon Church *v.* United States (136 U. S., 1), Justice Bradley, speaking for the Court, said: "Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the

[1] The power of the Federal Government to govern territories has also been deduced from the fact that territories being subject to the sovereignty of the United States and admittedly not subject to government by any of the States, their control necessarily falls to the federal power.

Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them." And in De Lima *v.* Bidwell (182 U. S., 1), [one of the Insular Cases], the Court said: "It [the power to govern] is an authority which arises, not necessarily from the territorial clause of the Constitution but from the necessities of the case, and from the inability of the States to act upon the subject."

Not only has there never been any serious dispute as to the power of the National Government to govern all territories subject to its sovereignty and not included within the boundaries of any of the States, but, with equally unanimous assent, this power has been held to be practically absolute. That is to say, the form of government which shall be erected over these territories, and the extent to which their inhabitants shall be permitted to participate in this government, is recognized to rest wholly within the discretion of the President and the federal law-making power. In Mormon Church *v.* United States (136 U. S., 1) the Supreme Court said: "The power of Congress over the territories is general and plenary." In National Bank *v.* County of Yankton (101 U. S., 129), Chief Justice Waite, speaking for the Court, asserted: "Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void.

In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the States." Again, in Murphy *v.* Ramsay (114 U. S., 15) the Court declared: "The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. But in ordaining government for the territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it. It rests with Congress to say whether, in a given case, any of the people resident in the Territory, shall participate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient. The right of local self-government, as

known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved."

Finally, in 1850, in a case involving the effect of a territorial statute of Florida, the Court said: "They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both the federal and state authorities. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to state and federal jurisdiction. They are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control. Whether or not there are provisions in that instrument which extend to and act upon these territorial governments, it is not now material to examine" (Benner *v.* Porter, 9 How., 235).

This absolute power of Congress to determine the political or governmental rights in the territories constitutionally attaches from the moment that they become subject to the sovereignty of the United States. Until Congress exercises this right, however, and provides them with governments and laws, they remain under the control of the federal executive. This duty devolves upon the President as a result

from his general obligation to see that the authority and peace of the United States are everywhere maintained throughout its territorial limits. Thus after the treaty of peace with Spain in 1899, Porto Rico remained under the control of the President until by the act of April 12, 1900, known as the "Foraker Act," Congress provided a government for that island. So also it was by an exercise of the same authority that the President, after the same treaty of cession, appointed commissions for the government of the Philippine Islands.

On March 2, 1901, Congress enacted[1] that "All military, civil, and judicial powers necessary to govern the Philippine Islands . . . shall, until otherwise provided by Congress, be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct for the establishment of civil government and for the maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion." This act changed the basis of the Philippine government from a presidential to a congressional one, but did not change its form, the President being given by Congress practically the same powers that before that time he had exercised by virtue of his position as Chief Executive. By the act of July 1, 1902, entitled "an act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," Con-

[1] This was the so-called Spooner amendment to the act making appropriation for the support of the army for the fiscal year ending June 30, 1902.

gress not only approved and ratified the previous acts of the Philippine Commission for the control of the islands, and continued their government in the Philippine Commission, but went on to define the general lines of action that body should take, especially with regard to the introduction of local self-government as fast as circumstances should warrant.

The constitutional power of the President to assume and exercise the absolute control of territories until Congress has made statutory provision for their government, has been repeatedly affirmed by the Supreme Court. In Cross *v.* Harrison (16 How., 193), speaking of the government that the executive had established in California, that Court said: "It had its origin in the lawful exercise of a belligerent right over a conquered territory. . . . It did not cease as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but that was not done. The right inference from the inaction of both is that it was meant to be continued until it had been legislatively changed."

Acting in pursuance of its powers, Congress has, from time to time, as new territories have been acquired, established for them by statutes territorial governments. The first of these statutes was that of August 7, 1789, passed at the first session of the First Congress providing for the government of the territory northwest of the Ohio River. The latest of these statutes are those establishing civil rule in Porto Rico and the Philippines.

Generally speaking, it may be said that the governments thus created have been and are of four kinds.

First, there is the class of so-called Unorganized Territories, at present consisting of Indian Territory and Alaska. These have no local self-government but are governed by officials nominated by the President and confirmed by the Senate, and have for their laws such as have been given them by Congress. To this class of autocratically governed territories should also possibly be added the Samoan, Wake, Midway, and Guano Islands which are ruled by officers of the military force of the United States.

Second, there is the whole class of Organized Territories that has included all of the continental territories of the United States except Indian Territory and Alaska, and at present embraces New Mexico, Arizona, Oklahoma, and Hawaii. The chief executive and judicial officers of these governments are nominated by the President and confirmed by the Senate and hold office for four years. Their legislatures consist of two Houses, each elected by those inhabitants of the territories who had been given the suffrage by federal law. The law-making power of these bodies is extended by Congress "to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." The laws passed in pursuance of this legislative authority are, of course, not only subject to scrutiny in the courts as to their constitutionality, but may be amended or annulled at any time by an act of Congress.

Third, there is the government of the island Porto

Rico which stands in a class by itself. According to the Foraker Act of April 12, 1900, now (1904) in force, its governor and chief executive officials and judges are nominated by the President and confirmed by the Senate, and its legislature is composed of two houses, the upper of which consists of the six chief executive officials and five native Porto Ricans, and the lower of thirty-five members elected by popular vote.

Fourthly, and finally, there is the government of the Philippine Islands by means of a Commission appointed by the President and confirmed by the Senate under authority granted by Congress.

Regarding all of these territorial governments it is to be said that they are "congressional" rather than "federal" governments. That is to say, they do not constitute parts of the General Government, *in sensu strictiore,* but exist only as agents of Congress. Therefore, it has been declared, for instance, that the appointment of their judges for terms of but four years does not violate the provision of the national Constitution that all federal judges shall hold office for life. This was so decided in the case of American Insurance Co. *v.* Canter (1 Pet., 511), in which the Supreme Court said of the judicial tribunals that had been established in Florida by Congress: "These courts . . . are not constitutional courts in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which

enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but was conferred by Congress in execution of those general powers which that body possesses over the territories of the United States."

CHAPTER XIV

THE CONSTITUTIONAL STATUS OF TERRITORIES: THE CIVIL RIGHTS OF THEIR INHABITANTS

THE Constitution of the United States contains a number of express limitations upon the federal legislative power. In addition to those contained in the first ten amendments relative to freedom of religion, speech, and press, the quartering of troops, the right of the people to assemble, to petition, to keep and bear arms, to be secure against unreasonable searches and seizures, to presentment or indictment by jury, to speedy trial, to juries in civil suits, to immunity from excessive bail and fines and cruel and unusual punishments, etc., it is elsewhere provided in the Constitution that all duties, imposts, and excises shall be uniform throughout the United States, that the writ of *habeas corpus* shall not be suspended, except under certain specified circumstances, that no bill of attainder or *ex post facto* law shall be passed, no capitation or other direct tax laid except in proportion to population, no duty laid upon goods exported from a State, no commercial preferences given to the ports of one State over those of another, no money drawn from the treasury but in consequence of an appropriation made by law, no title of nobility granted, etc. The Thir-

teenth Amendment also declares that "neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

When legislating for the States or their inhabitants these limitations have of course to be observed. The question whether the same is true when Congress is legislating for the territories and their populations has, however, been recently subjected to a most severe debate, and even now only a partial settlement of it by the Supreme Court has been obtained. The answer to this question has involved a reëxamination of the fundamental nature of the federal Constitution and of the purposes for which it was framed and adopted. By a series of judgments rendered in the recently decided "Insular Cases," the Supreme Court has determined the following points.

In the case of De Lima *v.* Bidwell (182 U. S., 1), decided May 27, 1901, a majority of the justices—five out of nine—held that immediately upon the ratification of the treaty of peace with Spain in 1898, ceding Porto Rico to the United States, that island, being already in the possession of the United States, ceased to be foreign territory and came under the sovereignty of the United States, with a result that the existing tariff act, which by its terms applied to imports from "foreign countries," no longer was applicable to goods coming to the United States from Porto Rico. In a later case the same doctrine was applied to the Philippine Islands, the point being overruled that, because of the resistance at the time being offered to

American occupation by the natives, the United States was not in actual possession of them.[1]

In both cases four justices dissented, not, however, upon the ground that these islands had not come under the sovereignty of the United States, but because, as they thought, the necessary act of Congress subjecting them to the revenue laws of the United States had not been passed. The doctrine of the minority, in other words, was, that the mere act of cession, ratified by the treaty-making power, did not of itself extend over the ceded territory the government and laws of the United States, but that to effectuate this there must be either an express provision in the treaty itself to that effect or a subsequent act of Congress.

In the case of Downes *v.* Bidwell (182 U. S., 244), decided May 27, 1901, five of the nine justices of the Supreme Court concurred in holding that, though by the treaty of cession the island of Porto Rico came under the sovereignty of the United States, and, when viewed from the standpoint of all other nations became a part of the United States, yet, when looked at from the viewpoint of its own public law, it did not become a part of the "United States" as that term is used in the Constitution.

In order to arrive at this conclusion one of these five justices—Brown—reasoned as follows:

After calling attention to the fact that, as decided in the case of De Lima *v.* Bidwell, by cession by treaty with a foreign power, a territory, already in the actual possession of the United States, at once ceased to be

[1] Fourteen Diamond Rings *v.* United States, 183 U. S., 176, decided December 2, 1901.

foreign and became domestic territory, he pointed out that the cases under consideration involved the further and more important question whether upon becoming domestic territory the provisions of the federal Constitution were extended of their own force over annexed territories. The Constitution not itself directly giving an answer to this, the solution, he said, would have to be found in the nature of the government created by that instrument. According to this justice's view, this instrument was created, if not *by* the States, at least exclusively *for* the States, and not for the territories or any other extra-State lands that might belong to the United States. Thus, to quote his own words, "It can nowhere be inferred that the territories were considered a part of the United States. The Constitution was created by the people of the *United States,* as a union of States; and even the provision relied upon here, that all duties, imposts, and excises should be uniform 'throughout the United States' is explained by the subsequent provisions of the Constitution, that 'no tax or duty shall be laid on articles exported from any *State,*' and 'no preference shall be given by any regulation of commerce or revenue to the ports of one *State* over those of another; nor shall vessels bound to or from one *State* be obliged to enter, clear, or pay duties in another.' In short, the Constitution deals with *States,* their people and their representatives. The Thirteenth Amendment to the Constitution prohibiting slavery and involuntary servitude 'within the United States, or in any place subject to their jurisdiction' is also significant as showing that there

may be places within the jurisdiction of the United States that are no part of the Union. . . . Upon the other hand, the Fourteenth Amendment, upon the subject of citizenship, declares only that 'all persons born or naturalized *in the United States,* and subject to the jurisdiction thereof, are citizens of the United States, and of the *State* wherein they reside.' Here there is a limitation to persons born or naturalized in the United States, which is not extended to persons born in any place 'subject to their jurisdiction.' ''

To restate, then, the position of Justice Brown, it would appear that, according to his view, the "United States," when looked at from the domestic or constitutional viewpoint, includes only the individual States such as Virginia, New York, Texas, etc., in Union. The Federal District, the territories, and, in fact, all areas not within the boundaries of some one of these States, though under the national sovereignty, are not a part of the Union. Looked at, however, from the international viewpoint, the term United States has, as Justice Brown later observes, "a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal Government, wherever located. In its treaties and conventions with foreign nations this government is a unit. This is so, not because the territories comprise a part of the government established by the people of the States in their Constitution, but because the Federal Government is the only authorized organ of the territories, as well as of the States, in their foreign relations." [1]

[1] Citing De Geofroy *v.* Riggs, 133 U. S., 258.

Not being considered a part of the political unit created and organized by the federal Constitution, it would seem logically to follow that the non-State areas, or rather their populations, would not be entitled to any of the privileges or immunities defined in that instrument. But Justice Brown does not draw this conclusion. Speaking of the limitations laid upon the powers of Congress by the Constitution, he says:

"There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time and place, and such as are operative only 'throughout the United States' or among the several States. Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States' it goes to the competency of Congress to pass a bill of that description. Perhaps the same remark may be applied to the First Amendment that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances.' We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight Amendments is of general and how far of local application. Upon the other hand, when the Constitution declares that all duties shall be uniform 'throughout the United States' it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the 'United

States,' by which term we understand the *States* whose people *united* to form the Constitution, and such as have since been admitted to the Union upon an equality with them." And later on he says: "We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, suffrage (Minor *v.* Happersett, 21 Wall., 162), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals.

"Whatever may be finally decided by the American people as to the status of these islands and their inhabitants,—whether they shall be introduced into the sisterhood of States or be permitted to form independent governments,—it does not follow that in the

meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution, to be protected in life, liberty, and property. This has been frequently held by this Court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States [citing cases]. We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to protect."

According to Justice Brown, then, there are some provisions of the Constitution that control Congress when legislating for such territorial possessions as are not within the States, and other provisions that do not. Those that do not, he says, may, however, be made applicable by acts of Congress, and in part this has already been done in the case of all but the recently acquired possessions. And, he adds, "when the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith." In making this last assertion he is indubitably incorrect. If an act of legislation is required to extend the Constitution over a territory, it goes there not as a Constitution but as a statute, and an irrepealable statute is admitted by every one to be an

impossibility—every legislature necessarily possessing a power to repeal equal to its power to enact. This being so, if the premises of Justice Brown be accepted, the conclusion must also be accepted that at the present time every territory of the United States, organized and unorganized, contiguous and non-contiguous, continental and insular, still remains, except possibly as to a few general rights, absolutely subject to the arbitrary will of Congress. Arizona, New Mexico, Oklahoma, and even the District of Columbia in this respect stand upon a footing exactly the same as that of Porto Rico or the Philippines.

The foregoing, however, is not the only objectionable conclusion that may be drawn from Justice Brown's reasoning. Logically it would seem that his premise that the Constitution was intended only for the States would lead to the conclusion that Congress, which of course derives all its powers from that instrument, would not have the authority to govern territories at all. Hon. John G. Carlisle, in his address to the American Bar Association, has stated this dilemma very clearly. "Whether we agree to it or not," he says, "we can all understand the proposition that the Constitution was made for the States, and that, of its own force, it has no application to a territory. It is very simple, and, if it could be established, it would put an end to the controversy, but it would also put an end to the constitutional power of Congress to govern a territory, because that power would not be included in any of those delegated to that body. All its powers would be confined to the States. No power to govern a territory could be implied, because, ac-

cording to this theory, it would be inconsistent with the very purpose for which the Constitution was made, and we would, therefore, be in the awkward position of possessing the power to acquire territory, but without power to govern it unless immediately admitted as a State."

This very radical position taken by Justice Brown in the Insular Cases has been stated at some length because of the prominence that has been given it in the newspapers and public discussions of the judgments rendered by the Supreme Court in the Insular Cases. As a matter of fact, however, this position was not concurred in by any one of the other eight justices, and it thus stands not only unsupported by previous opinions of the Court, but in flat contradiction to many of them. The four justices that concurred with Justice Brown in the judgment that was rendered in the case of Downes *v.* Bidwell, namely, that the constitutional provision that duties shall be uniform "throughout the United States" does not restrain Congress in legislating for the newly acquired islands, were able to do this by the following reasoning.

The "United States," as that term is employed in the Constitution, they said, includes not simply the States, as Justice Brown had said, but also such territories as have been "incorporated" with them; and the Constitution itself therefore extends over them as well as over the States—not of course, however, in the sense that the powers of Congress when legislating for the States and the incorporated territories are the same, but that so far as applicable, the provisions of

the Constitution are at once applicable to all territories subject to the sovereignty of the United States, and therefore require no act of Congress for their extension, nor can their application to such territories be denied by Congress.

These four justices were the same that had dissented from the judgment in the De Lima *v.* Bidwell case, which decided that by the treaty of cession Porto Rico at once ceased to be "foreign territory" within the meaning of the federal tariff laws. Reaffirming this same opinion in the Downes case, they asserted that by the ratification of the treaty of cession Porto Rico came under the sovereignty of the United States, or, to use their own expression, became "appurtenant" to it, but was not thereby "incorporated" into the "United States." In other words, it became a territory belonging to the United States but not, when looked at from a constitutional viewpoint, a part thereof. To effect this latter change of status, they declared, the treaty-making power is incompetent, the approval of Congress, express or implied, being required.

Without attempting even a summary of the legislative acts and judicial expressions which these justices claimed supported them in their view, we may profitably reproduce their conclusion in their own words: "It is," they said, . . . "indubitably settled by the principles of the law of nations, by the nature of the government created under the Constitution, by the express and implied powers conferred upon that government by the Constitution, by the mode in which those powers have been executed from the beginning,

and by an unbroken line of decisions of this Court, first announced by Marshall and followed and lucidly expounded by Taney, that the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation, and that, on the other hand, when it has expressed in the treaty the conditions favorable to incorporation, they will, if the treaty be not repudiated by Congress, have the force of the law of the land, and therefore by the fulfilment of such conditions cause incorporation to result. It must follow, therefore, that where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions, but expressly provides to the contrary, that incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family."[1]

As has been already said, according to the view of these four justices, the Constitution is the charter of government not only of the States but also both of the territories that have been incorporated into the Union and those merely appurtenant to the United States. Every function of the Federal Government, they de-

[1] Article IX of the Spanish-American treaty contains the following clause: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." Spanish subjects, natives of Spain, are by the same article to be permitted to elect whether they will become United States subjects or retain their Spanish citizenship.

clare, is derived from the Constitution and that instrument is everywhere potential so far as its provisions are applicable. Therefore, "in the case of the territories, as in every other instance when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable." Starting, then, with this principle and the premise that Porto Rico was not by the treaty of cession incorporated into the United States, these justices proceed to determine what provisions of the Constitution are applicable to it.

The limitations placed by the Constitution upon the powers of Congress they divided into two classes which correspond quite closely to the two classes recognized by Justice Brown. "Undoubtedly," they said "there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts." These prohibitions are operative upon Congress when legislating for territories whether incorporate or merely appurtenant.

Upon the other hand, they asserted, there are limitations upon the powers of Congress which apply only when that body is enacting laws for the United States, that is, for the States and the incorporated territories. Among the limitations of this sort, they held, is the one involved in the case then decided, providing that all duties shall be uniform "throughout the United

States." Therefore, they held, that that portion of the Foraker Act which provided for Porto Rico a tariff different from that in force in the United States was not unconstitutional.

Four justices dissented both from the judgment rendered in this case and from the reasonings by which it was supported. According to their view there is no constitutional distinction to be drawn between territories incorporated into the United States and territories unincorporated or merely appurtenant to the United States. States and territories, they declared, are the only political units known to American Constitutional Law, and when, by a treaty of cession and actual occupation, lands and their inhabitants have come under the sovereignty of the United States, such lands are a part of the United States, and no approving act of Congress is needed or is efficient to increase the constitutional privileges to which they are entitled and to make effective the legislative limitations upon the powers of Congress. This view they showed to have been the one almost uniformly accepted by all three of the departments of the General Government since the adoption of the Constitution. Especially they relied upon the case of Loughborough *v.* Blake (5 Wh., 317), which had never been overruled, in which Chief Justice Marshall, when asked to hold that the District of Columbia was not a part of the United States, declared: "Does this term [the United States] designate the whole or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and territories.

The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania, and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other."

In the separate opinion which he prepared, Justice Harlan was especially emphatic in his repudiation both of the doctrine asserted by Justice Brown that the Constitution was created "by the people of the *United States,* as a union of *States,* to be governed solely by representatives of the *States,*" and of the theory of the other four justices as to the status of "unincorporated" territories.

In order fully to appreciate the radical character of the doctrine held by the four justices who concurred with Justice Brown in the judgment in the Downes case, it is necessary clearly to appreciate that it was held, in effect, that this so-called incorporation of a territory by Congress into the United States is not an act the commission of which is to be determined by facts, but only by the formal declaration of an intention expressly declared by Congress. So long as this intention is not asserted, a territory is declared to remain unincorporated into the United States notwithstanding the fact that, as was the case in Porto Rico, a complete territorial government may have been created, federal courts established, with the right of appeal therefrom to the United States Supreme Court, and all the local officials required to take an oath to support the Constitution of a Union of which they were not a part. Especially

difficult to accept is the declaration that the treaty-making power of the National Government is by itself incompetent to add territory to the United States in a domestic, constitutional sense. The authority of treaty-making power to annex territory is conceded; the Constitution itself places treaties upon a plane of equality with the statutes of Congress; and the Supreme Court has repeatedly affirmed that a subsequent treaty operates as a repeal of all acts of Congress inconsistent with it; wherefore it would seem irresistibly to follow that when the treaty-making power has accepted an unconditional cession of territory to the United States, that act is as absolutely valid and as fully operative as though Congress itself had legislated upon the subject. To assert the contrary is, in effect, to say that the treaty-making and the law-making powers are not coördinate in power, the express provision of the Constitution to the contrary notwithstanding.

Another objection to the doctrine of the Downes case which it seems absolutely impossible to overcome, is that, in reality, it does not simply assert the right of Congress to legislate regarding unincorporated territory without regard to some of the limitations imposed by the Constitution, but declares that in the exercise of this absolute power Congress may, in effect at least, disregard those same restrictions with reference to the inhabitants of the States of the Union. No argument is needed to show that a tariff law which affects articles taken from a State to an unincorporated territory, or from the latter to the former, affects the inhabitants of both, and cannot therefore be said

to be simply a local law. But if not limited in its effects to the unincorporated territory in question, it would seem to be an act necessarily subject to the constitutional limitations placed upon Congress when legislating for the States. It is therefore impossible to escape the arguments of the dissenting justices in the Downes case when they say: "Conceding that the power to tax for the purposes of territorial government is implied from the power to govern territory, whether the latter power is attributed to the power to acquire or the power to make needful rules and regulations, these particular duties are nevertheless not local in their nature, but are imposed as in the exercise of national powers. The levy is clearly a regulation of commerce, and a regulation affecting the States and their people as well as this territory and its people. . . . In any point of view, the imposition of duties on commerce operates to regulate commerce, and is not a matter of local legislation; and it follows that the levy of these duties was in the exercise of the national power to do so, and subject to the requirement of geographical uniformity."

Lastly, it may be said in objection to the doctrines declared in the Downes case, that in attempting to give to Congress a right to legislate for certain territories under United States sovereignty free from certain limitations placed by the Constitution upon its powers, there is seriously weakened, if not, from a strictly logical standpoint, absolutely destroyed, that most fundamental principle of our constitutional jurisprudence according to which all the provisions of the Constitution are equally binding upon Congress.

The distinction that is made between the absolute prohibitions of legislative power and the limitations imposed by the Constitution upon the exercise of the powers that are granted, is clearly not qualified to support the conclusion that Congress under certain circumstances may disregard the latter when it may not the former. As Chief Justice Fuller declared in his dissenting opinion: "It is idle to discuss the distinction between a total want of power and a defective exercise of it;" and again, "The powers delegated by the people to their agents are not enlarged by the expansion of the domain within which they are exercised. When the restriction on the exercise of a particular power by a particular agent is ascertained, that is an end to the question. To hold otherwise is to overthrow the basis of our constitutional law." Mr. Carlisle in the address from which we have already once quoted, has also shown so clearly the fallacy of the argument of the prevailing opinion upon this point that we are justified in reproducing his words. He says: "The distinction attempted to be taken between the obligatory force of absolute prohibitions upon the power of Congress and the obligatory force of limitations and qualifications imposed by the Constitution upon the exercise of its powers over a particular subject, cannot, in my opinion, be sustained by any sound process of reasoning. It is true that there is a difference in degree between an absolute denial of all power to do a particular thing and a grant of power to do that thing to a limited extent, or in a prescribed manner only; but the absolute prohibition and the express or implied limita-

tion are equally obligatory upon Congress. It is bound to obey both or its act is void. . . . To say that Congress, in legislating for a territory, is not bound by the constitutional *limitations* upon a granted power, but is or may be bound by the express *prohibitions,* is simply to assert that all parts of the Constitution are not of equal force and effect as restraints upon legislation, and that a power not granted may be constitutionally exercised if it is not expressly prohibited, a theory, which, if sanctioned by the judiciary, would at once revolutionize the government. It would no longer be a government of enumerated and delegated powers, but would possess the whole mass of sovereign power which is now vested in the people, subject only to the comparatively few express prohibitions."

The latest of the cases dealing with the question of the civil rights of the inhabitants of the insular possessions of the United States is that of The Territory of Hawaii *v.* Mankichi (190 U. S., 197), decided June 1, 1903. The facts and questions of law involved in this case were these. The Joint Resolution of Congress of July 7, 1898, providing for the annexation of the Hawaiian Islands, expressly provided that "The municipal legislation of the Hawaiian Islands, . . . not inconsistent with this joint resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." After the annexation to the United States, Congress not having determined otherwise, the defendant in error, Mankichi, was tried for

and convicted of manslaughter according to the usual course of procedure in force in the Republic of Hawaii prior to July 7, 1898, which course of procedure did not require the indictment to be found by a grand jury, and which permitted a less number than the entire twelve of the petit jury to convict. A petition for a writ of *habeas corpus* having been made by Mankichi upon the ground that, according to the Constitution of the United States, one might not be tried for manslaughter except upon an indictment or presentment found by a grand jury, nor convicted except by a unanimous petit jury, and the case having been appealed to the Supreme Court of the United States, that tribunal was called upon to determine: first, whether it was the intention and the necessary effect of the annexing joint resolution to make these constitutional provisions immediately applicable to the islands; and secondly, if it did not, whether it lay within the power of Congress or of the authorities of Hawaii to deny to the accused the rights in question. Both of these questions the majority of the court, five justices, answered in the affirmative.

Passing upon the intention and effect of the annexing resolution, Justice Brown in his opinion said: "Of course, under the Newland's [annexing] resolution, any new legislation must conform to the Constitution of the United States; but how far the exceptions to the existing municipal legislation were intended to abolish existing laws must depend somewhat upon circumstances. Where the immediate application of the Constitution required no new legislation to take the place of that which the Constitution abolished, it may

be well held to have taken immediate effect; but where the application of a procedure well known and acquiesced in left nothing to take its place, without new legislation, the result might be so disastrous that we might well say that it could not have been within the contemplation of Congress."

With reference to the question of the non-applicability *ex proprio vigore* of the constitutional provisions involved, Justice Brown declared: "Most, if not all, of the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well-being."

Two of the majority justices further justified the judgment that was rendered upon the ground, "That as a consequence of the relation which the Hawaiian Islands occupied toward the United States, growing out of the resolution of annexation, the provisions of the Fifth and Sixth Amendments of the Constitution concerning grand and petit juries were not applicable to that territory, because whilst the effect of the resolution of annexation was to acquire the islands, and subject them to the sovereignty of the United States, neither the terms of the resolution nor the situation which arose from it served to incorporate the Hawaiian Islands into the United States, and make them an

integral part thereof." In other words, these two justices held the case to be controlled by the decision in Downes *v.* Bidwell.

To the foregoing judgment of the Court as well as to the reasoning by which it was supported, four justices entered an emphatic dissent. Three of these contented themselves simply with an argument that, as a matter of fact, the provision of the resolution of annexation which has been quoted above, validating all existing legislation, except such as might be contrary to the Constitution of the United States, should be construed as having extended over the islands the Fifth and Sixth Amendments to that instrument. Justice Harlan, however, in his dissenting opinion, in addition to this, attacked the validity of the position assumed by the majority that it was within the constitutional power of Congress to exclude from operation in a territory, incorporate or not incorporate, any of the provisions of the Constitution. "In my opinion," said he, "the Constitution of the United States became the supreme law of Hawaii immediately upon the acquisition by the United States of complete sovereignty over the Hawaiian Islands, and without any act of Congress formally extending the Constitution to those islands. It then, at least, became controlling, beyond the power of Congress to prevent. From the moment when the government of Hawaii accepted the joint resolution of 1898, by a formal transfer of its sovereignty to the United States,—when the flag of Hawaii was taken down, by authority of Hawaii, and in its place was raised that of the United States,—every human being in Hawaii charged with the com-

mission of crime there could have rightly insisted that neither his life nor his liberty could be taken, as punishment for crime, by any process, or as the result of any mode of procedure, that was inconsistent with the Constitution of the United States. . . . I stand by the doctrine that the Constitution is the supreme law of every territory, as soon as it comes under the sovereign dominion of the United States for purposes of civil administration, and whose inhabitants are under its entire authority and jurisdiction. I could not hold otherwise without conceding the power of Congress, the creature of the Constitution, by mere non-action, to withhold vital constitutional guarantees from the inhabitants of a territory governed by the authority, and only by the authority, of the United States."

As regards the assertion made in the majority opinion that the rights secured by the Fifth and Sixth Amendments are not "fundamental," Justice Harlan declared: "It is a new doctrine, I take leave to say, in our constitutional jurisprudence, that the framers of the Constitution did not regard those provisions and the rights secured by them, as fundamental in their nature. It is an undisputed fact in the history of the Constitution that that instrument would not have been accepted by the required number of States, but for the promise of the friends of that instrument, at the time, that immediately upon the adoption of the Constitution, amendments would be proposed and made that should prevent the infringement by any federal tribunal or agency, of the rights then commonly regarded as embraced in Anglo-Saxon liberty; among which rights, according to universal belief at that time,

were those secured by the provisions relating to grand and petit juries."

In the foregoing account of the "Insular Cases" there has been given a statement not only of the prevailing but of the dissenting opinions. Furthermore, to some extent, the effort has been made to present the reasoning employed in their support. This has been done not solely because of the very great importance of the constitutional questions involved, but also because, as a matter of fact, there is some ground for believing that the judgments rendered have by no means definitely fixed the law upon these points. Therefore it is quite desirable that we should be supplied with the principle upon which, possibly, if not probably, the doctrine finally accepted will be founded.

One important point is to be noticed in the very beginning of a criticism of the prevailing opinions in these cases. As will have been seen from the account that has been given of the case, though there was a judgment concurred in by five justices in Downes *v.* Bidwell, namely, the judgment that the tax uniformity clause was not applicable to the island Porto Rico, one of these five justices based his conclusion upon reasoning that was repudiated both by the four justices who concurred in the judgment and by the four who dissented from it. There was therefore declared in that case no constitutional doctrine that received the approval of a majority of the court. Moreover, the four justices who concurred with Justice Brown in the judgment that was rendered did so upon a principle that a clear majority of the court had just declared invalid in the case of De Lima *v.* Bidwell; whereas the

four dissenting justices based their opinion upon a principle which that case had held sound.[1]

DISTRICT OF COLUMBIA

THE constitutional status of the district used as the seat of the Federal Government is almost exactly the same as that of the territories. In the case of Loughborough *v.* Blake (5 Wh., 317), so often cited in the Insular Cases, Chief Justice Marshall emphatically declared, as we have already learned, that the District of Columbia was a part of the United States, and that in legislating for it Congress is restrained by the limitations constitutionally placed upon the exercise of its powers. The Downes case, however, has held this to be an erroneous dictum.

As early as 1804, in Hepburn *v.* Ellzey (2 Cr., 445), it was held that the District of Columbia was not a State in the sense in which that word is used in the constitutional clause that gives to the federal courts

[1] Upon this point see the remarks of Professor J. W. Burgess in the "Political Science Quarterly," XVI (1901), p. 504. The opinion of this competent critic, himself a firm believer in imperialism as a principle of Anglo-Saxon politics, is as follows: "The judgment in the Downes case is . . . nothing but an arbitrary bit of patchwork. Its purpose is to satisfy a certain demand of fancied political expediency in the work of imperial expansion. It is based upon the narrowest possible view of that expediency; for I venture to affirm that in the prosecution of that policy the simple knowledge on the part of those to be made subject to it that the constitutional liberties of the great republic were to be extended to them, as well as the powers extended over them, would be worth to us an army of a million of men."

jurisdiction in suits between citizens of different States.

In De Geofroy *v.* Riggs (133 U. S., 258) it was, however, declared that the District was one of "the States of the Union" within the meaning of that term as used in an international agreement.[1]

The reasoning by which Marshall in the Loughborough case found the District entitled to the protection of the limiting clauses of the Constitution, was approved by the dissenting justices in the Downes *v.* Bidwell case, and repudiated by the majority justices. These latter, however, affirmed, as a matter of fact, that the protection of these constitutional limitations had been extended over the District by a specific act of Congress.[2]

[1] This case is cited by Justice Brown in his opinion in the case of Downes *v.* Bidwell, as illustrating the broader, international use of the term "United States."

[2] 16 "Statutes at Large," chap. 62, sec. 34.

CHAPTER XV

CITIZENSHIP

THE subject of citizenship in the United States is one the exact legal definition of which is not yet settled, notwithstanding the fact that an amendment to the Constitution has been adopted, the chief purpose of which was to effect this.

As adopted, the federal Constitution contained no definition of citizenship. Impliedly, however, it recognized a state citizenship in that clause which provides that "citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." It also would seem to have recognized a federal citizenship in the clauses providing that the President shall be "a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution;" that Senators and Representatives shall have been nine and seven years respectively citizens "of the United States;" and that Congress shall have the power to pass laws regulating the naturalization of aliens.

The relationship between these two citizenships,—state and national,—however, the Constitution did not expressly determine.

By some it was asserted that there was no federal

citizenship apart from state citizenship—that one became a citizen of the United States only by being or becoming a citizen of one of the States. Calhoun has been credited with holding this view.[1] This, however, is not quite correct. In a speech delivered in the United States Senate in 1833 upon the then pending Force Bill, he declared: "If by a citizen of the United States he [Senator Clayton] means a citizen at large, one whose citizenship extends to the entire geographical limits of the country without having a local citizenship in some State *or territory*,[2] a sort of a citizen of the world, all I have to say is that such a citizen would be a perfect nondescript; that not a single individual of this description can be found in the entire mass of our population. . . . Every citizen is a citizen of some State *or territory*, and as such, under an express provision of the Constitution, is entitled to all the privileges and immunities of citizens in the several States; and it is in this and no other sense that we are citizens of the United States."

From this it will be seen that Calhoun recognized not only a state citizenship but a territorial citizenship, which latter of course could be derived only from a federal source. What he and others of the States' Rights school held was that as between state citizenship and federal citizenship, the former was the more fundamental; that, in other words, the latter was derived from the former. The fact of the federal control of naturalization Calhoun explained by alleging that that power was one which enabled Congress simply to

[1] Brannon, "The Fourteenth Amendment," p. 17.

[2] Italics our own.

remove the disabilities of foreign birth, the several States being left free to decide whether or not, when such disabilities had been removed from aliens resident within their borders, they should be accepted by them as citizens. In 1832, however, in the case of Gassies *v.* Ballon (6 Pet., 761), this construction was declared incorrect by Chief Justice Marshall. "The defendant in error," said Marshall, "is alleged in the proceedings to be a citizen of the United States, naturalized in Louisiana and residing there. This is equivalent to an averment that he is a citizen of the United States. A citizen of the United States, residing in any State of the Union, is a citizen of that State."

The whole question of the relation between state and federal citizenship came up for discussion and decision in the Dred Scott case (Scott *v.* Sandford, 19 How., 393), decided in 1856. Two of the questions involved in this case were, whether a State might make a negro one of its own citizens, and if so, whether such a one thereby necessarily became a citizen of the United States and as such entitled to the special privileges and immunities created by the Constitution.

The majority of the court held that though the individual States had full discretion as to whom they should admit to their own citizenship, they had not the power, by an exercise of this right, to endow with the privileges of federal citizenship those individuals who, at the time the Constitution was adopted, were held by law and general opinion not qualified, because of race, to become citizens. Negroes, it was declared, were of this class. "We must not confound," said Taney in his opinion, "the rights of citizenship which a State

may confer within its own limits, and the rights of citizenship as a member of the Union. . . . [A person] may have all the rights and privileges of a citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other States. . . . Each State . . . may confer them upon an alien or any one it thinks proper, or upon any class or description of persons, yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States. . . . The rights which he would acquire would be restricted to the State which gave them. . . . No State can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone is concerned, he would undoubtedly be entitled to the rights of a citizen and clothed with all the rights and immunities which the constitution and law of the State attached to that character."

From this doctrine that a citizen of a State, whatever his class or condition, did not necessarily become a citizen of the United States, Justice Curtis dissented. National citizenship and state citizenship he held to apply to the same persons in all cases, thus, apparently, excluding from federal citizenship inhabitants of the territories. Furthermore, it would seem that he committed himself to the doctrine that state citizenship is the more fundamental as being the source whence federal citizenship is derived. "It is left to each State to determine," he said, "what free persons born within its limits shall be citizens of such State and *thereby* be citizens of the United States. . . .

Among the powers unquestionably possessed by the several States was that of determining what persons should, and what persons should not, be citizens."

In effect, then, the Dred Scott decision held that free negroes in the United States, though subjects of, that is, owing allegiance to, the United States, were not "citizens" of the United States within the meaning of that provision of the Constitution which provides the right of bringing suits in federal courts.

In 1868 was adopted the Fourteenth Amendment which provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The two main purposes of this declaration undoubtedly were: (1) the assertion that national citizenship is primary and paramount to state citizenship; and (2) the granting of both national and state citizenship to the negro. That national citizenship was to be paramount is shown not only in the words just quoted, but in the further provision of the amendment that "no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In the Slaughter House Cases (16 Wall., 36) it was held, in effect, that this amendment did not have the effect of absorbing state citizenship and its appurtenant rights in the national citizenship, but that the two remain as distinct as before. Upon this point the

court declared: "It [the clause defining citizenship] declares that persons may be citizens of the United States without regard to the citizenship of a particular State, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.[1] The next observation is more important. . . . It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual."

In the above it will be noticed that the court declares that an additional element is necessary to con-

[1] This interpretation of the phrase "subject to its jurisdiction" was a mere dictum of the court, the point not being involved in the suit at bar. Moreover, as we shall see, *post*, p. 248, it was an incorrect dictum so far as regards persons born within the United States of parents who are aliens.

vert a federal citizen into a state citizen. This additional element, it should also be observed, is not one the giving or refusing of which is within the control of the State. By the mere act of taking up residence within a State, which that State cannot prevent, a federal citizen, *ipso facto,* becomes a citizen of the State. The State thus no longer has any power to determine who shall be or become its own citizens. The federal Constitution fixes that once for all.

But though the States may not determine who shall constitute its citizen body, they still retain, as the decision in the Slaughter House Cases goes on to declare, a full authority, free from federal supervision and control, to decide what political privileges—as, for instance, the right to vote, or to hold office—shall exist, and who shall be entitled to enjoy them. Thus, upon the one hand, federal and state citizenship does not entitle one, of right, to the suffrage or qualify him for public office. Upon the other hand, the States may grant, and in a number of cases have granted, these privileges to aliens who, though not naturalized, have declared their intention, according to the requirements of the national law regulating naturalization, of becoming United States citizens.

A State cannot prevent, as has been said, a federal citizen from becoming one of its own citizens. It is not certain, however, that it may not grant its own citizenship to one not a federal citizen, or even to one, as for instance a Mongolian, who, according to existing federal law, cannot become a federal citizen.[1] This point is, however, of only academic interest, for whe-

[1] According to the existing laws of naturalization, only members of the white races and negroes may be naturalized.

ther made a state citizen or not, all the privileges of state citizenship may be given an alien.

In the case of United States *v.* Wong Kim Ark (169 U. S., 649), decided in 1898, was determined the question whether, under the provisions of the Fourteenth Amendment, one is a citizen of the United States who is born in the United States of alien parents permanently domiciled therein. The determination of this point turned upon the question whether or not American law follows the English Common Law principle that birth within the territorial limits of a State makes one a citizen of that State, or accepts the rule followed by most European States that citizenship is determined by that of the parents. The Supreme Court declared that the first is the correct American principle and that, therefore, the Chinaman, defendant in the suit being decided, was an American citizen. The acceptance of this doctrine, it was held, does not prevent the United States from providing that children born abroad of American citizens shall be considered citizens of the United States.[1]

Regarding the phrase "subject to the jurisdiction

[1] "Persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States." Law enacted in 1855. "Revised Statutes," Sec. 1993. The acceptance by some nations of parentage and by others of place of birth as determinant of citizenship, as also the assertion by some nations and the denial by others as of a right of expatriation, gives rise in many cases to a double citizenship. Thus, for example, the child born in the

thereof'' the court said: ''The real object of the Fourteenth Amendment of the Constitution, in qualifying the words, 'all persons born in the United States' by the addition 'and subject to the jurisdiction thereof,' would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law), the two classes of cases,—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State,—both of which, as has already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country.''

United States of citizens of a State that holds that the citizenship of the child is fixed by that of its parents, is claimed as a citizen both by the United States and by the foreign State whose citizens the parents are. A similar result follows when by naturalization American citizenship is conferred upon the subject of a foreign State that does concede to its subjects the right of expatriation.

CHAPTER XVI

THE POLITICAL STATUS OF INDIANS

THE status of the Indians, to which allusion is made in the foregoing quotation, needs explanation, not only because of its peculiar character, but because the constitutional principles that have been declared to govern the Federal Government in its control of these aborigines may find an application in the near future in the government by the United States of the less civilized tribes inhabiting its newly acquired insular possessions.

The only references made by the Constitution to the Indians are in the provisions that "Indians not taxed" shall not be counted in determining the number of Representatives to which a State shall be entitled (Art. I, Sec. 2); and that Congress shall have the power to regulate commerce with Indian tribes (Art. I, Sec. 8, Clause 3).

Since the adoption of the present Constitution, Indians, resident within the boundaries of the United States, while considered as absolutely and exclusively subject to its sovereignty so far as concerns both foreign powers and the individual States of the Union, have nevertheless been treated for many purposes as constituting independent nations or tribes under the

protection of the Federal Government, and therefore to be dealt with by means of treaties rather than by statutes.[1] Until recently they have been allowed to govern themselves in most matters by their own tribal governments.

In Worcester *v.* Georgia (6 Pet., 515), decided in 1832, Chief Justice Marshall said: "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States, and provide that all intercourse with them shall be carried on exclusively by the government of the Union." Speaking of the Indians over whose lands the State of Georgia had attempted to exercise jurisdiction,[2] he said: "The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States."

In 1884 in the case of Elk *v.* Wilkins (112 U. S., 94) the question arose whether an Indian, born a member of one of the Indian tribes within the United States, became a citizen of the United States under the Four-

[1] In its control of the Indians, whether by means of statutes or treaties, Congress has never been held bound by any of the limiting clauses of the Constitution.

[2] These lands were within the territorial limits of the State of Georgia.

teenth Amendment, by reason of his birth within the United States, and of his afterward voluntarily separating himself from his tribe and taking up a residence among white citizens. In declaring that he did not, the Court said:

"Under the Constitution of the United States, as originally established, 'Indians not taxed' were excluded from the persons according to whose numbers representatives and direct taxes were apportioned among the several States; and Congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the States of the Union. The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States; but they were alien nations, distinct political communities, with whom the United States might and did deal as they saw fit, either through treaties made by the President and Senate, or through acts of Congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any State. General acts of Congress did not apply to Indians, unless so expressed as clearly to manifest an intention to include them. . . . The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action of, or assent of the

United States, they were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life. . . . Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent power), although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children, born within the United States, of ambassadors or other public ministers of foreign nations. . . . Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the Fourteenth Amendment, by being 'naturalized in the United States' by or under some treaty or statute."

Since the decision of the Supreme Court in Elk *v.* Wilkins a number of acts of Congress have been passed which have had the effect of destroying, to a very considerable extent, the autonomous tribal governments of the Indians and of subjecting them to the legislative control of Congress instead of to that of the treaty-making power. The way was opened to this

change by a "rider" attached to an appropriation bill in 1891 which provided that "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty."

By an act passed in 1885 the federal courts were, for the first time, given a considerable jurisdiction over crimes committed upon reservations by Indians upon Indians. The constitutionality of this act was attacked upon the ground that it was not within the legislative power of Congress thus to interfere with the internal legal affairs of Indians still maintaining tribal governments. The Court held, however, in United States *v.* Kagama (118 U. S., 375), that whatever political and legal freedom was enjoyed by the Indians was by way of permission or cession from the Federal Government, and was, therefore, subject to curtailment or complete withdrawal by that power. "These Indian tribes," it declared, "are the wards of the Nation. They are communities dependent on the United States, dependent largely for their daily food, dependent for their political rights. They owe no allegiance to the States and receive from them no protection."

To this decision the objection was urged, and, it would seem, with considerable force, that since the Indians are no longer permitted to enjoy tribal autonomy, and are no longer treated by the Federal Government as independent communities which are to be dealt with by treaties instead of statutes, there disappears the constitutional justification for denying

to the States the control of such of them as live within their territorial limits. To this the Supreme Court had no better answer to give than expediency—always a poor, if not an absolutely invalid argument. "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers," it said, "is necessary to their protection, as well as to the safety of those among whom they dwell." Upon this argument the exclusive jurisdiction of the Federal Government over the negroes might be justified.

At various times during past years, Congress has declared, as to particular Indian tribes, that their lands should be divided and held in severalty by their respective members, and that, thereupon, such Indians should become citizens of the United States, and pass immediately from the exclusive jurisdiction of the Federal Government to that of the States in which they reside. In 1887, by the General Land in Severalty Law, known as the "Dawes Act," the President was given the power to apply this process to practically every Indian reservation in the country. The peculiarity of these acts is, it will be observed, that it makes citizens of Indians against their will. The action is taken at the discretion of the President and citizenship is the result.[1]

[1] The Dawes Act also provides for allotments of land and citizenship to Indians who may wish to settle upon the public lands of the United States. It also declares that all Indians forsaking their tribal life and adopting the habits of civilized life shall become citizens. Without this express statutory provision, as was decided in Elk *v.* Wilkins, citizenship could not thus be obtained.

For legislation further subjecting the Indians to the control of the federal courts, see the act of January 1, 1898.

The peculiar status of those Indians who have not become citizens is illustrated in the form of a letter of protection issued, in lieu of a passport, to those traveling abroad. The following is a letter issued by our consul at Odessa, the form of which has been approved by the State Department:

"To whom it may concern:

"The bearer of this document is a North American Indian whose name is Hampa. This Indian is a ward of the United States, and is entitled to the protection of its consular and other officials. He is not, however, entitled to a passport, as he is not a citizen of the United States. This consulate has the honor to request the Russian authorities to grant Hampa all necessary protection during his stay in Russia, and grant him permission to depart when he requires it.

"_____

"Consul."

CHAPTER XVII

THE CITIZENSHIP OF INHABITANTS OF CEDED TERRITORIES

WHETHER or not the inhabitants of territories ceded by one nation to another necessarily have, according to the principles of International Law, the option of becoming citizens of the annexing State, or retaining their old citizenship, is a point upon which International Law writers do not seem to be fully agreed. Rivier, for instance, in his recent work, "Principes du Droit des Gens," declares that they have not—that unless expressly provided otherwise, they become, *nolens volens*, the subjects of the power to which their territory is united. Other text-book writers, Westlake and Halleck, for instance, claim that the treaty of cession being silent upon this point, an option exists.[1] Halleck declares: "The transfer of territory establishes its inhabitants in such a position toward the new sovereignty that they may elect to become, or not to become, its subjects. Their obligations to the former government are canceled, and they may or

[1] This right of option as regards citizenship is not to be confounded with the right, by some alleged to exist, of the inhabitants to decide whether or not they will consent to a transfer of sovereignty over their territory to another power. Such a right has never been accepted by International Law writers, nor recognized by the United States in any of the annexations by it of new territories.

may not, become the subjects of the new government, according to their own choice. If they remain in the territory after this transfer, they are deemed to have elected to become its subjects, and thus to have consented to the transfer of their allegiance to the new sovereignty. If they leave, *sine animo revertendi,* they are deemed to have elected to continue aliens to the new sovereignty. The *status* of the inhabitants of the conquered and transferred territory is thus determined by their own acts. This rule is the most just, reasonable, and convenient which could be adopted. It is reasonable on the part of the conqueror, who is entitled to know who become his subjects and who prefer to continue aliens; it is very convenient for those who wish to become the subjects of the new State, and is not unjust toward those who determine not to become its subjects. According to this rule, *domicile,* as understood and defined in public law, determines the question of transfer of allegiance, or rather, is the rule of evidence by which that question is to be decided."

That, in the absence of treaty stipulations to the contrary, the citizenship of the inhabitants of ceded territory is to be determined by the rule thus stated, is generally admitted by American International Law writers, and has been more than once declared by the United States Supreme Court. In American Insurance Co. *v.* Canter, the Court said: "The same act which transferred their territory transfers the allegiance of those who remain in it;" and in Boyd *v.* Thayer (143 U. S., 135) it was declared that "the nationality of the inhabitants of territory acquired by

conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise as may be provided."

In all the treaties entered into by the United States whereby territory was acquired, prior to that of 1899 with Spain, it was provided either that the inhabitants of the ceded territories remaining therein should be admitted as soon as possible to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, or that they should be "incorporated in the Union of the United States," or both. It cannot, however, be said with certainty as has been maintained by some, that it was due to these provisions that the inhabitants of the ceded territories were collectively naturalized, for this point has never been squarely passed upon by the Supreme Court. The undoubted purpose and the probable legal effect of these provisions was only to create an obligation on the part of the United States not to discriminate civilly against these peoples, and, when the conditions should warrant, to confer upon them full political privileges. The determination when this time had arrived was left to the discretion of Congress. Provisions similar to those of which we have been speaking are almost always inserted by all nations in treaties of cession at the instance of the ceding power, as a mere matter of equity, it being but just, in handing over to the control of another power citizens of its own, that, as far as possible, a State should obtain a guarantee that they shall not be civilly or politically oppressed.

By these treaties of cession entered into by the United States, the inhabitants of the ceded territories did become, however, United States citizens under the general rule quoted above, because those treaties contained no stipulations to the contrary.

In the treaty of peace with Spain which provided for the cession to the United States of Porto Rico, Guam, and the Philippines, we find for the first time appearing a provision affirming, in effect, that the cession of the islands was not to operate as a naturalization of their native inhabitants, but that the determination of their civil rights and political status was to be left to the subsequent judgment of Congress. Spanish subjects, natives of the Iberian Peninsula, but resident in the islands, were, however, given the right to elect whether or not they would retain their old citizenship or become American subjects. The provisions of the treaty upon these points were as follows: "Spanish subjects, natives of the Peninsula [of Spain] residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce, and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their de-

cision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

"The civil right and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress."

Relative to the effect of this last treaty provision, a question presents itself, which has not yet been passed upon by the Supreme Court. This is, whether it is within the constitutional competence of the treaty-making power to confer upon Congress the right to determine whether or not the inhabitants of territories coming under the sovereignty of the United States shall become its citizens. The Constitution declares that the acts of the treaty-making power, as well as those of the federal legislature, shall be the supreme law of the land. The validity of both are, however, dependent upon their consonance with the requirements of the Constitution. If, then, according to that instrument, there may not be subjects of the United States who are not also its citizens, no treaty can give to the law-making branch the power to treat any persons as such. In the Insular Cases it was held that the islands obtained from Spain have not been incorporated into the "United States." Their inhabitants have not been naturalized by statute and the treaty with Spain expressly refuses to them citizenship. The whole question of their civil status thus depends upon whether or not they are citizens according to the provision of the Fourteenth Amendment which declares that "all persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." That is to say, it will depend upon whether the term "United States," as employed in this amendment, will be construed to exclude or include "unincorporated" territories.

In the case of Gonzales *v.* Williams (24 Sup. Ct. Reporter, 177), decided January 4, 1904, the Supreme Court held that inasmuch as, since the treaty of cession with Spain, the island of Porto Rico had ceased to be foreign territory, natives living there in 1899 are not "aliens" within the meaning of that term as employed in the act of Congress providing for the detention and deportation of alien immigrants likely to become public charges. Whether or not such persons, though subject to the sovereignty of the United States, are its citizens within the narrower constitutional sense, so long as the island remains unincorporated into the United States, was not passed upon.

As regards those of the natives of the Philippine Islands, who are still uncivilized and maintain tribal relations, it may be that the courts will construe their status to be similar to that of the Indian tribes in the United States.

CHAPTER XVIII

ADMISSION OF NEW STATES

THE process of admitting new States to the American Union is a comparatively simple process and but few constitutional questions have arisen in connection with it. The constitutional clause governing the subject reads as follows: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of Congress" (Art. IV, Sec. 3). It will thus be seen that nothing is said as to the conditions that must be met by a given territory before it may claim, or Congress be obligated to grant, admission to the Union as a State. The whole matter is left absolutely to the discretion of Congress. There can be no question but that at the time of the adoption of the Constitution the idea was generally held that all non-state territory held or to be held by the United States was to be regarded as material from which new States were to be created as soon as population and material development should warrant. But no attempt was made to force the hand of Congress under circumstances

that could not be foreseen by defining in the Constitution itself the conditions under which statehood should be accorded. But one limitation is laid down, and that impliedly, and one that relates rather to the status of new States after admission, than to the process of admission itself. This is that the new Commonwealths, when received into constitutional fellowship with the older members of the Union, shall stand upon an exactly equal footing with them. The Constitution does not expressly declare this, but, without distinguishing between the original and the new States, defines the political privileges which the States are to enjoy, and declares that all powers not granted to the United States shall be considered as reserved "to the States." From this it almost irresistibly follows that Congress has not the right to provide that certain members of the Union, possessing full statehood, shall have their constitutional competences in any manner less than that of their sister States. According to this, then, though Congress may exact of territories whatever conditions it sees fit as requirements precedent to their admission as States, when admitted as such, it cannot deny to them any of the privileges and immunities which the other Commonwealths enjoy.[1]

This principle of the equality of States had its origin before the adoption of the Constitution itself. In the acts of cession by the several States by which the old Confederacy obtained the control of the Northwest Territory, it was provided that from this vast area new States should, from time to time, be organized, which

[1] See Pollard's Lessee *v.* Hagan, 3 How., 212; Strader *v.* Graham, 10 How., 82; Weber *v.* Harbor Commissioners, 18 Wall., 57.

should be admitted to the Confederacy with the same sovereign rights enjoyed by the other States.

The famous Northwest Ordinance of 1787, reënacted by the Congress of the United States in 1789, after laying down the general conditions upon which statehood was to be accorded, declared that the States, so admitted, should be "on an equal footing with the original States in all respects whatever."

Notwithstanding, however, this requirement of equality, Congress at an early date began the practice of exacting from would-be States various promises by the terms of which they were to hold themselves bound after their admission to the Union and until Congress should release them. Thus, for instance, beginning in 1802 with Ohio, the first State formed from the Northwest Territory, it was demanded by Congress that that State, when admitted, should pass an ordinance, irrevocable without the consent of Congress, not to tax for five years all public lands sold by the United States; and a requirement substantially similar was demanded of many of the States later formed. When Missouri was admitted in 1821 it was required to declare that its constitution should never be so construed as to permit its legislature to pass a law excluding citizens of other States from the enjoyment of any of the privileges and immunities granted them by the federal Constitution.[1]

Beginning with the admission of Nevada in 1864, the promises exacted of territories seeking admission

[1] A superfluous requirement, for with or without such a promise, a State is, and was then, constitutionally unable to deprive any one of rights granted by the federal Constitution.

as States assumed a more political character. Of Nevada it was required that her constitution should harmonize with the Declaration of Independence and that the right to vote should not be denied persons on account of their color. Of Nebraska, admitted in 1867, it was demanded that there should be no denial of the franchise or any other right on account of race or color, Indians excepted. Of the States that had attempted secession, still more radical were the requirements precedent to the granting to them of permission again to enjoy the other rights which they had for the time being forfeited. Of all of them it was required that there should be, by their laws, no denial of the right to vote except for crime; and of three, that negroes should not be disqualified from holding office, or be discriminated against in the matter of school privileges.[1] Finally, Utah, when admitted as a State in 1894, was required by Congress by the Enabling Act to make "by ordinance irrevocable without the consent of the United States and the people of the United States, provisions for perfect religious toleration and for the maintenance of public schools free from sectarian control; and that polygamous or plural marriages are forever prohibited."

In two comparatively recent cases, the Supreme Court has emphatically declared that, after becoming a member of the Union, a State is not restrained by political limitations exacted of it at the time of, and as a condition precedent to, its admission to the Union

[1] By the adoption of the Fourteenth and Fifteenth Amendments, some of these limitations have been made applicable to all the States and thus an equality, as to them, created.

as a State. In Escanaba *v.* Lake Michigan Transportation Co. (107 U. S., 678) the Court declared, relative to certain limitations placed upon the governing powers of Illinois while in a territorial condition: "Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1789 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her after she became a State of the Union. On her admission, she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted and could be admitted only on the same footing with them." And in Bolln *v.* Nebraska (176 U. S., 83) it was declared: "This Court has held in many cases that, whatever be the limitations upon the power of a territorial government, they cease to have any operative force, except as voluntarily adopted after such territory has become a State of the Union. Upon the admission of a State it becomes entitled to and possesses all the rights of dominion and sovereignty which belong to the original States, and, in the language of the act of 1867 admitting the State of Nebraska, it stands 'upon an equal footing with the original States in all respects whatsoever.'"

In the foregoing cases reference was had, as appears from the quotations, to States created out of territories. There would seem to be, however, no reason why the same doctrine should not be applied to the political limitations exacted of a number of the southern States at the time of their readmission

to full constitutional privileges after the period of Civil War and Reconstruction.[1]

In the case of Stearns *v.* Minnesota (179 U. S., 223), it was held, however, that a Commonwealth, at the time of its admission, or at any other time, might enter into compacts as to property rights with the United States, which would continue binding upon it. Relative to a covenant required of and entered into by Minnesota at the time of her admission as a State not to tax land belonging to the United States, or to tax non-resident higher than resident purchasers of it, the Court said: "That these provisions of the enabling act and the Constitution [of Minnesota] in form at least, made a compact between the United States and the State, is evident. In an inquiry as to the validity of such a compact this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into between the States, or between a State and the Nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question of the validity of these two kinds of agreements is obvious. It has often been said that a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of

[1] A case involving this point has recently been argued before the Supreme Court, and has not yet [1904] been decided.

status but only of the power of a State to deal with the Nation or with any other State in reference to such property. The case before us is one involving simply an agreement as to property between a State and the Nation. That a State and the Nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this court, and that they have been frequently made in the admission of new States, as well as subsequently thereto, is a matter of history."

As has been seen, the Constitution does not attempt to fix the *modus operandi* in which new members are to be admitted into the Union. It does not even say whether they are to be formed from territory already under its sovereignty, and in one instance, that of Texas, a new State was received by the direct process of incorporating, by a joint resolution of Congress, a foreign, independent State. In all other cases, however, new States have been formed from areas already belonging to the United States and organized as territories.

The usual process by which these territories obtain statehood is as follows: The people of a territory petition Congress to grant them statehood. If that body is favorably disposed, a so-called "enabling act" is passed, authorizing the framing of a state constitution, prescribing the manner in which it shall be framed, and laying down certain requirements that must be met. All these conditions having been met, a resolution reciting this fact is passed by Congress, and the territory declared a State and admitted as such into the Union. In some cases the final step in the process

has been a Proclamation issued by the President in obedience to the direction of Congress.

The above has been the usual and regular process. In not a few instances, however, the inhabitants of territories have met in conventions and framed constitutions without first obtaining the authorization of Congress. The acceptance, however, by that body, of the instrument framed has been considered sufficient to validate the proceeding.

There has been some little constitutional speculation as to whether the decisive, creative act in the bringing into existence of a new State is the Resolution of Congress approving the constitution that has been drawn up and declaring the former territory one of the States of the Union, or whether the vivifying force is derived from the constituent act of the people of the territory in framing and adopting their state constitution. The latter is the view most acceptable to the States' Rights school.[1] It would seem to be sufficiently plain, however, that the former is the correct doctrine; for there can be no question but that it lies within the power of Congress arbitrarily to refuse its approval to a constitution that has been framed by the people of a territory strictly in accordance with the require-

[1] In Brownson's "American Republic," premising that the entrance of territories into the Union as States is the free act of the peoples of the respective territories, the argument was made that the States of the Southern Confederacy, by their ordinances of secession, in effect annulled these acts, and thus, *ipso facto*, relegated themselves to the status of territories, and as such came under the complete control of Congress for that body to "reconstruct" their governments as it should see fit, and readmit them as States, and upon such terms, as it should approve.

ments of the Enabling Act. The final, and therefore decisive step, has thus to be taken by the Federal Government.

This doctrine has, indeed, received judicial sanction at the hands of the United States Supreme Court in its decision in the case of Scott *v.* Jones (5 How., 343).[1]

[1] Cf. Jameson, "Constitutional Convention," Sec. 207; "Opinions of U. S. Attorney-General," II, 726; and speech of H. W. Davis, in Appendix to Vol. XXXVII of the "Congressional Globe," pp. 261–262.

CHAPTER XIX

INTERSTATE RELATIONS

In the chapters that have gone before there have been considered the constitutional relations which exist between the federal government upon the one side and state governments upon the other. In order to complete the account of the American Constitutional System it will now be necessary to give a description of the relations which exist between the several States themselves.

Except as otherwise specifically provided by the federal Constitution, the States of the American Union, when acting within the spheres of government reserved to them, stand toward one another as independent sovereign States. The laws of one State have, *ex proprio vigore,* no force, and its officials have no public authority, outside of its own boundaries.[1]

[1] The general principles of interstate comity, that is, those principles that hold good in the field of the "Conflict of Laws" or Private International Law, apply, *mutis mutandis,* to the commonwealth members of the American Union in precisely the same manner that they do to sovereign independent States. Even a brief presentation of these principles would be outside of the province of this work. "The rules of private international law are taken notice of by the courts just as are the general principles of the common law; and the federal courts, like those

This general principle of political and legal exclusiveness, is, however, modified by the federal Constitution in the following respects:

1. "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime" (Art. IV, Sec. 2). As we have already learned, this constitutional provision has been construed to impose simply a moral obligation upon the States—not a legal obligation the performance of which by the state authorities may be compelled by the Federal Government.

2. "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof" (Art. IV, Sec. 1).[1]

of the States, when administrating justice within a State between suitors entitled to bring suits therein, will recognize and be governed by them. But, like other rules of law, they are subject to be varied and controlled by state legislation, and there may be and often is a general state policy upon some particular subject before which the rules of private international law which are opposed to it must give way." Cooley, "Principles of Constitutional Law," p. 178.

[1] This Congress has done. By a law passed in 1790 ("Revised Statutes," Sec. 905), it is provided that "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of

3. "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" (Art. IV, Sec. 2).

The last two of these constitutional modifications of the interstate exclusiveness of the members of the American Union require some discussion.

The provision that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," means, that when, in any legal proceeding instituted in one State, there is involved a right that is evidenced by or has been recognized or created by a legislative act, record, or judicial proceeding of another State, it shall be recognized and enforced.

Thus, if a person after actual service of process upon a debtor obtain judgment against him in the courts of one State, he may bring suit upon that judgment against his debtor and attach his property in any other State, and in such suit the debtor may not attack the judgment upon its merits. He may deny that such a judgment exists, or question the jurisdiction of the court that rendered it, but, these pleas being overruled, he cannot further oppose the rendition of a new judgment against him upon the ground that the court that rendered the first decision against him erred

the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings so authenticated, shall have such faith and credit given them in every court within the United States as they have by law and usage in the courts of the State from which they are taken."

either at law or in its determination of the facts. The real effect of the constitutional provision is thus to establish a binding rule of evidence, rather than one of jurisdiction. A judgment rendered in one State cannot be treated as a judgment in another State, but it may serve as the indisputable evidence of a debt. Thus, referring to this constitutional clause and to the statute passed by Congress in pursuance of it, the Supreme Court has said in Wisconsin *v.* Pelican Insurance Co. (127 U. S., 265): "While they make the record of a judgment, rendered after due notice in one State, conclusive evidence in the courts of another State or of the United States, of the matter adjudged, they do not affect the jurisdiction either of the court in which the judgment is rendered or of the court in which it is offered in evidence. Judgments recovered in one State of the Union, when proved in the courts of another government, whether state or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being reëxaminable on their merits, nor impeachable for a fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. In the words of Justice Story: '. . . The Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within the territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribu-

nals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments.' ''

The real force and meaning of this ''full faith and credit'' clause of the Constitution has been especially worked out in connection with the subject of marriage and divorce and it will therefore be proper to state briefly the positions that the Supreme Court has assumed upon this point.

Shortly stated, this court has held that one State is not obliged to recognize the validity of a decree of divorce granted by a court of another State unless that court had jurisdiction to grant it, and that such jurisdiction depends upon the domicil of the parties. If the *bona fide* domicil of both of the parties, or of the husband only, is that of the State in which the divorce is granted, the decree is binding in every other State (Atherton *v.* Atherton, 181 U. S., 155). It is also similarly valid if the *bona fide* domicil of but the wife be in the State in which the decree is granted, if the wife has left the home of her husband because of misconduct upon his part, and notice actual or constructive (*i. e.,* by publication or mailing of notice) of the beginning of the suit has been served upon him. A decree of divorce granted the husband by a court of the State in which he is domiciled, if proper notice of the beginning of the suit has been served upon the wife, is valid in other States whether or not he has in fact left his wife without good cause. This is because the matrimonial domicil is that of the husband, and the wife

can obtain a different domicil only in case of fault upon his part. Whether or not a state court has jurisdiction to render a decree of divorce that will have extraterritorial effect where the domicil of the party plaintiff only is in the State, but the matrimonial domicil is in another State, and where there has been only constructive and not actual service upon the defendant, has not yet been answered by the Supreme Court.[1] The better opinion would seem to be, however, that it has. Where the plaintiff has not a *bona fide* domicil in the State, a court cannot render a decree binding in other States even if the non-resident defendant voluntarily enters a personal appearance (Andrews *v.* Andrews, 188 U. S., 14). Of course, however, there is nothing to prevent courts of one State from recognizing, if they see fit, a decree thus granted in another State. The provision of the Federal Constitution is brought into force only when state courts refuse to grant full faith and credit (Lynde *v.* Lynde, 181 U. S., 183).

Finally it should be said that in all cases where the notice that has been served upon the defendant has been but a constructive one, that is, by publication or mailing and not personal, the decree that is rendered has no extraterritorial force except as dissolving the matrimonial status. It cannot control in an extrater-

[1] In Andrews *v.* Andrews, decided in 1903, the Court said: "True it is that in Bell *v.* Bell and Streitwolf *v.* Streitwolf, the question was reserved whether jurisdiction to render a divorce having extraterritorial effect could be acquired by a mere domicil in the State of the party plaintiff, where there had been no matrimonial domicil in such State—a question also reserved here."

ritorial manner questions of property rights, custody of children, and the payment of alimony.

The same principle appears in all suits. Where only constructive service has been obtained, only a judgment *in rem* may be rendered, that is, one upon which execution may be issued against any property within the State. Only in case there has been personal service upon the defendant may a judgment *in personam* be rendered, upon which suit may be brought in another State.

The clause of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," has for its general aim the prevention of arbitrary and vexatious discriminations by the several States in favor of their own citizens and against the citizens of other States. "It was undoubtedly the object of the clause in question," says the Supreme Court in the case of Paul *v.* Virginia (8 Wall., 168), "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly

to constitute the citizens of the United States one people as this (Lemmon *v.* The People of N. Y., 20 N. Y., 607). Indeed, without some provision of the kind, removing from the citizens of each State the disabilities of alienage in the other, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."

In a very early case in the federal Circuit Court (Corfield *v.* Coryell, 4 Wash. C. C., 371), Justice Washington attempted a still more particular, though not an exhaustive, enumeration of the privileges and immunities that are protected from state discrimination. He there said: "The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen

of one State to pass through or to reside in any other State for the purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised.[1] These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each State in every other State was manifestly calculated (to use the expression of the preamble to the corresponding provision in the old Articles of Confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union.' ''

Much of the foregoing quotation is *obiter,* the determination of the commonwealth privileges and immunities not being necessarily involved in the case. Many of these rights have, however, in subsequent

[1] As we shall presently see, the right to the exercise in the several States of the elective franchise may be made dependent upon residence in the State for a fixed period. This period of residenceship must be the same for all persons coming from any of the other States.

cases, been specifically passed upon and sustained,[1] and it is believed that there is not one of them that would not be declared by the Supreme Court, in a proper case, to be beyond the discriminating power of the States.

The latest important construction by the Supreme Court of this equal privileges and immunities clause is to be found in the case of Blake *v.* McClung (172 U. S., 239), decided in 1898. In that case there was held unconstitutional an act of the State of Tennessee which provided that resident creditors of mining and manufacturing corporations chartered in other States, and doing business in the State of Tennessee should have "a priority in the distribution of assets, or subjection to the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries." After calling attention to the fact that the court had never attempted to give an exact or comprehensive definition of the clause "privileges and immunities" but had deemed it "safe, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined in each case, upon a view of the particular rights asserted and denied therein," the Court nevertheless goes on to quote with approval the decision of Justice Washington in Corfield *v.* Coryell, and the opinion of the Supreme Court in Paul *v.* Virginia. The principles therein stated, it is declared, "have not been modified by any subsequent decision of this court."

[1] See especially articles by W. S. Meyers in "Michigan Law Review," I, pp. 286, 364.

Turning now to the negative side of the subject, it may be said that a citizen of one State, resident in or seeking the enforcement of rights in another State, is not entitled, of right, to all the privileges and immunities that the laws and constitution of his own State may grant to him.

"The privileges and immunities secured to citizens of each State in the several States, by the provision in question," the Supreme Court has declared (Paul *v.* Virginia), "are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States."

Continuing, the Court goes on in the same case to declare that inasmuch as a corporation is the mere creation of local law, it can have no legal existence, or right to do business, beyond the limits of the sovereignty by which it has been created. In other words, the interstate comity clause of the federal Constitution which we have been discussing does not necessitate the recognition by the several States of corporations created by any of the other States. "Having no absolute right of recognition in other States," says the Court, "but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think

proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

This principle of state omnipotence when dealing with the corporations of other States is, however, limited, it should be observed, in the very important respect that in so far as such corporations are engaged in the conduct of interstate commerce they may not be controlled, the regulation of this subject being, as has been before shown, exclusively a federal concern.[1]

The interstate comity clause of the federal Constitution also does not compel the several States to grant to resident citizens of the other States the political privileges extended their own citizens. This the Supreme Court has held from the very beginning, and has recently reaffirmed in the case of Blake *v.* McClung. "A State," says the court in that case, " may, by rule uniform in its operation as to citizens of the several States, require residence within its limits for a given time before a citizen of another State who becomes a resident thereof shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each State of the privileges and immunities secured by the Constitution to citizens of the several States. The Constitution forbids only such legislation affecting citizens of the

[1] See especially Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S., 1.

respective States as will substantially or practically put a citizen of one State in a condition of alienage when he is within or removes to another State, or when asserting in another State the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the Government of the Union was ordained and established."

Finally, it may be said, that the several States may impose upon non-residents such special limitations and obligations as are, in aim and effect, not discriminative but reasonably necessary for the protection of their own citizens from fraud, disease, or injury of any sort. Thus, as an example, though the citizens of other States may not be forbidden to sue in the courts of the State, they may be required to give bonds for costs not exacted of residents.

COMPACTS BETWEEN THE STATES

THE control of international relations being exclusively vested in the Federal Government, it necessarily follows that the several States have no authority to enter into any diplomatic or political relations with foreign powers. Nevertheless, from an excess of caution, the federal Constitution declares that "No State shall enter into any treaty, alliance or confederation," and that "No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State, or with a foreign power."

It will be noticed that in the latter of these two con-

stitutional clauses, the qualification "without the consent of Congress" is introduced. There has, therefore, never been any doubt but that when this congressional consent is extended, the several States of the American Union may enter into agreements and compacts with one another, so long as their effect is not to create what in political language is termed an "alliance" or "confederation."[1] Not only this, but it has been held that there are a variety of subjects concerning which the several States may enter into agreements with one another without the necessity of obtaining the consent of Congress. Upon this point, in Virginia *v.* Tennessee (148 U. S., 503), the Supreme Court said:

"There are many matters upon which different States may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter State might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter State to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that State to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through the State in that way. If the bordering line of the two States should cross some malarious and disease-producing district, there could be no possible

[1] Green *v.* Biddle, 8 Wh., 1; Poole *v.* Fleeger, 11 Pet., 185.

reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering States to agree to unite in removing the cause of disease. So, in the case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session."

"If, then," the Court asks, "the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one State and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?" "Looking at the clause in which the terms 'compact' or 'agreement' appear," answers the Court, "it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[1]

SUITS BETWEEN STATES

A FINAL topic to be discussed in connection with the general subject of Interstate Relations is that of the amenability of one State to a suit brought against it by another State.

[1] The Court then goes on to quote with approval from Story's "Commentaries upon the Constitution," Sec. 1403.

Since the very first years of the Union, the Supreme Court of the United States, in the exercise of its original jurisdiction, has entertained suits between States upon questions of boundary.[1] This tribunal has not, however, limited its jurisdiction over suits between States to boundary controversies merely. Whenever it has discovered substantial state interests at stake, it has extended its judicial power. Thus, in the recent case of Missouri *v.* Illinois (180 U. S., 208), decided in 1900, in which the State of Missouri had complained that the health and property of her citizens were endangered by the emptying into the Mississippi River of the sewage of the City of Chicago, the Supreme Court, in overruling a demurrer as to its jurisdiction, declared: "An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this Court at the suit of the State of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the General Government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is

[1] For a review of such cases see the opinion of the Supreme Court rendered in the case of Missouri *v.* Illinois, 180 U. S., 208.

found in the constitutional provisions we are considering."

So, also, in the case of Kansas *v.* Colorado (185 U. S., 125), decided in 1902, the Supreme Court held that a controversy between States of which it had original jurisdiction was presented by a bill averring that the defendant State had, and was about to exercise, the power wholly to deprive the plaintiff State of the benefit of the water of the Arkansas River which rises in the State of Colorado and flows into and through the State of Kansas.

In the case of Louisiana *v.* Texas (176 U. S., 1), however, the court held that a bill alleging that the public officers of the latter State were so executing quarantine laws, valid in themselves, as to discriminate between the citizens of Texas and those of Louisiana, did not state a proper ground of a suit between States. In its opinion the Court said: "In order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another. . . . A controversy between States does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one State to a distinct collision with a sister State."

Regarding this subject of suits between States, it may finally be added that it has been held that neither Indian tribes nor territories are "States" in the sense of the clause of the Constitution granting original jurisdiction to the Supreme Court (Cherokee Nation *v.* Georgia, 5 Pet., 1; and Hepburn *v.* Ellzey, 2 Cr., 445).

No instance of a suit between a foreign power and one of the States of the American Union has arisen, and it is very doubtful whether the Supreme Court would entertain one. A foreign power could not, of course, be made to appear as a defendant in such a suit, and reason would therefore suggest that it should not be permitted to appear as a plaintiff.

The question whether the Supreme Court will entertain a suit requiring a money judgment brought by one State against another, has just been decided in the affirmative. Such a suit was brought a number of years ago by New Hampshire against Louisiana (108 U. S.,76), but was dismissed upon the ground that the plaintiff State was not really a party of interest, but had instituted the suit in behalf of some of its own citizens. In the case of South Dakota *v.* North Carolina (24 Supreme Court Reporter, 269), however, decided February 1, 1904, it appearing that South Dakota was suing in its own behalf, the Supreme Court asserted its original jurisdiction and rendered judgment against the defendant State, North Carolina. A dissenting opinion, concurred in by four justices, was filed.

No suit has yet been brought by a State against the United States. In Chisholm *v.* Georgia, Chief Justice Jay indicated, *obiter,* that such a suit probably could not be brought; but in Mississippi *v.* Johnson, a contrary view was intimated.[2]

A number of suits against individual States insti-

[1] For reasons stated in Chapter IX. For a fuller discussion of this point, see "Columbia Law Review," Vol. II, 283, 364.

[2] See two excellent articles entitled "Notes on Suits between States," in the "Columbia Law Review," Vol. II, 283, 364.

tuted by the United States have been entertained by the Supreme Court. Thus in United States *v.* North Carolina (136 U. S., 211) an action of debt upon certain bonds issued by the defendant was tried and determined upon its merits; and in United States *v.* Texas (143 U. S., 621) a question of boundary was determined.

BIBLIOGRAPHICAL NOTE

THIS note is by no means intended to be exhaustive. Its aim is simply to suggest the more important sources of information regarding the constitutional law of the United States.

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II. *Sources.*

1. *United States Supreme Court Reports.* The one great source of information regarding the constitutional law of the United States is the reported decisions of the federal Supreme Court. The volumes in which these are contained now (1904) number one hundred and ninety. About four new volumes are added each year. In the more important cases, abstracts of counsel as well as the opinions of the justices are given. Until 1875 these volumes received the name of the official reporting them. Since then they

have been designated simply as United States Reports. Current decisions, in unbound form, are published and sold to subscribers.

The following is a list of the reports, giving their titles, abbreviations commonly used in citing them, the number of volumes, and periods covered.

Reporters	Abbreviations	Volumes	Periods Covered
Dallas	Dall.	4	1790–1800
Cranch	Cr.	9	1801–1815
Wheaton	Wh. or Wheat.	12	1816–1827
Peters	Pet.	16	1828–1842
Howard	How.	24	1843–1860
Black	Black	2	1861–1862
Wallace	Wall.	23	1863–1874
United States Reports	91–190 U. S.	100	1875–1904

Volumes 91–107 U. S. inclusive are sometimes cited as Otto 1–17.

J. B. THAYER'S "Cases in Constitutional Law" (1895), in two very large volumes, is an admirable selection of condensed cases, illuminated with notes, prepared for use by students following the "Case Book" system of instruction. Smaller collections are:

C. E. BOYD'S "Cases in American Constitutional Law" (1898);

E. MCCLAIN'S "A Selection of Cases on Constitutional Law" (1900).

2. *Reports of the Inferior Federal Courts.* Almost all important constitutional questions are carried to the Supreme Court, so that these reports are very much less important than those of the highest court.

3. *Reports of the Highest Courts of the States.* Many important constitutional questions in state con-

stitutional law receive their final determination by these tribunals.

4. *Opinions of the Attorney-General of the United States.* These opinions, given for the guidance of federal officers, often deal with important constitutional questions that have not been, or cannot be, considered by the Supreme Court.

5. *Federal Statutes and Treaties.* Each year there is published by the National Government a volume entitled "The Statutes at Large of the United States of America, . . . and Recent Treaties, Conventions, Executive Proclamations, and the Concurrent Resolutions of the Two Houses of Congress." In 1878 there was published "The Revised Statutes of the United States," which embraced all federal laws, general and permanent in their nature, in force December 1, 1873.

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T. M. COOLEY, A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of

the States of the American Union. 7th Ed. 1903. A great work, but, as its title indicates, covering only a portion of the field of American constitutional law.

T. M. COOLEY and others, The Constitutional History of the United States as Seen in the Development of its Law. 1889. A series of excellent lectures by eminent lawyers.

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E. P. Powell, Nullification and Secession in the United States. 1897.

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CONSTITUTION OF THE UNITED STATES[1]

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

ARTICLE I.—Legislative Department

SECTION I.—All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION II.—*Clause* 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

Clause 2. No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Clause 3. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, *three-fifths of all other persons.*

[1] Italicized clauses have been repealed or have become obselete.

The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. *The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three; Massachusetts, eight; Rhode Island and Providence Plantations, one; Connecticut, five; New York, six; New Jersey, four; Pennsylvania, eight; Delaware, one; Maryland, six; Virginia, ten; North Carolina, five; South Carolina, five; and Georgia, three.*

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

Clause 5. The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

SECTION III.—*Clause* 1. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.

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

Clause 3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

Clause 4. The Vice-President of the United States shall be

president of the Senate, but shall have no vote, unless they be equally divided.

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

Clause 6. The Senate shall have the sole power to try all impeachments: when sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Clause 7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

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

Clause 2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION V.—*Clause* 1. Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

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

Clause 3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and

nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Clause 4. Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

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

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

SECTION VII.—*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.

Clause 2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill

shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Clause 3. Every order, resolution or vote, to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII.—*Clause* 1. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

Clause 2. To borrow money on the credit of the United States;

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

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

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

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

Clause 7. To establish post-offices and post-roads;

Clause 8. To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries;

Clause 9. To constitute tribunals inferior to the Supreme Court;

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

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

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

Clause 13. To provide and maintain a navy;

Clause 14. To make rules for the government and regulation of the land and naval forces;

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

Clause 16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

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

Clause 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION IX.—*Clause* 1. *The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.*

Clause 2. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

Clause 3. No bill of attainder or ex-post-facto law shall be passed.

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

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

Clause 6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

Clause 7. No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

Clause 8. No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince or foreign state.

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

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

Clause 3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships-of-war, in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.—Executive Department

SECTION I.—*Clause* 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows:

Clause 2. Each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an Elector.

[*Clause* 3. *The Electors shall meet in their respective States, and vote by ballot for two persons, of whom one, at least, shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the Government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of Electors appointed; and if there be more than one, who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose, by ballot, one of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall, in like manner, choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the Electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice-President.*] The foregoing Clause was repealed in 1804. It is quoted here merely for

reference. Article XII. of the Amendments replaces it in the Constitution, and is here inserted instead of the original Clause.

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

necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

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

Clause 5. No person except a natural-born citizen, *or a citizen of the United States at the time of the adoption of this Constitution*, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years resident within the United States.

Clause 6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President; and such officer shall act accordingly until the disability be removed, or a President shall be elected.

Clause 7. The President shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Clause 8. Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

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

pardons for offences against the United States, except in cases of impeachment.

Clause 2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

Clause 3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session.

SECTION III.—He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION IV.—The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.—Judicial Department

SECTION I.—The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The

judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

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

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

Clause 3. The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION III.—*Clause* 1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.

Clause 2. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

Clause 3. The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.—General Provisions

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

SECTION II.—*Clause* 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Clause 2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

Clause 3. *No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.*

SECTION III.—*Clause* 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress.

Clause 2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION IV.—The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the Legislature, or of the executive (when the Legislature cannot be convened), against domestic violence.

ARTICLE V.—Power of Amendment

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI.— Miscellaneous Provisions

Clause 1. All debts contracted, and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

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, any thing in the Constitution or laws of any State to the contrary notwithstanding.

Clause 3. The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.—Ratification of the Constitution

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in convention, by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the Independence of the United States of America the twelfth.

In witness whereof, we have hereunto subscribed our names.

GEORGE WASHINGTON,
President, and Deputy of Virginia.

NEW HAMPSHIRE
JOHN LANGDON
NICHOLAS GILMAN

MASSACHUSETTS
NATHANIEL GORHAM
RUFUS KING

CONNECTICUT
WILLIAM SAMUEL JOHNSON
ROGER SHERMAN

NEW YORK
ALEXANDER HAMILTON

NEW JERSEY
WILLIAM LIVINGSTON
DAVID BREARLEY
WILLIAM PATERSON
JONATHAN DAYTON

PENNSYLVANIA
BENJAMIN FRANKLIN
THOMAS MIFFLIN
ROBERT MORRIS
GEORGE CLYMER
THOMAS FITZSIMONS
JARED INGERSOLL
JAMES WILSON
GOUVERNEUR MORRIS

DELAWARE
GEORGE READ
GUNNING BEDFORD, JR.
JOHN DICKINSON
RICHARD BASSETT
JACOB BROOM

MARYLAND
JAMES MCHENRY
DANIEL OF ST. THOMAS JENIFER
DANIEL CARROLL

VIRGINIA
JOHN BLAIR
JAMES MADISON, JR.

NORTH CAROLINA
WILLIAM BLOUNT
RICHARD DOBBS SPAIGHT
HUGH WILLIAMSON

SOUTH CAROLINA
JOHN RUTLEDGE
CHARLES C. PINCKNEY
CHARLES PINCKNEY
PIERCE BUTLER

GEORGIA
WILLIAM FEW
ABRAHAM BALDWIN

Attest: WILLIAM JACKSON, *Secretary*

AMENDMENTS

TO THE CONSTITUTION OF THE UNITED STATES, RATIFIED ACCORDING TO THE PROVISIONS OF THE FIFTH ARTICLE OF THE FOREGOING CONSTITUTION

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

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

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

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

ARTICLE V.—No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war and public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

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

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

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

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

ARTICLE XI.—The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

ARTICLE XII.—See pages 308 and 309.

ARTICLE XIII.—*Section* 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the person shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

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

ARTICLE XIV.—*Section* 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to

any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be appointed among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of Electors for President and Vice-President of the United States, Representatives in Congress, the executive or judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or Elector of President or Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

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

ARTICLE XV.—*Section* 1. The rights of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

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

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