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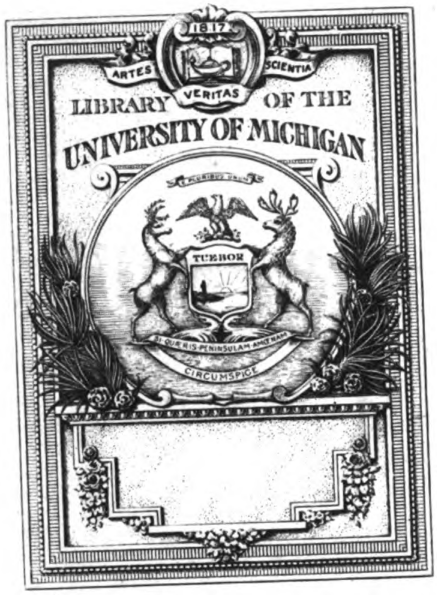

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74TH CONGRESS
2d Session

SENATE

DOCUMENT
No. 232

THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA

(ANNOTATED)

ANNOTATIONS OF CASES DECIDED BY THE
SUPREME COURT OF THE UNITED STATES
TO JANUARY 1, 1938

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1938

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SENATE CONCURRENT RESOLUTION NO. 35

(Submitted by Mr. Ashurst)

Resolved by the Senate (*the House of Representatives concurring*), That the Constitution of the United States of America (Annotated), including all amendments thereto, and with citations of the cases of the Supreme Court of the United States construing its several provisions, collated under each separate provision, be compiled and revised up to date, and that the same shall be printed and bound; and that three thousand copies shall be printed, of which two thousand two hundred copies shall be for the use of the House of Representatives and eight hundred copies for the use of the Senate.

Adopted May 14, 1936.

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PREFACE

By Senate Concurrent Resolution No. 35, submitted by Senator Henry F. Ashurst of Arizona, and subsequently adopted by the Congress on May 14, 1936, there was directed to be compiled a revised edition of the Constitution of the United States (Annotated) which had been published by order of the Senate in 1924. With the concurrence of the then Director of the Legislative Reference Service, the task of revision was entrusted to the Bill Digest Section of that Service.

Recognizing that the 1924 Annotation has been widely used, the present compilers have in the main followed the plan of that work. Any alteration has been made with the one object of increasing the practical usefulness of the publication.

Some changes in format and type have been adopted, which will speak for themselves. In particular, the clauses of the Constitution, where they appear through the body of the text, are printed in special type; and cut-in side notes indicate the subject matter of the several clauses.

Several important substantive changes require explanation:

First. The revision has undertaken to break down the accumulated statements of the several paragraphs of text, and allocated to each the pertinent citations by means of numbered notes. This task confronted the revisers at the very outset and has necessitated a careful check of all the material in the 1924 volume especially where multiple citations were given to a paragraph which contained several statements of law. It has materially lengthened the period of preparation but seemed clearly worth while in a volume designed for rapid and ready reference.

Second. The examination necessary to carry out the more exact citation of cases thus undertaken led to a rather extensive rewriting of the notes. In view of the considerable number of new cases to be included, it was felt that every reasonable means of saving space should be adopted. Obviously the work could not hope to be exhaustive without overrunning the bounds of a single volume. The revisers have therefore limited the number of quotations or statements on any one point. Mere iteration has in general been avoided. This has meant cutting many of the notes in the 1924 volume which, while pertinent, seemed not to be essential.

In preparing the notes, the exact language of the Court has in many instances been reproduced. In addition to exact quotations, or paraphrases of the opinions, the headnotes of the reports have been freely utilized in summing up the law.

The arrangement of notes under the several clauses has for the most part followed the order of the text of the particular clause under consideration. This procedure is obviously suggested by such clauses as article 1, section 8

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(powers of Congress) or article 1, section 10 (enumerating actions prohibited to the States); it is equally followed where annotations are made upon separate words of the text, and under clauses where an extensive subheading proved necessary.

Aid from the textwriters has been limited by practical considerations of time and staff. Of the general works on the Constitution, those of Justices Story and Miller, and the more recent volumes of Willoughby, have been most frequently consulted, and in more specialized fields the works of Benedict on Admiralty, McGehee on Due Process of Law, Freund on Police Power, and Gavit on the Commerce Clause. The United States Code Annotated has proved valuable not only in checking the cases, but in suggestions for arrangement.

Certain features of the earlier volume, which are perhaps strictly beyond the scope of a mere annotation, have been retained in a revised form [e. g., an historical statement of the formation of the Constitution (p. 9) a general note on constitutional interpretation (p. 57), a list of Federal statutes held unconstitutional (p. 1065)].

A new feature is the table of cases (p. 1079) which it is hoped will facilitate the use of the volume.

The annotations include the decisions of the Supreme Court rendered prior to January 1, 1938.

W. C. GILBERT,
In Charge, Bill Digest Section.

HERBERT PUTNAM,
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HISTORICAL NOTE ON FORMATION OF THE CONSTITUTION

In June 1774, the Virginia and Massachusetts assemblies independently proposed an intercolonial meeting of delegates from the several colonies to restore union and harmony between Great Britain and her American Colonies. Pursuant to these calls there met in Philadelphia in September of that year the first Continental Congress, composed of delegates from 12 colonies. On October 14, 1774, the assembly adopted what has come to be known as the Declaration and Resolves of the First Continental Congress. In that instrument, addressed to His Majesty and to the people of Great Britain, there was embodied a statement of rights and principles, many of which were later to be incorporated in the Declaration of Independence and the Federal Constitution.[a]

This Congress adjourned in October with a recommendation that another Congress be held in Philadelphia the following May. Before its successor met, the battle of Lexington had been fought. In Massachusetts the colonists had organized their own government in defiance of the royal governor and the Crown. Hence, by general necessity and by common consent, the second Continental Congress assumed control of the "Twelve United Colonies", soon to become the "Thirteen United Colonies" by the cooperation of Georgia. It became a *de facto* government: it called upon the other colonies to assist in the defense of Massachusetts; it issued bills of credit; it took steps to organize a military force, and appointed George Washington commander in chief of the Army.

While the declaration of the causes and necessities of taking up arms of July 6, 1775,[b] expressed a "wish" to see the union between Great Britain and the colonies "restored", sentiment for independence was growing. Finally, on May 15, 1776, Virginia instructed her delegates to the Continental Congress to have that body "declare the united colonies free and independent States." [c]

[a] The colonists, for example, claimed the right "to life, liberty, and property", "the rights, liberties, and immunities of free and natural-born subjects within the realm of England"; the right to participate in legislative councils; "the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of [the common law of England]"; "the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws"; "a right peaceably to assemble, consider of their grievances, and petition the king." They further declared that the keeping of a standing army in the colonies in time of peace without the consent of the colony in which the army was kept was "against law"; that it was "indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legislature be independent of each other"; that certain acts of Parliament in contravention of the foregoing principles were "infringements and violations of the rights of the colonists." (Text in Documents Illustrative of the Formation of the Union, pp. 1–5.)

[b] Text in Documents Illustrative of the Formation of the Union, pp. 10–17.

[c] Ibid., pp. 19–20.

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Accordingly on June 7 a resolution was introduced in Congress declaring the union with Great Britain dissolved, proposing the formation of foreign alliances, and suggesting the drafting of a plan of confederation to be submitted to the respective colonies.[4] Some delegates argued for confederation first and declaration afterwards. This counsel did not prevail. Independence was declared on July 4, 1776; the preparation of a plan of confederation was postponed. It was not until November 17, 1777, that the Congress was able to agree on a form of government which stood some chance of being approved by the separate States. The Articles of Confederation were then submitted to the several States, and on July 9, 1778, were finally approved by a sufficient number to become operative.

Weaknesses inherent in the Articles of Confederation became apparent before the Revolution out of which that instrument was born had been concluded. Even before the thirteenth State (Maryland) conditionally joined the "firm league of friendship" on March 1, 1781, the need for a revenue amendment was widely conceded. Congress under the Articles lacked authority to levy taxes. She could only request the States to contribute their fair share to the common treasury, but the requested amounts were not forthcoming. To remedy this defect, Congress applied to the States for power to lay duties and secure the public debts. Twelve States agreed to such an amendment, but Rhode Island refused her consent, thereby defeating the proposal.

Thus was emphasized a second weakness in the Articles of Confederation, namely, the *liberum veto* which each State possessed whenever amendments to that instrument were proposed. Not only did all amendments have to be ratified by each of the 13 States, but all important legislation needed the approval of 9 States. With several delegations often absent, one or two States were able to defeat legislative proposals of major importance.

Other imperfections in the Articles of Confederation also proved embarrassing. Congress could, for example, negotiate treaties with foreign powers, but all treaties had to be ratified by the several States. Even when a treaty was approved, Congress lacked authority to secure obedience to its stipulations. Congress could not act directly upon the States or upon individuals. Under such circumstances foreign nations doubted the value of a treaty with the new republic.

Furthermore, Congress had no authority to regulate foreign or interstate commerce. Legislation in this field, subject to unimportant exceptions, was left to the individual States. Disputes between States with common interests in the navigation of certain rivers and bays were inevitable. Discriminatory regulations were followed by reprisals.

Virginia, recognizing the need for an agreement with Maryland respecting the navigation and jurisdiction of the Potomac River, appointed in June 1784, four commissioners to "frame such liberal and equitable regulations concerning the said river as may be mutually advantageous to the two States." Maryland in January 1785 responded to the Virginia resolution by appointing a like number of commissioners[5] "for the purpose of settling the navigation and

[4] Ibid., p. 21.

[5] George Mason, Edmund Randolph, James Madison, and Alexander Henderson were appointed commissioners for Virginia; Thomas Johnson, Thomas Stone, Samuel Chase, and Daniel of St. Thomas Jenifer for Maryland.

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jurisdiction over that part of the bay of Chesapeake which lies within the limits of Virginia, and over the rivers Potomac and Pocomoke" with full power on behalf of Maryland "to adjudge and settle the jurisdiction to be exercised by the said States, respectively, over the waters and navigations of the same."[f]

At the invitation of Washington the commissioners met at Mount Vernon, in March 1785, and drafted a compact which, in many of its details relative to the navigation and jurisdiction of the Potomac, is still in force.[g] What is more important, the commissioners submitted to their respective States a report in favor of a convention of all the States "to take into consideration the trade and commerce" of the Confederation. Virginia, in January 1786, advocated such a convention, authorizing its commissioners to meet with those of other States, at a time and place to be agreed on, "to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States, such an act relative to this great object, as when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same."[h]

This proposal for a general trade convention seemingly met with general approval; nine States appointed commissioners. Under the leadership of the Virginia delegation, which included Randolph and Madison, Annapolis was accepted as the place and the first Monday in September 1786 as the time for the convention. The attendance at Annapolis proved disappointing. Only five States—Virginia, Pennsylvania, Delaware, New Jersey, and New York—were represented; delegates from Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. Because of the small representation, the Annapolis convention did not deem "it advisable to proceed on the business of their mission." After an exchange of views, the Annapolis delegates unanimously submitted to their respective States a report in which they suggested that a convention of representatives from all the States meet at Philadelphia on the second Monday in May 1787 to examine the defects in the existing system of government and formulate "a plan for supplying such defects as may be discovered."[i]

The Virginia legislature acted promptly upon this recommendation and appointed a delegation to go to Philadelphia. Within a few weeks New Jersey, Pennsylvania, North Carolina, Delaware, and Georgia also made appointments. New York and several other States hesitated on the ground that, without the consent of the Continental Congress, the work of the convention would be extra-legal; that Congress alone could propose amendments to the Articles of Confederation. Washington was quite unwilling to attend an irregular convention. Congressional approval of the proposed convention became, therefore, highly important. After some hesitancy Congress approved the suggestion for a convention at Philadelphia "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and

[f] The text of the resolutions is to be found in 153 U. S. 162–163.

[g] See Wharton v. Wise, 153 U. S. 155 [1894].

[h] Text in Documents Illustrative of the Formation of the Union, p. 38.

[i] Ibid., pp. 39–43.

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confirmed by the States render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union."

Thereupon, the remaining States, Rhode Island alone excepted, appointed in due course delegates to the Convention, and Washington accepted membership on the Virginia delegation.

Although scheduled to convene on May 14, 1787, it was not until May 25 that enough delegates were present to proceed with the organization of the Convention. Washington was elected as presiding officer. It was agreed that the sessions were to be strictly secret.

On May 29 Randolph, on behalf of the Virginia delegation, submitted to the convention 15 propositions as a plan of government. Despite the fact that the delegates were limited by their instructions to a revision of the Articles, Virginia had really recommended a new instrument of government. For example, provision was made in the Virginia plan for the separation of the three branches of government; under the Articles executive, legislative, and judicial powers were vested in the Congress. Furthermore the legislature was to consist of two houses rather than one.

On May 30 the Convention went into a committee of the whole to consider the 15 propositions of the Virginia plan *seriatim*. These discussions continued until June 13, when the Virginia resolutions in amended form were reported out of committee. They provided for proportional representation in both houses. The small States were dissatisfied. Therefore, on June 14 when the Convention was ready to consider the report on the Virginia plan, Paterson of New Jersey requested an adjournment to allow certain delegations more time to prepare a substitute plan. The request was granted, and on the next day Paterson submitted nine resolutions embodying important changes in the Articles of Confederation, but strictly amendatory in nature. Vigorous debate followed. On June 19 the States rejected the New Jersey plan and voted to proceed with a discussion of the Virginia plan. The small States became more and more discontented; there were threats of withdrawal. On July 2 the convention was deadlocked over giving each State an equal vote in the upper house—five States in the affirmative, five in the negative, one divided.[1]

The problem was referred to a committee of 11, there being 1 delegate from each State, to effect a compromise. On July 5 the committee submitted its report, which became the basis for the "great compromise" of the convention. It was recommended that in the upper house each State should have an equal vote, that in the lower branch each State should have one representative for every 40,000 inhabitants, counting three-fifths of the slaves, that money bills should originate in the lower house (not subject to amendment by the upper chamber). When on July 12 the motion of Gouverneur Morris of Pennsylvania that direct taxation should also be in proportion to representation, was adopted, a crisis had been successfully surmounted. A compromise spirit began to prevail. The small States were now willing to support a strong national government.

Debates on the Virginia resolutions continued. The 15 original resolutions had been expanded into 23. Since these resolutions were largely declarations of principles, on July 24 a committee of five[2] was selected to draft a detailed

[1] The New Hampshire delegation did not arrive until July 23, 1787.

[2] Rutledge of South Carolina, Randolph of Virginia, Gorham of Massachusetts, Ellsworth of Connecticut, and Wilson of Pennsylvania.

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constitution embodying the fundamental principles which had thus far been approved. The Convention adjourned from July 26 to August 6 to await the report of its committee of detail. This committee, in preparing its draft of a Constitution, turned for assistance to the State constitutions, to the Articles of Confederation, to the various plans which had been submitted to the Convention and other available material. On the whole the report of the committee conformed to the resolutions adopted by the Convention, though on many clauses the members of the committee left the imprint of their individual and collective judgments. In a few instances the committee avowedly exercised considerable discretion.

From August 6 to September 10 the report of the committee of detail was discussed, section by section, clause by clause. Details were attended to, further compromises were effected. Toward the close of these discussions, on September 8, another committee of five [1] was appointed "to revise the style of and arrange the articles which had been agreed to by the house."

On Wednesday, September 12 the report of the committee of style was ordered printed for the convenience of the delegates. The Convention for 3 days compared this report with the proceedings of the Convention. The Constitution was ordered engrossed on Saturday, September 15.

The Convention met on Monday, September 17, for its final session. Several of the delegates were disappointed in the result. A few deemed the new Constitution a mere makeshift, a series of unfortunate compromises. The advocates of the Constitution, realizing the impending difficulty of obtaining the consent of the States to the new instrument of Government, were anxious to obtain the unanimous support of the delegations from each State. It was feared that many of the delegates would refuse to give their individual assent to the Constitution. Therefore, in order that the action of the convention would appear to be unanimous, Governeur Morris devised the formula "Done in Convention, by the unanimous consent of the States present the 17th of September * * * In witness whereof we have hereunto subscribed our names." Thirty-nine of the forty-two delegates present thereupon "subscribed" to the document.[2]

The Convention had been called to revise the Articles of Confederation. Instead, it reported to the Continental Congress a new Constitution. Furthermore, while the Articles specified that no amendments should be effective until approved by the legislatures of all the States, the Philadelphia Convention suggested that the new Constitution should supplant the Articles of Confederation when ratified by conventions in nine States. For these reasons, it was feared that the new Constitution might arouse opposition in Congress.

Three members of the Convention—Madison, Gorham, and King—were also Members of Congress. They proceeded at once to New York, where

[1] William Samuel Johnson of Connecticut, Alexander Hamilton of New York, Gouverneur Morris of Pennsylvania, James Madison of Virginia, and Rufus King, of Massachusetts.

[2] At least 65 persons had received appointments as delegates to the Convention; 55 actually attended at different times during the course of the proceedings; 39 signed the document. It has been estimated that generally fewer than 30 delegates attended the daily sessions. For further details respecting the Convention of 1787 *see*: Elliott, Debates; Farrand, Records of the Constitutional Conventions; Farrand, The Framing of the Constitution; Meigs, Growth of the Constitution.

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Congress was in session, to placate the expected opposition. Aware of their vanishing authority, Congress on September 28, after some debate, decided to submit the Constitution to the States for action. It made no recommendation for or against adoption.

Two parties soon developed, one in opposition and one in support of the Constitution, and the Constitution was debated, criticized, and expounded clause by clause. Hamilton, Madison, and Jay wrote a series of commentaries, now known as the Federalist Papers, in support of the new instrument of government.[a] The closeness and bitterness of the struggle over ratification and the conferring of additional powers on the central government can scarcely be exaggerated. In some States ratification was effected only after a bitter struggle in the State convention itself.

Delaware, on December 7, 1787, became the first State to ratify the new Constitution, the vote being unanimous. Pennsylvania ratified on December 12, 1787, by a vote of 46 to 23, a vote scarcely indicative of the struggle which had taken place in that State. New Jersey ratified on December 19, 1787, and Georgia on January 2, 1788, the vote in both States being unanimous. Connecticut ratified on January 9, 1788; yeas 128, nays 40. On February 6, 1788, Massachusetts, by a narrow margin of 19 votes in a convention with a membership of 355, endorsed the new Constitution, but recommended that a bill of rights be added to protect the States from Federal encroachment on individual liberties. Maryland ratified on April 28, 1788; yeas 63, nays 11. South Carolina ratified on May 23, 1788; yeas 149, nays 73. On June 21, 1788, by a vote of 57 to 46, New Hampshire became the ninth State to ratify, but like Massachusetts she suggested a bill of rights.

By the terms of the Constitution nine States were sufficient for its establishment among the States so ratifying. The advocates of the new Constitution realized, however, that the new government could not succeed without the addition of New York and Virginia, neither of which had ratified. Madison, Marshall, and Randolph led the struggle for ratification in Virginia. On June 25, 1788, by a narrow margin of 10 votes in a convention of 168 members, that State ratified over the objection of such delegates as George Mason and Patrick Henry. In New York an attempt to attach conditions to ratification almost succeeded. But on July 26, 1788, New York ratified, with a recommendation that a bill of rights be appended. The vote was close—yeas 30, nays 27.

Eleven States having thus ratified the Constitution,[b] the Continental Congress—which still functioned at irregular intervals—passed a resolution on September 13, 1788, to put the new Constitution into operation. The first Wednesday of January 1789 was fixed as the day for choosing presidential electors, the first Wednesday of February for the meeting of electors, and the first Wednesday of March (i. e. March 4, 1789) for the opening session of the new Congress. Owing to various delays, Congress was late in assembling, and it was not until April 30, 1789, that George Washington was inaugurated as the first President of the United States.

[a] These commentaries on the Constitution, written during the struggle for ratification, have been frequently cited by the Supreme Court as an authoritative contemporary interpretation of the meaning of its provisions.

[b] North Carolina added her ratification on November 21, 1789; yeas 184, nays 77. Rhode Island did not ratify until May 29, 1790; yeas 34, nays 32.

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THE CONSTITUTION OF THE UNITED STATES OF AMERICA

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CONSTITUTION OF THE UNITED STATES

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within

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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 chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

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The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

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Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questiond in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Recon-

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sideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

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To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

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Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post

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facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's 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 Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The 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

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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 chuse 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 chuse the President. But in chusing 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 chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President,

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declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a

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Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

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Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States,

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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 it's equal Suffrage in the Senate.

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

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The Word, "the," being interlined between the seventh and eighth Lines of the first Page, The Word "Thirty" being partly written on an Erazure in the fifteenth Line of the first Page, The Words "is tried" being interlined between the thirty second and thirty third Lines of the first Page and the Word "the" being interlined between the forty third and forty fourth Lines of the second Page.

Attest WILLIAM JACKSON Secretary

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 Independance of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names,

G^{o}. WASHINGTON—Presid^{t}
and deputy from Virginia

New Hampshire	JOHN LANGDON NICHOLAS GILMAN
Massachusetts	NATHANIEL GORHAM RUFUS KING
Connecticut	W^{M}. SAM^{L}. JOHNSON ROGER SHERMAN
New York . . .	ALEXANDER HAMILTON
New Jersey	WIL: LIVINGSTON DAVID BREARLEY. W^{M}. PATERSON. JONA: DAYTON
Pensylvania	B FRANKLIN THOMAS MIFFLIN ROB^{T} MORRIS GEO. CLYMER THO^{S} FITZSIMONS JARED INGERSOLL JAMES WILSON GOUV MORRIS

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Delaware	Geo: Read Gunning Bedford jun John Dickinson Richard Bassett Jaco: Broom
Maryland	James McHenry Dan of St Thos Jenifer Danl Carroll
Virginia	John Blair— James Madison Jr.
North Carolina	Wm Blount Richd Dobbs Spaight. Hu Williamson
South Carolina	J. Rutledge Charles Cotesworth Pinckney Charles Pinckney Pierce Butler.
Georgia	William Few Abr Baldwin

In Convention Monday, September 17th 1787.

Present

The States of

New Hampshire, Massachusetts, Connecticut, Mr Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

Resolved,

That the preceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards 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;

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and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled. Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention

G° WASHINGTON Presid^{t}

W. JACKSON Secretary.

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AMENDMENTS

TO THE

CONSTITUTION OF THE UNITED STATES OF AMERICA

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ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.[a]

AMENDMENT [I.][b]

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

[a] In Dillon *v.* Gloss, 256 U. S. 368 [1921], the Supreme Court stated that it would take judicial notice of the date on which a State ratified a proposed constitutional amendment. Accordingly the Court consulted the State journals to determine the dates on which each house of the legislature of certain States ratified the 18th Amendment. It, therefore, follows that the date on which the governor approved the ratification, or the date on which the secretary of state of a given State certified the ratification, or the date on which the Secretary of State of the United States received a copy of said certificate, or the date on which he proclaimed that the amendment had been ratified are not controlling. Hence, the ratification date given in the following notes is the date on which the legislature of a given State approved the particular amendment (signature by the speaker or presiding officers of both houses being considered a part of the ratification of the "legislature"). When that date is not available, the date given is that on which it was approved by the governor or certified by the secretary of state of the particular State. In each case such fact has been noted. Except as otherwise indicated information as to ratification is based on data supplied by the Department of State.

[b] Brackets enclosing an amendment number indicate that the nunber was not specifically assigned in the resolution proposing the amendment. It will be seen, accordingly, that only amendments XIII, XIV, XV and XVI were thus technically ratified by number. The first 10 amendments along with 2 others which failed of ratification were proposed by Congress on September 25, 1789, when they passed the Senate [1 Ann. Cong. (1st Cong., 1st sess.) 90], having previously passed the House on September 24 [*Id.*, 948]. They appear officially in 1 Stat. 97. Ratification was completed on December 15, 1791, when the eleventh State (Virginia) approved these amendments, there being then 14 States in the Union.

The several State legislatures ratified the first 10 amendments to the Constitution (i. e. nos. 3 to 12 of those proposed) on the following dates: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; New York, February 27, 1790; Pennsylvania, March 10, 1790; Rhode Island, June 7, 1790; Vermont, November 3, 1791; Virginia, December 15, 1791. The two amendments which failed of ratification (i. e. nos. 1 and 2 of those proposed) prescribed the ratio of representation to population in the House, and specified that no law varying the compensation of members of Congress should be effective until after an intervening election of Representatives. The first was ratified by 10 States (1 short of the requisite number) and the second by 6 States [2 Doc. Hist. Const., 325–390].

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AMENDMENT [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.

AMENDMENT [III.]

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

AMENDMENT [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.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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AMENDMENT [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.

AMENDMENT [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.

AMENDMENT [VIII.]

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

AMENDMENT [IX.]

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

AMENDMENT [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.

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AMENDMENT [XI.][c]

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.

AMENDMENT [XII.][d]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall

[c] The 11th Amendment was proposed by Congress on March 4, 1794, when it passed the House [4 Ann. Cong. (3d Cong., 1st sess.) 477, 478], having previously passed the Senate on January 14 [*Id.*, 30, 31]. It appears officially in 1 Stat. 402. Ratification was completed on February 7, 1795, when the twelfth State (North Carolina) approved the amendment, there being then 15 States in the Union. Official announcement of ratification was not made until January 8, 1798, when President John Adams in a message to Congress stated that the 11th Amendment had been adopted by three-fourths of the States and that it "may now be deemed to be a part of the Constitution" [1 Mess. and Papers of Pres. 250]. In the interim South Carolina had ratified, and Tennessee had been admitted into the Union as the Sixteenth State.

The several State legislatures ratified the 11th Amendment on the following dates: New York, March 27, 1794; Rhode Island, March 31, 1794; Connecticut, May 8, 1794; New Hampshire, June 16, 1794; Massachusetts, June 26, 1794; Vermont, between October 9 and November 9, 1794; Virginia, November 18, 1794; Georgia, November 29, 1794; Kentucky, December 7, 1794; Maryland, December 26, 1794; Delaware, January 23, 1795; North Carolina, February 7, 1795; South Carolina, December 4, 1797 [State Department, Press Releases, vol. XII, p. 247 (1935)].

[d] The 12th Amendment was proposed by Congress on December 9, 1803, when it passed the House [13 Ann. Cong. (8th Cong., 1st sess.) 775, 776], having previously passed the Senate on December 2 [*Id*, 209]. It was not signed by the presiding officers of the House and Senate until December 12. It appears officially in 2 Stat. 306. Ratification was probably completed on June 15, 1804, when the legislature of the thirteenth State (New Hampshire) approved the amendment, there being then 17 States in the Union. The Governor of New Hampshire, however, vetoed this act of the legislature on June 20, and the act failed to pass again by two-thirds vote then required by the State constitution. Inasmuch as art. V of the Federal Constitution specifies that amendments shall become effective "when ratified by the legislatures of three-fourths of the several States or by conventions in three-fourths thereof," it has been generally believed that an approval or veto by a governor is without significance If the ratification by New Hampshire be deemed ineffective, then the amendment became operative by Tennessee's ratification on July 27, 1804. On September 25, 1804, in a circular letter to the Governors of the several States, Secretary of State Madison declared the amendment ratified by three-fourths of the States.

The several State legislatures ratified the 12th Amendment on the following dates: North Carolina, December 22, 1803; Maryland, December 24, 1803; Kentucky, December 27, 1803; Ohio, between December 5 and December 30, 1803; Virginia, between December 20, 1803 and February 3, 1804; Pennsylvania, January 5, 1804; Vermont, January 30, 1804; New York, February 10, 1804; New Jersey, February 22, 1804; Rhode Island, between February 27 and March 12, 1804; South Carolina, May 15, 1804; Georgia, May 19, 1804; New Hampshire, June 15, 1804; and Tennessee, July 27, 1804. The amendment was rejected by Delaware on January 18, 1804, and by Connecticut at its session begun May 10, 1804.

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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 the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

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AMENDMENT XIII.*

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

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

* The 13th Amendment was proposed by Congress on January 31, 1865, when it passed the House [Cong. Globe (38th Cong., 2d sess.) 531], having previously passed the Senate on April 8, 1864 [*Id.* (38th Cong., 1st sess.) 1490]. It appears officially in 13 Stat. 567 under date of February 1, 1865. Ratification was completed on December 6, 1865, when the legislature of the twenty-seventh State (Georgia) approved the amendment, there being then 36 States in the Union. On December 18, 1865, Secretary of State Seward certified that the 13th amendment had become a part of the Constitution [13 Stat. 774].

The several State legislatures ratified the 13th Amendment on the following dates: Illinois, February 1, 1865; Rhode Island, February 2, 1865; Michigan, February 2, 1865; Maryland, February 3, 1865; New York, February 3, 1865; West Virginia, February 3, 1865; Missouri, February 6, 1865; Maine, February 7, 1865; Kansas, February 7, 1865; Massachusetts, February 7, 1865; Pennsylvania, February 8, 1865; Virginia, February 9, 1865; Ohio, February 10, 1865; Louisiana, February 15 or 16, 1865; Indiana, February 16, 1865; Nevada, February 16, 1865; Minnesota, February 23, 1865; Wisconsin, February 24, 1865; Vermont, March 9, 1865 (date on which it was "approved" by Governor); Tennessee, April 7, 1865; Arkansas, April 14, 1865; Connecticut, May 4, 1865; New Hampshire, June 30, 1865; South Carolina, November 13, 1865; Alabama, December 2, 1865 (date on which it was "approved" by Provisional Governor); North Carolina, December 4, 1865; Georgia, December 6, 1865; Oregon, December 11, 1865; California, December 15, 1865; Florida, December 28, 1865 (Florida again ratified this amendment on June 9, 1868, upon its adoption of a new constitution); Iowa, January 17, 1866; New Jersey, January 23, 1866 (after having rejected the amendment on March 16, 1865); Texas, February 18, 1870; Delaware, February 12, 1901 (after having rejected the amendment on February 8, 1865). The amendment was rejected by Kentucky on February 24, 1865, and by Mississippi on December 2, 1865.

"A thirteenth amendment depriving of United States citizenship any citizen who should accept any title, office, or emolument from a foreign power, was proposed by Congress on May 1, 1810, when it passed the House [21 Ann. Cong. (11th Cong., 2d sess.) 2050], having previously passed the Senate on April 27 [20 Ann. Cong. (11th Cong., 2d sess.) 672]. It appears officially in 2 Stat. 613. It failed of adoption, being ratified by but 12 States up to December 10, 1812 [2 Miscell. Amer. State Papers, 477–479; 2 Doc. Hist. Const. 454–499], there then being 18 in all.

"Another thirteenth amendment, forbidding any future amendment that should empower Congress to interfere with the domestic institutions of any State, was proposed by Congress on March 2, 1861, when it passed the Senate [Cong. Globe (36th Cong., 2d sess.) 1403], having previously passed the House on February 28 [*Id.*, 1285]. It appears officially in 12 Stat. 251. It failed of adoption, being ratified by but three States: Ohio, May 13, 1861 [58 Laws Ohio, 190]; Maryland, January 10, 1862 [Laws Maryland (1861–62) 21]; Illinois, February 14, 1862 [2 Doc. Hist. Const., 518] irregular, because by convention instead of by legislature as authorized by Congress." [Burdick, The Law of the American Constitution, 637.]

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AMENDMENT XIV.ƒ

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 apportioned among the several States according to their respective numbers, counting the

ƒ The 14th Amendment was proposed by Congress on June 13, 1866, when it passed the House [Cong. Globe (39th Cong., 1st sess.) 3148, 3149], having previously passed the Senate on June 8 [*Id.*, 3042]. It appears officially in 14 Stat. 358 under date of June 16, 1866. Ratification was probably completed on July 9, 1868, when the legislature of the twenty-eighth State (South Carolina or Louisiana) approved the amendment, there being then 37 States in the Union. However, Ohio and New Jersey had prior to that date "withdrawn" their earlier assent to this amendment. Accordingly, Secretary of State Seward on July 20, 1868, certified that the amendment had become a part of the Constitution if the said withdrawals were ineffective [15 Stat. 706–707]. Congress at once (July 21, 1868) passed a joint resolution declaring the amendment a part of the Constitution and directing the Secretary to promulgate it as such. On July 28, 1868, Secretary Seward certified without reservation that the amendment was a part of the Constitution. In the interim, two other States, Alabama on July 13 and Georgia on July 21, 1868, had added their ratifications.

The several State legislatures ratified the 14th Amendment on the following dates: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866 (the New Jersey Legislature on February 20, 1868 "withdrew" its consent to the ratification; the Governor vetoed that bill on March 5, 1868; and it was repassed over his veto on March 24, 1868); Oregon, September 19, 1866 (Oregon "withdrew" its consent on October 15, 1868); Vermont, October 30, 1866; New York, January 10, 1867; Ohio, January 11, 1867 (Ohio "withdrew" its consent on January 15, 1868); Illinois, January 15, 1867; West Virginia, January 16, 1867; Michigan, January 16, 1867; Kansas, January 17, 1867; Minnesota, January 17, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Indiana, January 23, 1867; Missouri, January 26, 1867 (date on which it was certified by the Missouri secretary of state); Rhode Island, February 7, 1867; Pennsylvania, February 12, 1867; Wisconsin, February 13, 1867 (actually passed February 7, but not signed by legislative officers until February 13); Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, March 9, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; North Carolina, July 2, 1868 (after having rejected the amendment on December 13, 1866); Louisiana, July 9, 1868 (after having rejected the amendment on February 6, 1867); South Carolina, July 9, 1868 (after having rejected the amendment on December 20, 1866); Alabama, July 13, 1868 (date on which it was "approved" by the Governor); Georgia, July 21, 1868 (after having rejected the amendment on November 9, 1866—Georgia ratified again on February 2, 1870); Virginia, October 8, 1869 (after having rejected the amendment on January 9, 1867); Mississippi, January 17, 1870; Texas, February 18, 1870 (after having rejected the amendment on October 27, 1866); Delaware, February 12, 1901 (after having rejected the amendment on February 7, 1867). The amendment was rejected (and not subsequently ratified) by Kentucky on January 8, 1867, and by Maryland on March 23, 1867.

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whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

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

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AMENDMENT XV.[a]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

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

AMENDMENT XVI.[b]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment

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[a] The 15th Amendment was proposed by Congress on February 26, 1869, when it passed the Senate [Cong. Globe (40th Cong., 3rd sess.) 1641], having previously passed the House on February 25 [*Id.* 1563, 1564]. It appears officially in 15 Stat. 346 under date of February 27, 1869. Ratification was probably completed on February 3, 1870, when the legislature of the twenty-eighth State (Iowa) approved the amendment, there being then 37 States in the Union. However, New York had prior to that date "withdrawn" its earlier assent to this amendment. Even if this withdrawal were effective, Nebraska's ratification on February 17, 1870, authorized Secretary of State Fish's certification of March 30, 1870, that the 15th Amendment had become a part of the Constitution [16 Stat. 1131].

The several State legislatures ratified the 15th Amendment on the following dates: Nevada, March 1, 1869; West Virginia, March 3, 1869; North Carolina, March 5, 1869; Louisiana, March 5, 1869 (date on which it was "approved" by the Governor); Illinois, March 5, 1869; Michigan, March 5, 1869; Wisconsin, March 5, 1869; Maine, March 11, 1869; Massachusetts, March 12, 1869; South Carolina, March 15, 1869; Arkansas, March 15, 1869; Pennsylvania, March 25, 1869; New York, April 14, 1869 (New York "withdrew" its consent to the ratification on January 5, 1870); Indiana, May 14, 1869; Connecticut, May 19, 1869; Florida, June 14, 1869; New Hampshire, July 1, 1869; Virginia, October 8, 1869; Vermont, October 20, 1869; Alabama, November 16, 1869; Missouri, January 7, 1870 (Missouri had ratified the first section of the 15th Amendment on March 1, 1869; it failed to include in its ratification the second section of the amendment); Minnesota, January 13, 1870; Mississippi, January 17, 1870; Rhode Island, January 18, 1870; Kansas, January 19, 1870 (Kansas had by a defectively worded resolution previously ratified this amendment on February 27, 1869); Ohio, January 27, 1870 (after having rejected the amendment on May 4, 1869); Georgia, February 2, 1870; Iowa, February 3, 1870; Nebraska, February 17, 1870; Texas, February 18, 1870; New Jersey, February 15, 1871 (after having rejected the amendment on February 7, 1870); Delaware, February 12, 1901 (date on which approved by Governor; Delaware had previously rejected the amendment on March 18, 1869). The amendment was rejected (and not subsequently ratified) by California, Kentucky, Maryland, Oregon, and Tennessee.

[b] The 16th Amendment was proposed by Congress on July 12, 1909, when it passed the House [44 Cong. Rec. (61st Cong., 1st sess.) 4390, 4440, 4441], having previously passed the Senate on July 5 [*Id.*, 4121]. It appears officially in 36 Stat. 184. Ratification was completed on February 3, 1913, when the legislature of the thirty-sixth State (Delaware, Wyoming, or New Mexico) approved the amendment, there being then 48 States in the Union. On February 25, 1913, Secretary of State Knox certified that this amendment had become a part of the Constitution [37 Stat. 1785].

The several State legislatures ratified the 16th Amendment on the following dates: Alabama, August 10, 1909; Kentucky, February 8, 1910; South Carolina, February 19, 1910

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among the several States, and without regard to any census or enumeration.

AMENDMENT [XVII.][1]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Illinois, March 1, 1910; Mississippi, March 7, 1910; Oklahoma, March 10, 1910; Maryland April 8, 1910; Georgia, August 3, 1910; Texas, August 16, 1910; Ohio, January 19, 1911; Idaho, January 20, 1911; Oregon, January 23, 1911; Washington, January 26, 1911; Montana, January 27, 1911; Indiana, January 30, 1911; California, January 31, 1911; Nevada, January 31, 1911; South Dakota, February 1, 1911; Nebraska, February 9, 1911; North Carolina, February 11, 1911; Colorado, February 15, 1911; North Dakota, February 17, 1911; Michigan, February 23, 1911; Iowa, February 24, 1911; Kansas, March 2, 1911; Missouri, March 16, 1911; Maine, March 31, 1911; Tennessee, April 7, 1911; Arkansas, April 22, 1911 (after having rejected the amendment at the session begun January 9, 1911); Wisconsin, May 16, 1911; New York, July 12, 1911; Arizona, April 3, 1912; Minnesota, June 11, 1912; Louisiana, June 28, 1912; West Virginia, January 31, 1913; Delaware, February 3, 1913; Wyoming, February 3, 1913; New Mexico, February 3, 1913; New Jersey, February 4, 1913; Vermont, February 19, 1913; Massachusetts, March 4, 1913; New Hampshire, March 7, 1913 (after having rejected the amendment on March 2, 1911). The amendment was rejected (and not subsequently ratified) by Connecticut, Rhode Island, and Utah.

[1] The 17th Amendment was proposed by Congress on May 13, 1912, when it passed the House [48 Cong. Rec. (62d Cong., 2d sess.) 6367], having previously passed the Senate on June 12, 1911 [47 Cong. Rec. (62d Cong. 1st sess.) 1925]. It appears officially in 37 Stat. 646. Ratification was completed on April 8, 1913, when the thirty-sixth State (Connecticut) approved the amendment, there being then 48 States in the Union. On May 31, 1913, Secretary of State Bryan certified that it had become a part of the Constitution [38 Stat. 2049].

The several State legislatures ratified the 17th Amendment on the following dates: Massachusetts, May 22, 1912; Arizona, June 3, 1912; Minnesota, June 10, 1912; New York, January 15, 1913; Kansas, January 17, 1913; Oregon, January 23, 1913; North Carolina, January 25, 1913; California, January 28, 1913; Michigan, January 28, 1913; Iowa, January 30, 1913; Montana, January 30, 1913; Idaho, January 31, 1913; West Virginia, February 4, 1913; Colorado, February 5, 1913; Nevada, February 6, 1913; Texas, February 7, 1913;

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AMENDMENT [XVIII.][1]

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Washington, February 7, 1913; Wyoming, February 8, 1913; Arkansas, February 11, 1913; Illinois, February 13, 1913; North Dakota, February 14, 1913; Wisconsin, February 18, 1913; Indiana, February 19, 1913; New Hampshire, February 19, 1913; Vermont, February 19, 1913; South Dakota, February 19 1913; Maine, February 20, 1913; Oklahoma, February 24, 1913; Ohio, February 25, 1913; Missouri, March 7, 1913; New Mexico, March 13, 1913; Nebraska, March 14, 1913; New Jersey, March 17, 1913; Tennessee, April 1, 1913; Pennsylvania, April 2, 1913; Connecticut, April 8, 1913; Louisiana, June 5, 1914. The amendment was rejected by Utah on February 26, 1913.

[1] The 18th Amendment was proposed by Congress on December 18, 1917, when it passed the Senate [Cong. Rec. (65th Cong., 2d sess.) 478], having previously passed the House on December 17 [*Id.*, 470]. It appears officially in 40 Stat. 1050. Ratification was completed on January 16, 1919, when the thirty-sixth State approved the amendment, there being then 48 States in the Union. On January 29, 1919, Acting Secretary of State Polk certified that this amendment had been adopted by the requisite number of States [40 Stat. 1941]. By its terms this amendment did not become effective until 1 year after ratification.

The several State legislatures ratified the 18th Amendment on the following dates: Mississippi, January 8, 1918; Virginia, January 11, 1918; Kentucky, January 14, 1918; North Dakota, January 28, 1918 (date on which approved by Governor); South Carolina, January 29, 1918; Maryland, February 13, 1918; Montana, February 19, 1918; Texas, March 4, 1918; Delaware, March 18, 1918; South Dakota, March 20, 1918; Massachusetts April 2, 1918; Arizona May 24, 1918; Georgia, June 26, 1918; Louisiana, August 9, 1918 (date on which approved by Governor); Florida, November 27, 1918; Michigan, January 2, 1919; Ohio, January 7, 1919; Oklahoma, January 7, 1919; Idaho, January 8, 1919; Maine, January 8, 1919; West Virginia, January 9, 1919; California, January 13, 1919; Tennessee, January 13, 1919; Washington January 13, 1919; Arkansas, January 14, 1919; Kansas, January 14, 1919; Illinois, January 14, 1919; Indiana, January 14, 1919; Alabama, January 15, 1919; Colorado, January 15, 1919; Iowa, January 15, 1919; New Hampshire, January 15, 1919; Oregon, January 15, 1919; Nebraska, January 16, 1919; North Carolina, January 16, 1919; Utah, January 16, 1919; Missouri, January 16, 1919; Wyoming, January 16, 1919; Minnesota, January 17, 1919; Wisconsin, January 17, 1919; New Mexico, January 20, 1919; Nevada, January 21, 1919; Pennsylvania, February 25, 1919; Connecticut, May 6, 1919; New Jersey, March 9, 1922; New York, January 29, 1919; Vermont, January 29, 1919.

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AMENDMENT [XIX.][h]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

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

AMENDMENT [XX.][i]

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators

[h] The 19th Amendment was proposed by Congress on June 4, 1919, when it passed the Senate [Cong. Rec. (66th Cong., 1st sess.) 635], having previously passed the House on May 21, [*Id.*, 94]. It appears officially in 41 Stat. 362. Ratification was completed on August 18, 1920, when the thirty-sixth State (Tennessee) approved the amendment, there being then 48 States in the Union. On August 26, 1920, Secretary of State Colby certified that it had become a part of the Constitution [41 Stat. 1823].

The several State legislatures ratified the 19th Amendment on the following dates: Illinois, June 10, 1919 (readopted June 17, 1919); Michigan, June 10, 1919; Wisconsin, June 10, 1919; Kansas, June 16, 1919; New York, June 16, 1919; Ohio, June 16, 1919; Pennsylvania, June 24, 1919; Massachusetts, June 25, 1919; Texas, June 28, 1919; Iowa, July 2, 1919 (date on which approved by Governor); Missouri, July 3, 1919; Arkansas, July 28, 1919; Montana, August 2, 1919 (date on which approved by Governor); Nebraska August 2, 1919; Minnesota, September 8, 1919; New Hampshire, September 10, 1919 (date on which approved by Governor); Utah, October 2, 1919; California, November 1, 1919; Maine, November 5, 1919; North Dakota, December 1, 1919; South Dakota, December 4, 1919 (date on which certified); Colorado, December 15, 1919 (date on which approved by Governor); Kentucky, January 6, 1920; Rhode Island, January 6, 1920; Oregon, January 13, 1920; Indiana, January 16, 1920; Wyoming, January 27, 1920; Nevada, February 7, 1920; New Jersey, February 9, 1920; Idaho, February 11, 1920; Arizona, February 12, 1920; New Mexico, February 21, 1920 (date on which approved by Governor); Oklahoma, February 28, 1920; West Virginia, March 10, 1920; Washington, March 22, 1920; Tennessee, August 18, 1920; Connecticut, September 14, 1920 (confirmed September 21, 1920); Vermont, February 8, 1921. The amendment was rejected by Georgia on July 24, 1919; by Alabama on September 22, 1919; by South Carolina on January 29, 1920; by Virginia, on February 12, 1920; by Maryland on February 24, 1920; by Mississippi on March 29, 1920; by Louisiana on July 1, 1920.

[i] The 20th Amendment was proposed by Congress on March 2, 1932, when it passed the Senate [Cong. Rec. (72d Cong., 1st sess.) 5086], having previously passed the House on March 1 [*Id.*, 5027]. It appears officially in 47 Stat. 745. Ratification was completed on January 23, 1933, when the thirty-sixth State approved the amendment, there being then 48 States in the Union. On February 6, 1933, Secretary of State Stimson certified that it had become a part of the Constitution [47 Stat. 2569].

The several State legislatures ratified the 20th Amendment on the following dates: Virginia, March 4, 1932; New York, March 11, 1932; Mississippi, March 16, 1932; Arkansas, March 17, 1932; Kentucky, March 17, 1932; New Jersey, March 21, 1932; South Carolina, March 25, 1932; Michigan, March 31, 1932; Maine, April 1, 1932; Rhode Island, April 14, 1932; Illinois, April 21, 1932; Louisiana, June 22, 1932; West Virginia, July 30, 1932; Pennsylvania, August 11, 1932; Indiana, August 15, 1932; Texas, September 7, 1932; Alabama, September 13, 1932; California, January 4, 1933; North Carolina, January 5, 1933; North

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and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SEC. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SEC. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Dakota, January 9, 1933; Minnesota, January 12, 1933; Arizona, January 13, 1933; Montana, January 13, 1933; Nebraska, January 13, 1933; Oklahoma, January 13, 1933; Kansas, January 16, 1933; Oregon, January 16, 1933; Delaware, January 19, 1933; Washington, January 19, 1933; Wyoming, January 19, 1933; Iowa, January 20, 1933; South Dakota, January 20, 1933; Tennessee, January 20, 1933; Idaho, January 21, 1933; New Mexico, January 21, 1933; Georgia, January 23, 1933; Missouri, January 23, 1933; Ohio, January 23, 1933; Utah, January 23, 1933; Colorado, January 24, 1933; Massachusetts, January 24, 1933; Wisconsin, January 24, 1933; Nevada, January 26, 1933: Connecticut, January 27, 1933; New Hampshire, January 31, 1933; Vermont, February 2, 1933; Maryland, March 24, 1933; Florida, April 26, 1933.

A proposed amendment which would authorize Congress to limit, regulate, and prohibit the labor of persons under 18 years of age was passed by Congress on June 2, 1924. This proposal at the time it was submitted to the States was referred to as "the proposed 20th Amendment." It appears officially in 43 Stat. 670.

The status of this proposed amendment is a matter of conflicting opinion. The Kentucky Court of Appeals in Wise v. Chandler (270 Ky. 1 [1937]) has held that it is no longer open to ratification because: (1) Rejected by more than one-fourth of the States; (2) a State may not reject and then subsequently ratify, at least when more than one-fourth of the States are on record as rejecting; and (3) more than a reasonable time has elapsed since it was submitted to the States in 1924. The Kansas Supreme Court in Coleman v. Miller (146 Kan. 390 [1937]) came to the opposite conclusion.

On October 1, 1937, 27 States had ratified the proposed amendment. Of these States 10 had previously rejected the amendment on one or more occasions. At least 26 different States have at one time rejected the amendment.

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SEC. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SEC. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SEC. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT [XXI.] *

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use

* The 21st Amendment was proposed by Congress on February 20, 1933, when it passed the House [Cong. Rec. (72d Cong., 2d sess.) 4516], having previously passed the Senate on February 16 [*Id.*, 4231]. It appears officially in 47 Stat. 1625. Ratification was completed on December 5, 1933, when the thirty-sixth State (Utah) approved the amendment, there being then 48 States in the Union. On December 5, 1933, Acting Secretary of State Phillips certified that it had been adopted by the requisite number of States [48 Stat. 1749].

The several State conventions ratified the 21st Amendment on the following dates: Michigan, April 10, 1933; Wisconsin, April 25, 1933; Rhode Island, May 8, 1933; Wyoming, May 25, 1933; New Jersey, June 1, 1933; Delaware, June 24, 1933; Indiana, June 26, 1933; Massachusetts, June 26, 1933; New York, June 27, 1933; Illinois, July 10, 1933; Iowa, July 10, 1933; Connecticut, July 11, 1933; New Hampshire, July 11, 1933; California, July 24, 1933; West Virginia, July 25, 1933; Arkansas, August 1, 1933; Oregon, August 7, 1933; Alabama, August 8, 1933; Tennessee, August 11, 1933; Missouri, August 29, 1933; Arizona, September 5, 1933; Nevada, September 5, 1933; Vermont, September 23, 1933; Colorado, September 26, 1933; Washington, October 3, 1933; Minnesota, October 10, 1933; Idaho October 17, 1933; Maryland, October 18, 1933; Virginia, October 25, 1933; New Mexico, November 2, 1933; Florida, November 14, 1933; Texas, November 24, 1933; Kentucky, November 27, 1933; Ohio, December 5, 1933; Pennsylvania, December 5, 1933; Utah, December 5, 1933; Maine, December 6, 1933; Montana, August 6, 1934. The amendment was rejected by a convention in the State of South Carolina, on December 4, 1933. The electorate of the State of North Carolina voted against holding a convention at a general election held on November 7, 1933.

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therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

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GENERAL PRINCIPLES OF INTERPRETATION

OF THE

CONSTITUTION OF THE UNITED STATES OF AMERICA

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GENERAL PRINCIPLES OF INTERPRETATION

The Approach to Constitutional Decisions.

Constitutional interpretation has formed one of the "delicate and important" functions of the Supreme Court.* In the early case of McCulloch *v.* Maryland, Chief Justice Marshall remarked: "We must never forget it is a Constitution we are expounding";[1] and the great cases of constitutional law are studded with similar reminders of the significance of a decision by the Supreme Court construing the basic charter of Government.[2]

[1] 4 Wheat. 316, 407 [1819].

[2] *See* e. g., Ex parte Garland, 4 Wall. 333, 382 [1867]; Hepburn *v.* Griswold, 8 Wall. 603, 610 [1870]; Adkins *v.* Children's Hospital, 261 U. S. 525, 544 [1923].

The whole object of constitutional, as of statutory, construction is to give effect to the intention of the framers of the instrument, and additionally, to the intention of the people in adopting it.[1] This intent, together with the general scope of the particular provision, is therefore to be kept constantly in view.[2] The same general rule was enunciated in somewhat more detail in Prigg *v.* Pennsylvania:[3] "It will, indeed, probably, be found, when we look to the character of the Constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact that many of its provisions were matters of compromise of opposing interests and opinions; that no uniform rule of interpretation can be applied to it which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. And, perhaps, the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed. * * * If by one mode of interpretation the right must become shadowy and unsubstantial, and without any remedial power adequate to the end; and

* The Supreme Court, expressly provided for in the Constitution, was organized pursuant to the Judiciary Act of September 24, 1789 (1 Stat. 73), and held its first term in New York, in February 1790. No cases were decided at the first three terms, while action of a preliminary character only was taken in two cases at the August term, 1791. One case was taken under advisement at the February term, 1792, and further action taken therein at the August term, 1792, but the first case in which an extended opinion was rendered was Georgia *v.* Brailsford, in August 1792, 2 Dall. 402. And with the exception of further hearings in this and another previous case, and on Hayburn's case (which was never decided) the first important case decided in the Supreme Court involved the construction of the Constitution (Chisholm *v.* Georgia, 2 Dall. 419 in February 1793).

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by another mode it will attain its just end and secure its manifest purpose; it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail."

[1] Lake County v. Rollins, 130 U. S. 670 [1889].
[2] Ex parte Yerger, 8 Wall. 85, 101 [1869].
[3] 16 Pet. 539, 610 [1842].

Constitutional decisions are not lightly undertaken. It is a settled principle in the Supreme Court that it will decide only actual matters in controversy essential to the decision of the particular case at bar.[1] The mere raising of a constitutional question, therefore, does not insure a decision upon it. To realize that caution in approaching such problems is of the first importance, it is necessary only to note the practical safeguards and restrictions which the Supreme Court has thrown around its consideration of constitutional questions. Justice Brandeis in a concurring opinion recently enumerated seven:[2]

(1) The Court will not pass on the constitutionality of legislation in a friendly, non-adversary proceeding.[3]

(2) The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it."[4]

(3) The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[5]

(4) The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be decided.[6]

(5) The Court will not pass upon the validity of a statute on complaint of one who fails to show that he is injured by its operation.[7]

(6) The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.[8]

(7) It is a cardinal principle that a statute will, if fairly possible, be construed so as to avoid a question of constitutionality.[9]

[1] United States v. Alaska S. S. Co., 253 U. S. 113, 116 [1920].
[2] Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 346 [1936].
[3] Citing Chicago & Gr. Trunk Ry. v. Wellman, 143 U. S. 339 [1892].
[4] Citing Liverpool, N. Y. & P. S. S. Co. v. Emigration Commissioners, 113 U. S. 33 [1885]; Abrams v. Van Schaick, 293 U. S. 188 [1934]; Wilshire Oil Co. v. United States, 295 U. S. 100 [1935].
[5] Citing Liverpool, N. Y. & P. S. S. Co. v. Emigration Commissioners, 113 U. S. 33 [1885].
[6] Citing Siler v. Louisville & N. R. Co., 213 U. S. 175, 191 [1909]; Light v. United States, 220 U. S. 523, 538 [1911]; Berea College v. Kentucky, 211 U. S. 45, 53 [1908].
[7] Citing Tyler v. Judges of Court of Registration, 179 U. S. 405 [1900]; Hendrick v. Maryland, 235 U. S. 610, 621 [1915].
[8] Citing Great Falls Mfg. Co. v. Attorney General, 124 U. S. 581 [1888]; Wall v. Parrot Silver & Copper Co., 244 U. S. 407, 411–412 [1917]; St. Louis Malleable Casting Co. v. Prendergast Construction Co., 260 U. S. 469 [1923].
[9] Citing Crowell v. Benson, 285 U. S. 22, 62 [1932].

The Purpose and Nature of the Constitution.

IN GENERAL.

The Constitution of the United States was made by, and for the protection of, the people of the United States.[1] In Ableman v. Booth,[2] holding that

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the process of a State court or judge has no authority beyond the limits of the sovereignty which confers the judicial power, Chief Justice Taney said: "The Constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities." This language was quoted in substantiation of the opinion of the court by Mr. Justice Field in Tarble's Case.[3]

[1] League v. De Young, 11 How. 203 [1851].
[2] 21 How. 506, 517 [1859].
[3] 13 Wall. 397 [1872].

The general object of the Constitution is constantly to be kept in view; the language of each separate provision must be construed with reference to that purpose and so as to subserve it.[1] No court is authorized to construe a clause of the Constitution, so as to defeat its obvious ends, when another construction, equally accordant with the words, and sense, will enforce and protect them.[2] But the obvious meaning of a provision is not to be restricted by and to the known purposes of its adoption. For example, the Thirteenth Amendment had its origin in the previous existence of African slavery, but the generality of its language makes its prohibition apply to slavery of white men as well; and also to peonage and every other form of compulsory labor. So, the provision of the Constitution prohibiting legislation by States impairing the obligation of contracts (art. 1, sec. 10) had its origin in the existence of tender laws, appraisement laws, stay laws, and installment laws passed by the States soon after the Revolution when their finances were embarrassed, and their people overwhelmed with debts, but in its construction the provision has not been limited to mere commercial contracts.[3]

[1] Gibbons v. Ogden, 9 Wheat. 1 [1824]; Brown v. Maryland, 12 Wheat. 437 [1827]; Maxwell v. Dow, 176 U. S. 581, 601 [1900]; Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 87 [1877]; Legal Tender Cases, 12 Wall. 457, 531 [1871]. *See also* Dartmouth College v. Woodward, 4 Wheat. 644 [1819].
[2] Prigg v. Pennsylvania, 16 Pet. 612 [1842].
[3] Railroad Tax Cases, 13 Fed. 722, 740 [1882], writ of error dismissed, 116 U. S. 138 [1885].

The terms of the Constitution are not to be nullified or evaded by astute verbal criticism without regard to the aim and objects of the instrument and the principles on which it was based; and where words admit of different intendments, that one is to be selected which is most consonant to the object in view.[1]

[1] Aldrich v. Kinney, 4 Conn. 380, 385 [1822]; People v. Dowell, 25 Mich. 247, 261 [1872].

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PERMANENCE.

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government, its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded.

It must also be remembered that the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take.[1]

[1] South Carolina *v.* United States, 199 U. S. 437, 448, 449 [1905]. *See also* Pensacola Tel. Co. *v.* Western Union, 96 U. S. 9 [1878]; In re Debs, 158 U. S. 591 [1895].

Some provisions, however, are considered as "progressive." Thus the Eighth Amendment, prohibiting cruel and unusual punishments, "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[1]

[1] Weems *v.* United States, 217 U. S. 349, 378 [1910].

It is the constant changing of conditions and the application to them of the changeless basic grants of the Constitution that give a present interest to the statement penned by Chief Justice Marshall in 1819: "the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist."[1]

[1] McCulloch *v.* Maryland, 4 Wheat. 316, 404 [1819].

DELEGATED AND RESERVED POWERS.

The Constitution enumerates the powers granted by the people[1] of the then existing States to the General Government.[2] To distinguish between such granted powers and the powers reserved to the States, the general rule of construction laid down in Livingston *v.* Van Ingen may be cited:

"When the people create a single, entire government, they grant at once all the rights of sovereignty * * *. Everything is granted that is not expressly reserved in the constitutional charter, or necessarily retained as inherent in the people. But when a Federal Government is erected with only a portion of the sovereign power, the rule of construction is directly the reverse, and every power is reserved to the members that is not, either in express terms, or by necessary implication, taken away from them, and vested exclusively in the Federal head. This rule has not only been acknowledged by the most intelligent friends to the Constitution, but is plainly declared by the instrument itself."[3] "While the Federal Government is acknowledged as one of enumerated powers, 'there is

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no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly", and declares only, that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people"; thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument'." [4]

[1] Jarrolt *v.* Moberly, 103 U. S. 586 [1881]; Martin *v.* Hunter, 1 Wheat. 326 [1816]; Lake County *v.* Rollins, 130 U. S. 662, 670 [1889]; Gibbons *v.* Ogden, 9 Wheat. 1, 188 [1824].
[2] See McCulloch *v.* Maryland, 4 Wheat. 316 [1819].
[3] 9 Johns. (N. Y.) 507, 574 [1812].
[4] McCulloch *v.* Maryland, 4 Wheat. 316, 406 [1819].

Even the express grant of powers by the Constitution cannot be too literally construed. "It is not denied, that the powers given to the Government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the Nation may require, and of employing the usual means of conveyance." [1]

[1] McCulloch *v.* Maryland, 4 Wheat. 316, 409 [1819].

The rule that exceptions from a power establish its existence is as applicable to the Constitution as to other instruments [1] and "an exception of any particular case presupposes that those which are not excepted are embraced within the grant or prohibition." [2] Exceptions are not to be implied; [3] a negative operation will be given affirmative words only where necessary to their having any operation at all. [4]

[1] Gibbons *v.* Ogden, 9 Wheat. 1, 191 [1824]; Brown *v.* Maryland, 12 Wheat. 438 [1827].
[2] Rhode Island *v.* Massachusetts, 12 Pet. 657, 722 [1838].
[3] Cohens *v.* Virginia, 6 Wheat. 264, 378 [1821].
[4] Marbury *v.* Madison, 1 Cr. 174 [1803].

CONFLICT BETWEEN FEDERAL AND STATE AUTHORITY.

A mere grant of power by the Constitution to the Federal Government does not *per se* transfer exclusive sovereignty in that field, unless so stated in terms, or jurisdiction is prohibited to the States, or there is "a direct repugnancy or incompatibility in the exercise of it by the States." [1] These exceptions have been further elaborated, especially by cases under the commerce clause. As stated in Cardwell *v.* American River Bridge Co., [2] the 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

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States may provide for their regulation and management, until Congress intervenes and supersedes their action."

[1] Houston *v.* Moore, 5 Wheat. 1, 49 [1820].
[2] 113 U. S. 205, 210 [1885].

In Brown *v.* Houston,[1] the Court said: "So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that that commerce shall be free and untrammeled; and any regulation of the subject by the States is repugnant to such freedom."

[1] 114 U. S. 622, 631 [1885]. *See also* Wabash, St. L. & P. R. Co. *v.* Illinois, 118 U. S. 557, 577 [1886].

In Sturges *v.* Crowninshield, involving a bankruptcy statute, Chief Justice Marshall laid down the principle that "Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the State legislatures, as if they had been expressly forbidden to act on it." [1]

[1] 4 Wheat. 122, 193 [1819].

Whenever any conflict arises between enactments of the National and State Governments, or in the enforcement of their asserted authorities, those of the National Government have supremacy until the validity of the different enactments and authorities is determined by the tribunals of the United States. The Court explained the necessity for such result in Tarble's Case: "This temporary supremacy until judicial decision by the national tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments." [1]

[1] 13 Wall. 397, 407 [1872].

GENERALITY OF LANGUAGE.

The Constitution is an instrument of government, in general terms, made and adopted by the people for practical purposes.* "The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen, that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to

* For a brief statement indicating the very practical considerations and proceedings underlying the Constitution, *see* Historical Note on Formation of the Constitution, p 9.

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mold and model the exercise of its powers, as its own wisdom, and the public interests, should require." [1]

[1] Martin v. Hunter, 1 Wheat. 304, 326 [1816].

Primary Consideration—Meaning of Words Used.

Primarily, constitutional interpretation is a question of ascertaining the meaning of the words used. No word or clause can be rejected as superfluous or meaningless, but each must be given its due force and appropriate meaning.[1]

[1] Knowlton v. Moore, 178 U. S. 41, 87 [1900].

The Constitution must receive a practical construction.[1] Words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.[2] "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." [3]

[1] Union P. R. Co. v. Peniston, 18 Wall. 5, 31 [1873].
[2] Pollock v. Farmers Loan & Trust Co., 158 U. S. 618 [1895].
[3] Gibbons v. Ogden, 9 Wheat. 1, 188 [1824].

Unless there are strong reasons for a contrary interpretation, terms in the Constitution, as in statutes generally, are to be given the meaning they have in common use.[1] But, in view of possible change in usage, and between the literal and the actual construction, that meaning should be given which obtained at common law and at the time the Constitution and its several amendments were adopted.[2]

[1] Tennessee v. Whitworth, 117 U. S. 147 [1886]; United States v. Sprague, 282 U. S. 716, 731 [1931].
[2] Veazie Bank v. Fenno, 8 Wall. 542 [1869].

"The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." [1] Resort to the maxims and principles of the common law is constantly had.[2] For example, the term *ex post facto*, which, literally construed, would apply to any act operating upon a previous fact, has always been understood as embracing only criminal laws and laws providing for the recovery of penalties or forfeitures.[3]

[1] Smith v. Alabama, 124 U. S. 465, 478 [1888]. *See also* United States v. Wong Kim Ark, 169 U. S. 649 [1898]; Moore v. United States, 91 U. S. 270 [1876].
[2] *See* e. g., South Carolina v. United States, 199 U. S. 449 [1905]; Callan v. Wilson, 127 U. S. 549 [1888]; United States v. Sanges, 144 U. S. 310 [1892]; Gompers v. United States, 233 U. S. 610 [1914].
[3] Locke v. New Orleans, 4 Wall. 172 [1867].

Where a particular word or sentence, taken by itself, is obscure or of doubtful meaning, such expression is to be examined in connection with its context. *Noscitur a sociis* applies with special force.[1] While the particular

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provision involved is the starting point of discussion in each concrete case, and the primary basis for textual construction, it is well settled that the Constitution, together with amendments, is to be regarded as one whole, and construed accordingly.[2] A provision afterward changed by amendment should be considered in construing the amendment.[3] The different clauses should each be given effect and if possible reconciled; and any actual conflict between the original instrument and an amendment is to be resolved in favor of the amendment.[4]

[1] Virginia v. Tennessee, 148 U. S. 519 [1893]; Ex parte Bain, 121 U. S. 1, 12 [1887]; Carpenter v. Pennsylvania, 17 How. 456, 463 [1855]; Kendall v. United States, 12 Pet. 524 [1838].

[2] Prout v. Starr, 188 U. S. 537, 543 [1903].

[3] Fletcher v. Peck, 6 Cr. 87, 139 [1810]; Brown v. Walker, 161 U. S. 591 [1896]; United States v. Wong Kim Ark, 169 U. S. 649, 654 [1898].

[4] Schick v. United States, 195 U. S. 65, 68 [1904].

Extrinsic Aids to Interpretation.

IN GENERAL.

Where the meaning of a provision is plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text.[1] But where there is ambiguity or doubt the principle stated by Justice Story "with all the lights and aids of contemporary history" applies and may fairly be construed to comprehend all the extrinsic aids which may be resorted to by courts. In fact, constitutional interpretation follows the same rules and has resort to the same sources of judicial information as statutory construction in general.[2] There can be no construction where there is nothing to construe.[3]

[1] McPherson v. Blacker, 146 U. S. 27 [1892].

[2] Rhode Island v. Massachusetts, 12 Pet. 657, 722 [1838].

[3] United States v. Hartwell, 6 Wall. 385, 396 [1868].

Before any appeal can be made to practical construction, it must appear that the true meaning of a provision of the Constitution is not clear. No number of statutes, or infractions of the Constitution, however numerous, can be permitted to import a power which does not exist, or to furnish a construction not warranted; long acquiescence of Congress and the Executive, by which the rights of parties have been determined and adjudged for many years, does not make constitutional that which is unconstitutional.[1]

[1] Fairbank v. United States, 181 U. S. 283, 307 [1901]; United States v. Boyer, 85 Fed. 425 [1898]; Marshall Field & Co. v. Clark, 143 U. S. 649, 691 [1892].

When the text of a constitutional provision is not ambiguous, the courts are not at liberty to search for its meaning beyond the instrument itself. If a case is within the letter of the Constitution it is not to be excluded from its meaning by showing that it was not in the minds of those who framed and adopted it; it is further necessary to show that, had the case been suggested, the language would have been changed so as to except it. It cannot be inferred from extrinsic circumstances that a case, for which the Constitution expressly provides, is exempted from its operation; such an exception may be made only if

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something in the literal construction is obviously absurd or mischievous, or repugnant to the spirit of the Constitution.[1] But for the application of this rule, a case must at least be within the words of the Constitution.

[1] Dartmouth College *v.* Woodward, 4 Wheat. 518, 644 [1819]. *See also* Ogden *v.* Saunders, 12 Wheat. 332 [1827]; Houston *v.* Moore, 5 Wheat. 1 [1820]; Briscoe *v.* Bank of Kentucky, 11 Pet. 257 [1837].

HISTORICAL ORIGIN.

The historical origin may be considered and historical evidence may be resorted to as aids in the construction and application of words and provisions. "What went before the adoption of the Constitution may be resorted to for the purpose of throwing light on its provisions."[1] "But in this, as in other instances, when called upon to construe and apply a provision of the Constitution of the United States, we must look not merely to its language but to its historical origin."[2]

[1] Marshall *v.* Gordon, 243 U. S. 521, 533 [1917]. *See also* Twining *v.* New Jersey, 211 U. S. 78 [1908]; Williamson *v.* United States, 207 U. S. 425 [1908].

[2] Missouri *v.* Illinois, 180 U. S. 208, 219 [1901]. *See also* Appleyard *v.* Massachusetts, 203 U. S. 222 [1906]; South Carolina *v.* United States, 199 U. S. 437 [1905].

HISTORY OF TIME OF ADOPTION.

The history of the time when a provision was framed and adopted should be examined to determine the old law, the mischief, and the remedy, and where it is undoubted that the object of a clause was to incorporate into the instrument certain principles which had become permanently fixed in the law of the mother country, the construction of those principles by the English courts is useful in determining their scope. In placing a construction upon an article of doubtful meaning, the safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it in a way, so far as is reasonably possible, to forward the known purpose or object for which it was adopted.[1]

[1] United States *v.* Wong Kim Ark, 169 U. S. 654 [1898].

DEBATES IN CONVENTION AND CONGRESS.

The views of the particular Members or the course of proceedings in the Convention cannot control the fair meaning and general scope of the Constitution as it was finally framed, and what individual Senators or Representatives may have urged in debate in regard to the meaning to be given to a proposed amendment does not furnish a firm ground for its construction, nor is it important as explanatory of the grounds upon which the Members voted in adopting it.[1]

[1] Legal Tender Cases, 12 Wall. 457, 561 [1871]; 110 U. S. 421, 444 [1884]; Maxwell *v.* Dow, 176 U. S. 581, 601 [1900].

In the case of Downes *v.* Bidwell[1] the court said: "It is unnecessary to enter into the details of this debate. The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of

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the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts." [1]

[1] 182 U. S. 244, 254 [1901]. *Cf.* Smith *v.* Turner (Passenger Cases), 7 How. 283, 396 [1849].

THE FEDERALIST.

As in the case of other contemporaneous exposition, the construction given to the Constitution by the authors of the Federalist is entitled to great weight. This collection of 85 essays, published in the newspapers immediately after the submission of the Constitution to the State conventions, constitutes indeed a frank advocacy of its adoption, by Hamilton, Madison and Jay; and in applying their opinions to cases which may arise, a right to judge of their correctness must be retained.[1]

[1] McCulloch *v.* Maryland, 4 Wheat. 316, 433 [1819]; Cohens *v.* Virginia, 6 Wheat. 264, 419 [1821]; Pollock *v.* Farmers' Loan & Trust Co., 158 U. S. 601, 627 [1895].

EXISTING LAW.

The law existing at the time the Constitution and the amendments were adopted and ratified, is often the best basis for ascertaining the scope and effect of a constitutional provision when such provision secures guaranties recognized by such law, rather than establishes new guaranties.[1] For example, "inspection laws" was a term well understood at the time when the Constitution provided (art. 1, sec. 10) that States might lay imposts or duties necessary for executing their inspection laws.[2] The provision (amendment 6) that an accused person should be confronted with the witnesses against him is subject to exceptions in the case of dying declarations and testimony of witnesses since deceased,—exceptions well established at the adoption of the Constitution and not intended to be abrogated.[3]

[1] Ex parte Wilson, 114 U. S. 417, 422 [1885]; Turner *v.* Maryland, 107 U. S. 38, 52 [1883]; Mattox *v.* United States, 156 U. S. 237, 243 [1895].
[2] New York *v.* Compagnie Générale Transatlantique, 10 Fed. 357 [1882], affirmed 107 U. S. 59 [1883].
[3] Kirby *v.* United States, 174 U. S. 47 [1899].

CONTEMPORARY LEGISLATION.

Proceedings in the State legislatures or the Continental Congress immediately before adoption of the Constitution have an important bearing on the construction to be given to that instrument.[1] And legislation by Congress at the time of proposing or immediately following the proposal or adoption of an amendment, is authoritative in determining the scope of a constitutional provision. For example, the first 10 amendments to the Constitution were proposed by the First Congress on September 25, 1789; at the same session (July 31) an act was passed to regulate the collection of customs duties (1 Stat. 29), which in section 23 authorized customs officials to seize and search for goods suspected of having been fraudulently entered or concealed. It cannot be suggested with any force that the same Congress which proposed the amendments could have regarded the Fourth and Fifth Amendments as forbidding the enactment of those or of kindred provisions.[2]

[1] Waring *v.* Clarke, 5 How. 411, 456 [1847].
[2] Matter of Platt, 19 Fed. Cas. No. 11,212 [1874]. *See also* United States *v.* Rhodes, 27 Fed. Cas. No. 16151 [1866]; Cohens *v.* Virginia, 6 Wheat. 264 [1821].

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CONTEMPORANEOUS CONSTRUCTION.

Contemporary interpretation of the Constitution is entitled to great weight, and the practice and acquiescence under it for a period of years afford an irresistible answer to objection and fix the construction.[1]

[1] Cohens *v.* Virginia, 6 Wheat. 264, 418 [1821]; United States *v.* Midwest Oil Co., 236 U. S. 459 [1915]; The "Laura", 114 U. S. 411, 416 [1885]; The "Genessee Chief" *v.* Fitzhugh, 12 How. 443, 458 [1852]; Stuart *v.* Laird, 1 Cr. 299 [1803]; Burrow Giles Lithograph Co. *v.* Sarony, 111 U. S. 53, 57 [1884]; Butte City Water Co. *v.* Baker, 196 U. S. 119, 127 [1905]; Halter *v.* Nebraska, 205 U. S. 34 [1907]; Myers *v.* United States, 272 U. S. 52 [1926].

Especially in cases of doubt, the solemn, deliberate, well-considered, and long settled decisions of the judiciary, and the quiet assent of the people to an unbroken and unvarying practice, ought to conclude the action of courts in favor of a principle so established, even when the individual opinions of the judges would be different were the question *res integra*.[1]

[1] Missouri *v.* Illinois, 180 U. S. 208, 219 [1901]; Kilbourn *v.* Thompson, 103 U. S. 168, 204 [1881]; McPherson *v.* Blacker, 146 U. S. 1, 27 [1892]; Wilkinson *v.* Leland, 2 Pet. 627, 657 [1829]; Cooley *v.* Philadelphia, 12 How. 299, 315 [1851]; Veazie Bank *v.* Fenno, 8 Wall. 533, 541 [1869].

In Ames *v.* Kansas,[1] it was said that in view of the practical construction put on the particular provision at the moment of the organization of the Government, and of the significant fact that no court of the United States had ever determined to the contrary the Supreme Court was "unable to say" that the vesting of jurisdiction in question was not within the power of Congress. In the recent case of United States *v.* Curtiss-Wright Export Corp.,[2] the Court cited a long succession of instances wherein power had been granted the President in respect to foreign relations, and held that "an impressive array of legislation * * * enacted by nearly every Congress from the beginning of our national existence to the present day, must be given unusual weight in the process of reaching a correct determination of the problem [validity of Public Resolution of May 28, 1934 (48 Stat. 811), relating to exports to the Chaco]."

[1] 111 U. S. 469 [1884].
[2] 299 U. S. 304, 327 [1936].

Liberal Construction.

The Constitution is not to be interpreted with the strictness of a code of laws, or of a private contract. Liberal construction received its great impetus with Chief Justice Marshall, who, in the case of McCulloch *v.* Maryland, laid down the classic rule: "We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. 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

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are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." [1]

[1] 4 Wheat. 316, 421 [1819].

In particular, the provisions for the protection of life, liberty, and property are to be largely and liberally construed in favor of the citizen;[1] at the same time they are not to be construed to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder or obstruct the administration of criminal justice. The limitations and ample provisions of the Constitution should not be extended so far as to destroy the necessary powers of the States or prevent their efficient exercise.[2] In speaking of the liberal construction to be given to restrictive or prohibitive provisions of the Constitution, the Court said in Fairbank *v.* United States: "If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is * * * the help found in the last clause of the eighth section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose." [3]

[1] Dorman *v.* State, 34 Ala. 216, 238 [1859].
[2] Brown *v.* Walker, 161 U. S. 591 [1896].
[3] 181 U. S. 283, 289 [1901].

Liberal construction, however, may not be carried to the extent of inserting anything in the Constitution which is not expressed or cannot be fairly implied. The general rule, that affirmative words may be given negative operation—i. e., may imply a negative of other objects than those affirmed—can be applied only where the implication promotes, not where it defeats, the obvious intention of an article. For example, in the case of the grant to the Supreme Court of original jurisdiction in certain cases, a negative or exclusive sense must be given or it has no operation, but in the grant of appellate jurisdiction, that jurisdiction may be exercised in every case cognizable under article III, in the Federal courts, in which original jurisdiction cannot be exercised, and the extent of this judicial power is to be measured, not by giving the affirmative words of the distributive clause a negative operation in every possible case, but by giving their true meaning to the words which define its extent.[1]

[1] Cohens *v.* Virginia, 6 Wheat. 264, 394 [1821]; Marbury *v.* Madison, 1 Cr. 137, 174 [1803].

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Stare Decisis.*

The doctrine of *stare decisis* assumes an added importance where the Constitution is under consideration.

The general maxim is, that a point of law once settled by a decision forms a precedent not afterward to be departed from—a precedent for the guidance of courts in substantially similar cases, adherence to which is necessary to preserve the certainty, stability, and symmetry of our jurisprudence.[1] The doctrine is based on the assumption that the rules of law to which it applies have been determined by a court having final jurisdiction of the questions involved;[2] and it applies with especial force with respect to rules of property and business law.[3] Thus, in 1862, where the Supreme Court summarily refused to reconsider its decision, five times affirmed, as to the validity of the act establishing the State Bank of Ohio, Justice Swayne stated: "Whatever differences of opinion may have existed in this Court originally in regard to these questions, or might now exist if they were open for reconsideration, it is sufficient to say that they are concluded by these adjudications. The argument upon both sides was exhausted in the earlier cases."[4]

[1] See Broom, Legal Maxims, 7th ed., p. 147; The "Madrid", 40 Fed. 677, 679 [1889].

[2] Calhoun Gold Mining Co. *v.* Ajax Gold Mining Co., 27 Colo. 1 [1899].

[3] See, e. g., Treon *v.* Brown, 14 Ohio 482, 488 [1846]; Newberry *v.* Trowbridge, 4 Mich. 391, 395 [1857]; Hines *v.* Driver, 89 Ind. 339, 342 [1883]; Kneeland *v.* Milwaukee, 15 Wis. 691 [1863]; Minnesota Min. Co. *v.* National Min. Co., 3 Wall. 332 [1866]; Mitchell *v.* Burlington, 4 Wall. 270 [1867]; Nadal *v.* May, 233 U. S. 447 [1914].

[4] Wright *v.* Sill, 2 Black 544 [1863].

Application of the doctrine presupposes a decision by a majority of the court; affirmance by an evenly divided court, while conclusive as to the particular matter in litigation, does not constitute the case an authority for the determination of other cases, either in the Supreme or inferior courts.[1]

[1] Hertz *v.* Woodman, 218 U. S. 205, 213 [1910].

On the other hand, the authority of a decision is not lessened by a failure to give the grounds for decision. Thus, in Fidelity & Deposit Co. *v.* United States, 187 U. S. 315 [1902], it was held that the decision in Smoot *v.* Rittenhouse [unreported], upholding the validity of a certain rule of the District of Columbia Supreme Court, was authoritative, though no grounds of decision were stated; and the inference to be drawn from that circumstance was that the Court felt there was no question as to the validity of the rule under consideration.

Application of the doctrine further presumes a discrimination between what is decision and *obiter dictum*. Thus, it was stated in Pollock *v.* Farmers' Loan and Trust Co., 157 U. S. 429, 574 [1895]: "Doubtless the doctrine of *stare decisis* is a salutary one, and to be adhered to on all proper occasions, but it only arises in respect of decisions directly upon the points in issue."

General expressions in an opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected but ought not to control the judgment in a subsequent suit when

* *See also* p. 950.

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the very point is presented for decision.[1] No opinion can be relied on as binding authority unless the case called for its expression. Its weight of reason must depend on what it contains; but it cannot be said that a case is not authority on one point because although that point was properly presented and decided in the regular course of the consideration of the case, something else was found in the end which disposed of the whole matter.[2]

[1] Cohens *v.* Virginia, 6 Wheat. 399 [1821]. *See also* Brooks *v.* Marbury, 11 Wheat. 78 [1826].

[2] Carroll *v.* Carroll, 16 How. 275 [1853]; Florida Cent. R. Co. *v.* Schutte, 103 U. S. 118 [1881]; Mast, Foos & Co. *v.* Stover Mfg. Co., 177 U. S. 485 [1900].

However, while the doctrine is thus recognized and acted upon by the Supreme Court within limits, in the language of Justice Brandeis, "*stare decisis* is not, like the rule of *res judicata*, a universal, inexorable command."[1] It is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right; but it does not require the court to follow a clearly erroneous authority. As early as 1849, Chief Justice Taney stated his position that "it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."[2]

[1] Dissenting opinion in Burnet *v.* Coronado Oil & Gas Co., 285 U. S. 393, 405 [1932]. *See also* Hertz *v.* Woodman, 218 U. S. 205 [1910].

[2] Smith *v.* Turner (Passenger Cases) 7 How. 283, 470 [1849].

In the light of experience and better reasoning, the Supreme Court has not infrequently overruled its constitutional decisions.[1]

[1] For a list of such cases, *see* dissenting opinion of Justice Brandeis in Burnet *v.* Coronado Oil & Gas Co., 285 U. S. 393, 407 (note 2), 409 (note 4) [1932].

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THE
CONSTITUTION OF THE UNITED STATES OF AMERICA
WITH ANNOTATIONS

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THE CONSTITUTION OF THE UNITED STATES OF AMERICA WITH ANNOTATIONS

[The abbreviations "Sec." stand for Section, "Cl." for Clause, and "Amdt." for Amendment]

The preamble.

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The People of the United States.

The Constitution emanated from the people and was not the act of sovereign and independent States.[1] The preamble contemplates the body of electors composing the States, the terms "people" and "citizens" being synonymous. Negroes, whether free or slaves, were not included in the term "people of the United States" at that time.[2]

[1] McCulloch *v.* Maryland, 4 Wheat. 316 [1819]. *See also* Chisholm *v.* Georgia, 2 Dall. 419, 470 [1793]; Penhallow *v.* Doane, 3 Dall. 54, 93 [1795]; Martin *v.* Hunter, 1 Wheat. 304, 324 [1816]; Barron *v.* Baltimore, 7 Pet. 247 [1833].

[2] Scott *v.* Sandford, 19 How. 393, 404 [1857].

To Form a More Perfect Union.

The Union of the States was never a purely artificial and arbitrary relation. It grew out of common origin, kindred principles and similar interests, and was confirmed by the necessities of war. It received definite form from the Articles of Confederation; and when these were found inadequate, the Constitution was ordained "to form a more perfect union." [1]

[1] Texas *v.* White, 7 Wall. 724 [1869]. *See also* Martin *v.* Hunter, 1 Wheat. 304, 332 [1816]; Scott *v.* Sandford, 19 How. 393, 441 [1857]; Legal Tender Cases, 12 Wall. 457, 554 [1871]; White *v.* Hart, 13 Wall. 650 [1872]; United States *v.* Cruikshank, 92 U. S. 549 [1876]; Wharton *v.* Wise, 153 U. S. 155, 167 [1894].

For the United States of America.

The Government is established "for the United States of America" and not for countries outside of their limits.[1] Where the Constitution

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has been once formally extended by Congress to Territories, neither Congress nor the Territorial legislature can enact laws inconsistent therewith.[2]

[1] In re Ross, 140 U. S. 464 [1891].
[2] Downes v. Bidwell, 182 U. S. 245, 271 [1901].

ALASKA.—Under the treaty with Russia concerning Alaska it appears that Alaska is incorporated into and is a part of the United States, and the provisions of the Constitution are applicable to that Territory.[1]

[1] Rasmussen v. United States, 197 U. S. 522 [1905].

CUBA.—Within the meaning of the extradition act of June 6, 1900 (31 Stat. 656), Cuba was, in 1900, foreign territory. "It cannot be regarded, in any constitutional, legal or international sense, a part of the territory of the United States." As between the United States and Cuba, the Island was "territory held in trust for the inhabitants of Cuba to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action." [1]

[1] Neely v. Henkel (No. 1), 180 U. S. 109, 119, 120 [1901].

HAWAIIAN ISLANDS.—Mere annexation did not effect incorporation of the Islands into the United States, and the provisions of the Constitution as to jury trials are not applicable to them.[1] But they are not foreign country within the meaning of the tariff laws.[2]

[1] Hawaii v. Mankichi, 190 U. S. 217 [1903]; Honolulu R. T. & L. Co. v. Hawaii, 211 U. S. 282 [1908].
[2] Goetze v. United States, 182 U. S. 221 [1901].

PHILIPPINE ISLANDS.—In the absence of incorporation into the United States, the status of the Islands, and the powers of Congress in relation thereto, are determined by article IV, section 3. While it was established in American Insurance Co. v. Canter, 1 Pet. 511 [1828], Downes v. Bidwell, 182 U. S. 244 [1901], and other cases, that Congress is not subject to all the restrictions applicable in its legislating for the United States, the exercise of the power expressly granted to govern the Territories is not without limitations. Right to a common-law jury was held not to be extended simply by force of the Constitution.[1] But the prohibition of double jeopardy, guaranteed by the Fifth Amendment, was held applicable.[2] The Islands were held not to be foreign country within the meaning of the tariff laws.[3]

[1] Dorr v. United States, 195 U. S. 138 [1904].
[2] Kepner v. United States, 195 U. S. 100 [1904]; Grafton v. United States, 206 U. S. 333 [1907].
[3] Fourteen Diamond Rings v. United States, 183 U. S. 177 [1901]; Lincoln v. United States, 197 U. S. 427 [1905].

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PUERTO RICO.—Puerto Rico was not incorporated into the United States by the cession from Spain, but became a Territory appurtenant and belonging to the United States—though not within the revenue clauses of the Constitution.[1] It was not incorporated by the Civil Government Act of 1900 (31 Stat. 77) nor by the Jones Act of 1917 (39 Stat. 951) (nor by the extension of revenue, navigation, immigration, banking, bankruptcy, extradition, census and other laws, the grant of citizenship, establishment of district court, etc.); and the requirement of jury trial, Sixth Amendment, does not apply.[2]

[1] Downes *v.* Bidwell, 182 U. S. 263 [1901]. *See also* Dooley *v.* United States, 182 U. S. 235 [1901]; Ponce *v.* Roman Catholic Apostolic Church, 210 U. S. 296 [1908].

[2] Balzac *v.* Porto Rico, 258 U. S. 298 [1922].

Preamble as a Source of Substantive Power.

No power to enact any statute is derived from the preamble. The Constitution is the only source of power authorizing action by any branch of the Federal Government.[1]

[1] Dorr *v.* United States, 195 U. S. 140 [1904]; Jacobson *v.* Massachusetts, 197 U. S. 22 [1905].

Of General Application.

In connection with the preamble and as of general application and interest, see—

Brown *v.* Maryland, 12 Wheat. 419 [1827]; Claflin *v.* Houseman, 93 U. S. 130 [1876]; Williams *v.* Bruffy, 96 U. S. 176 [1878]; Langford *v.* United States, 101 U. S. 341 [1880]; United States *v.* Jones, 109 U. S. 513 [1883]; Fort Leavenworth R. Co. *v.* Lowe, 114 U. S. 525 [1885]; Logan *v.* United States, 144 U. S. 263 [1892]; Fong Yue Ting *v.* United States, 149 U. S. 698 [1893]; United States *v.* Knight, 156 U. S. 1 [1895]; Mattox *v.* United States, 156 U. S. 237 [1895].

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ARTICLE I

LEGISLATIVE DEPARTMENT

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LEGISLATIVE DEPARTMENT

ARTICLE I

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.*

Article I. Legislative Department.
Sec. 1. The Congress.

Legislative Power.

IN GENERAL.

The provision "All legislative powers herein granted shall be vested in a Congress" means that Congress, "within the limits of its powers and observing the restrictions imposed by the Constitution may, in its discretion, enact any statute appropriate to accomplish the objects for which the National Government was established." [1]

[1] Burton *v.* United States, 202 U. S. 344, 367 [1906].

HEREIN GRANTED.

The only legislative powers vested in Congress are those "herein granted." "Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next enquiry must be whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it." [1]

[1] Justice Story, Commentaries on the Constitution, section 1243, quoted with approval in United States *v.* Harris, 106 U. S. 629, 636 [1883].

The Government of the United States is one of delegated, limited, and enumerated powers.[1] Therefore, every valid act of Congress must find in the Constitution some warrant for its passage. This is apparent by reference to certain provisions of the Constitution: e. g., (*a*) article I, section 1 that all legislative powers granted by the Constitution shall be vested in the Congress of the United States; (*b*)

* The Continental Congress had consisted of but one House. While the Constitution at several points contemplates action by one House or the other of Congress, it was stated in Kilbourn *v.* Thompson, 103 U. S. 168, 182 [1881]: "Neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body, except in the few instances where authority is conferred on either House separately, as in the case of impeachments."

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article I, section 8 which enumerates the powers granted to Congress, and concludes the enumeration with a grant of power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof"; and (*c*) the Tenth Amendment which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[2]

[1] Martin *v.* Hunter's Lessee, 1 Wheat. 304 [1816]; McCulloch *v.* Maryland, 4 Wheat. 316 [1819]; Gibbons *v.* Ogden, 9 Wheat. 1 [1824].
[2] United States *v.* Harris, 106 U. S. 629, 635 [1883].

In the Constitution are provisions in separate articles for the three great departments of Government—legislative, executive, and judicial. But there is a significant difference in the grants of powers to those departments: The first article, treating of legislative powers, does not make a general grant of legislative power to Congress; it vests in Congress "all legislative powers herein granted." The second article, on the other hand, vests "the executive power" in the President. Similarly, the third article states that "the judicial power of the United States" shall be vested in a Supreme Court and in such inferior courts as Congress may establish.[1] From the language thus used in these three articles, it has become established that the entire executive and judicial power of the Nation are vested in the President and the Federal judiciary, while only those legislative powers granted by the Constitution may be exercised by Congress.[2] "The proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a Government of enumerated powers."[3] Congress has no inherent sovereign powers in the realm of domestic legislation.

[1] Kansas *v.* Colorado, 206 U. S. 46, 81 [1907].
[2] Ibid, pp. 81–82.
[3] Ibid, p. 89.

But different principles determine the extent of legislative power in international affairs. "* * * the powers of the Federal Government in respect of foreign or external affairs and those in respect of domestic or internal affairs * * * are different, both in respect of their origin and their nature. The broad statement that the Federal Government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the States* such portions as it was thought desirable to vest in the Federal Government, leaving those not included in the enumeration still in the States. * * * That this

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doctrine applies only to powers which the States had, is self evident. And since the States severally never possessed international powers, such powers could not have been carved from the mass of State powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. * * * As a result of the separation from Great Britain by the Colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the Colonies severally, but to the Colonies in their collective and corporate capacity as the United States of America. * * * When, therefore, the external sovereignty of Great Britain in respect of the Colonies ceased, it immediately passed to the Union. * * * The Union existed before the Constitution, which was ordained and established among other things to form 'a more perfect Union.' Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be 'perpetual', was the sole possessor of external sovereignty and in the Union it remained without change save insofar as the Constitution in express terms qualified its exercise. * * * It results that the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have been vested in the Federal Government as necessary concomitants of nationality. * * * As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the internationa family. Otherwise, the United States is not completely sovereign." [1]

[1] United States *v.* Curtiss-Wright Export Corp., 299 U. S. 304, 315–318 [1936].

POWER OF INVESTIGATION DISTINGUISHED.

The powers of Congress in respect to investigation and legislation are not absolutely identical, but the power of investigation is the wider and extends to matters on which Congress could not constitutionally legislate directly, if they are reasonably calculated to afford information useful and material in the framing of constitutional legislation.[1]

[1] Interstate Commerce Commission *v.* Harriman, 157 Fed. 432 [1908], order modified in Harriman *v.* Interstate Commerce Commission, 211 U. S. 407 [1908]; Kilbourn *v.* Thompson, 103 U. S. 168 [1881].

Delegation of Legislative Power.*

IN GENERAL.

"The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is

See also pp. 155, 234, 252, 258, 549.

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thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply." [1]

[1] Panama Refining Co. *v.* Ryan, 293 U. S. 388, 421 [1935]. *See also* Morrill *v.* Jones, 106 U. S. 466 [1883], and Schechter Poultry Corp. *v.* United States, 295 U. S. 495, 529 [1935].

Legislative action laying down an intelligible principle to which a person or body is to conform does not constitute a forbidden delegation of legislative power.[1]

[1] Hampton & Co. *v.* United States, 276 U. S. 394, 409 [1928].

Congress may also, in enacting legislation, provide either that its operation shall be suspended or that it shall go into effect, upon the occurrence of certain events, the existence of which shall be ascertained and declared by administrative officers.[1]

[1] The brig "Aurora", 7 Cr. 382 [1813]; Marshall Field & Co. *v.* Clark, 143 U. S. 649 [1892]; Hampton & Co. *v.* United States, 276 U. S. 394 [1928].

TO EXECUTIVE OFFICERS AND AGENCIES.

Generally.

"The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the executive branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations." [1]

[1] Hampton & Co. *v.* United States, 276 U. S. 394, 406 [1928]. *See also* In re Kollock, 165 U. S. 526 [1897]; Buttfield *v.* Stranahan, 192 U. S. 470 [1904]; Union Bridge Co. *v.* United States, 204 U. S. 364 [1907]; Oceanic Steam Nav. Co. *v.* Stranahan, 214 U. S. 320 [1909]; United States *v.* Grimaud, 220 U. S. 506 [1911].

"That the legislative power of Congress cannot be delegated is, of course, clear. But Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations."[1]

[1] United States *v.* Shreveport Grain & El. Co., 287 U. S. 77, 85 [1932].

"The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to

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what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." [1]

[1] Judge Ranney, in Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County, 1 Ohio St. 77, 88 [1852], cited with approval in Marshall Field & Co. v. Clark, 143 U. S. 649, 693 [1892]; Hampton & Co. v. United States, 276 U. S. 394, 407 [1928].

The power which may thus be delegated to administrative officers, is strictly limited to administrative regulations, and does not extend to regulations actually subverting or modifying the terms of an act of Congress.[1]

[1] Morrill v. Jones, 106 U. S. 466 [1883]; United States v. Eaton, 144 U. S. 677 [1892]; United States v. United Verde Copper Co., 196 U. S. 207 [1905]; Williamson v. United States, 207 U. S. 425 [1908]; United States v. Antikamnia Co., 231 U. S. 654 [1914].

To the President.

In deciding whether Congress has abdicated its essential legislative functions and delegated them to the Executive, and in determining whether the grant of power amounts to "unfettered discretion" or actually lays down an "intelligible standard", due regard must be had to the nature of the power granted. If it relates solely to internal or domestic affairs, an act may be challenged as constituting an unlawful delegation of legislative power, while similar language used in an act relating to external or foreign affairs may be upheld. In the realm of foreign affairs the President already possesses a delicate, plenary, and exclusive power as the sole organ of the Federal Government in the field of international relations, a power which does not require as a basis for its exercise an act of Congress. The President, rather than Congress, has the better opportunity of knowing the conditions which prevail in foreign countries. These considerations disclose the unwisdom of requiring Congress to lay down narrowly definite standards by which the President is to be governed in the field of international relations. Broad discretion may be vested in the President in determining whether the enforcement of a neutrality or embargo statute will have a beneficial effect upon the reestablishment of peace, in deciding whether he shall invoke its provisions, in determining when it shall cease to operate, or in prescribing limitations and exceptions to its enforcement.[1]

[1] United States v. Curtiss-Wright Export Corp., 299 U. S. 304 [1936].

The act of October 1, 1890 (26 Stat. 612), section 3, authorizing the President to suspend "for such time as he shall deem just" the provisions of the act allowing the free importation of certain commodities as to any countries which impose upon the products of the United States duties which he "may deem to be reciprocally unequal and unjust," cannot be considered a delegation of legislative or treaty-making power, especially in view of the fact that from the

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foundation of the Government Congress has frequently invested the President with similar discretion.[1]

[1] Marshall Field & Co. *v.* Clark, 143 U. S. 649 [1892]. *See also* Buttfield *v.* Stranahan, 192 U. S. 470 [1904]; Nicholas & Co. *v.* United States, 249 U. S. 34 [1919]; Hampton & Co. *v.* United States, 276 U. S. 394 [1928].

The National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 195), authorizing the President to approve or prescribe codes of fair competition for various industries in order to effectuate the "policy of Congress"—declared in comprehensive terms to be the rehabilitation of industry and conservation of natural resources—is an unconstitutional delegation of legislative power. The Court said that "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."[1]

[1] Schechter Poultry Corp. *v.* United States, 295 U. S. 495, 537 [1935]. *See also* United States *v.* Chemical Foundation, 272 U. S. 1 [1926]; Panama Refining Co. *v.* Ryan, 293 U. S. 388 [1935].

In view of the delicacy of foreign relations and of the power peculiar to the President in this regard, congressional legislation which is to be made effective in the international field must often accord to him a degree of discretion and freedom which would not be admissible were domestic affairs alone involved; and so a joint resolution providing that if the President finds that the prohibition of the sale of munitions to certain warring countries may contribute to peace between those countries, he may make a proclamation to that effect and it shall thereafter be unlawful to sell munitions to them, is not an unconsitutional delegation of legislative power.[1]

[1] United States *v.* Curtiss-Wright Export Corp., 299 U. S. 304 [1936].

To the Secretary of War.

The act of March 3, 1869 (15 Stat. 336), authorizing a bridge over the East River in New York Harbor, construction thereof not to be commenced until the Secretary of War signified his approval of plans as conforming to the conditions prescribed by Congress, was held not to be an abdication of power to determine what constituted an obstruction to navigation.[1]

[1] Miller *v.* New York, 109 U. S. 393 [1883]. For further examples of delegation of power to the Secretary of War *see also* South Carolina *v.* Georgia, 93 U. S. 13 [1876]; Rider *v.* United States, 178 U. S. 251 [1900]; Union Bridge Co. *v.* United States, 204 U. S. 364 [1907]; Monongahela Bridge Co. *v.* United States, 216 U. S. 177 [1910]; Hannibal Bridge Co. *v.* United States, 221 U. S. 194 [1911]; Wisconsin *v.* Illinois, 278 U. S. 367 [1929].

To the Secretary of Agriculture.

Legislative power was not unconstitutionally delegated to the Secretary of Agriculture by the act approved June 4, 1897 (30 Stat.

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35) authorizing him to make rules and regulations covering forest reservations and making violations thereof a crime.[1]

[1] United States *v.* Grimaud, 220 U. S. 506 [1911]. *See also* Light *v.* United States, 220 U. S. 523 [1911].

To the Secretary of Labor.

The act of May 10, 1920 (41 Stat. 593), requiring the Secretary of Labor to deport aliens of certain enumerated classes, if, after hearing, he finds such aliens are "undesirable residents", was held not invalid as a delegation of legislative power in view of the legislative background and the "common understanding of the term undesirable residents."[1]

[1] Mahler *v.* Eby, 264 U. S. 32 [1924]; United States ex rel. Tisi *v.* Tod, 264 U. S. 131 [1924].

To the Interstate Commerce Commission.

By the Interstate Commerce Act and amendments thereto, Congress provided a code of laws regulating the activities of interstate carriers, and to facilitate application of the standards prescribed, set up an expert body with power to act upon notice and hearing, and to issue orders only when supported by findings of fact in turn sustained by the evidence.[1]

[1] Schechter Poultry Corp. *v.* United States, 295 U. S. 495, 539 [1935], citing Interstate Commerce Commission *v.* Louisville & N. R. Co., 227 U. S. 88 [1913]; Florida *v.* United States, 282 U. S. 194 [1931]; United States *v.* Baltimore & O. R. Co. 293 U. S. 454 [1935].

The Interstate Commerce Act, as amended, delegates (sec. 15) to the Commission the power, upon full hearing, to prescribe just and reasonable individual or joint rates, fares or charges (or maximum and/or minimum rates, etc.), if it is of opinion that existing rates are "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act." The validity of this delegation of power has never been directly and specifically passed upon by the Supreme Court, but in view of the numerous cases upholding rate-making orders of the Commission, may be considered as impliedly upheld.

The power of Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove an unjust discrimination against interstate commerce is not open to dispute.[1]

[1] Houston, E. & W. T. R. Co. *v.* United States, 234 U. S. 342 [1914]; Illinois C. R. Co. *v.* Public Utilities Comm. 245 U. S. 493 [1918]; Railroad Commission *v.* Chicago, B. & Q. R. Co., 257 U. S. 563 [1922]; Arkansas R. Commission *v.* Chicago, R. I. & P. R. Co., 274 U. S. 597 [1927]; Alabama *v.* United States, 279 U. S. 229 [1929].

As to the power delegated to the President and the Commission under the wartime act approved March 21, 1918 (40 Stat. 451), providing for Federal control of railroads, see—

Northern P. R. Co. *v.* North Dakota ex rel. Langer, 250 U. S. 135 [1919].

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For the effect of the recognition of local law by act of Congress, e. g., in the Wilson Act, the Bankruptcy Act, the Judicial Code (sec. 24), see—

In re Rahrer, 140 U. S. 545 [1891]; Hanover National Bank v. Moyses, 186 U. S. 181 [1902]; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 [1920]; Washington v. Dawson & Co. 264 U. S. 219 [1924].

Encroachment by the Executive and Judiciary on Legislative Power.*

IN GENERAL.

The doctrine of the "separation of powers" of the executive, legislative, and judicial branches of the Federal Government is fundamental in the American theory of constitutional Government.[1] One branch is not to encroach upon the other, except insofar as authorized by the Constitution. Essential functions of the legislature are not to be usurped by the executive nor by the judiciary. Similarly, the legislature is not to interfere with the other coordinate departments of the Government except where an intermingling of spheres of action is authorized or contemplated by the Constitution itself.

[1] *See* The Federalist, Nos. 47 to 51.

In this way a dangerous concentration of power is avoided, and respective powers are assigned to the departments best fitted to exercise them.[1]

[1] Madison, The Federalist, No. 47. *See also* Kilbourn v. Thompson, 103 U. S. 168 [1881].

ENCROACHMENT BY THE EXECUTIVE.

The doctrine of separation of powers is, of course, applicable to the Executive and to Congress, except insofar as the Constitution authorizes the President to veto legislation, to inform Congress on the state of the Union, to conduct foreign affairs, etc.

The exercise of the Presidential "pocket veto" after Congress adjourns is not an encroachment on legislative prerogatives. He has 10 days in which to indicate his approval or disapproval; if Congress adjourns in the interim, it thereby prevents a return of the bill.[1]

[1] Okanogan Indians v. United States (Pocket Veto Case), 279 U. S. 655 [1929].

But after a bill becomes law, it is the President's duty to see that it is enforced. He cannot then veto it by inaction. No power is vested in the President to repeal an act of Congress.[1] Of course, in enacting legislation, Congress may provide either that its operation shall be suspended or that it shall go into effect, upon the occurrence of certain events, the existence of which shall be ascertained and declared by the President.[2] For example, the Neutrality Act of May 1, 1937 (50 Stat. 121) does not in general become effective until "the President shall find that there exists a state of war between, or among, two or more foreign States." Certain provisions of that act do not

* *See also* pp. 376, 387, 418, 421, 424.

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become effective except upon a further finding by the President that their enforcement "is necessary to promote the security or preserve the peace of the United States or to protect the lives of citizens of the United States." Upon a finding by the President that these conditions cease to exist, the act is thereupon suspended. The President in acting under such legislation does not encroach upon the constitutional rights of the legislature.[3]

[1] The Confiscation Cases, 20 Wall. 92, 113 [1874]; United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 331–332 [1936].

[2] The brig "Aurora," 7 Cr. 382 [1813]; Marshall Field & Co. v. Clark, 143 U. S. 649 [1892]; Hampton & Co. v. United States, 276 U. S. 394 [1928].

[3] *Cf.* United States v. Curtiss-Wright Export Corp., 299 U. S. 304 [1936].

Similarly, the President has a right to institute a blockade of ports in possession of persons in armed rebellion against the Government. It is true that Congress by the Constitution alone has the power to declare war. But the President, by virtue of his duty to take care that the laws be faithfully executed, and by reason of the fact that he is commander in chief of the army and navy, may resist force by force, where war in fact exists. He need not wait "for Congress to baptize it with a name." [1] Such conduct is not an unconstitutional encroachment by the executive upon the legislative powers of Congress.

[1] The Prize Cases, 2 Black. 635, 669 [1863].

In the exercise of its legislative power Congress may, of course, prescribe penalties for the violation of certain laws. It may make the commission of certain acts a criminal offense. But the Constitution also confers on the President the power to grant reprieves and pardons. Pursuant to that provision of the Constitution, the President may grant individual pardons, may proclaim general amnesties, or may suspend sentences. While the systematic granting of pardons for certain offenses would nullify the effectiveness of a particular statute, the general exercise by the President of his power to grant reprieves and pardons is not deemed an encroachment upon legislative authority.*

ENCROACHMENT BY THE JUDICIARY.

In the words of Chief Justice Marshall, "the legislature makes, * * * and the judiciary construes the laws." [1] In general, this means that "a judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." [2]

[1] Wayman v. Southard, 10 Wheat. 1, 46 [1825].

[2] Holmes, J., in Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 226 [1908].

* *See* p. 384.

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The Court, therefore, has repeatedly said that it is not concerned with the policy, wisdom, or expediency of legislation. These matters fall within the province of Congress. The Supreme Court "neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends." [1] "Our duty * * * is fairly to construe the powers of Congress, and to ascertain whether or not the enactment falls within them, uninfluenced by predilections for or against the policy disclosed in the legislation. * * * Even should we consider the act unwise and prejudicial to both public and private interest, if it be fairly within delegated power our obligation is to sustain it." [2] "Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned." [3] "Into the motives which induced members of Congress to enact [particular legislation], this Court may not enquire." [4] "Nor may it pass upon the necessity for the exercise of a power possessed, since the possible abuse of a power is not an argument against its existence." [5]

[1] United States *v.* Butler, 297 U. S. 1, 63 [1936]. *See also* Chicago, B. & Q. R. Co. *v.* McGuire, 219 U. S. 549, 569 [1911].

[2] Railroad Retirement Board *v.* Alton R. Co., 295 U. S. 330, 346 [1935]. *See also* United States *v.* Jones, 131 U. S. 1, 19 [1889].

[3] Home Bldg. & L. Asso. *v.* Blaisdell, 290 U. S. 398, 447 [1934]. *See also* McCulloch *v.* Maryland, 4 Wheat. 316, 421 [1819]; Gibbons *v.* Ogden, 9 Wheat. 1, 197 [1824]; Brushaber *v.* Union Pacific R. Co., 240 U. S. 1, 25 [1916]; Rast *v.* Van Deman & Lewis Co., 240 U. S. 342, 357 [1916]; United States *v.* First Nat. Bank, 234 U. S. 245, 260 [1914]; Legal Tender Case, 110 U. S. 421, 450 [1884]; McCray *v.* United States, 195 U. S. 27, 54 [1904]; Everard's Breweries *v.* Day, 265 U. S. 545, 559 [1924].

[4] Arizona *v.* California, 283 U. S. 423, 455 [1931]; United States *v.* Des Moines Navigation Co., 142 U. S. 510, 544 [1892]; McCray *v.* United States, 195 U. S. 27, 53–59 [1904]; Weber *v.* Freed, 239 U. S. 325, 330 [1915]; Dakota Central Tel. Co. *v.* South Dakota, 250 U. S. 163, 184 [1919].

[5] Hamilton *v.* Kentucky Distilleries Co. 251 U. S. 146, 161 [1919]. *See also* Champion *v.* Ames (Lottery Case), 188 U. S. 321, 363 [1903].

"This court * * * has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here." [1] "For protection against unjust or unwise legislation, within the limits of recognized legislative power, the people must look to the polls and not to the courts." [2]

[1] License Tax Cases, 5 Wall. 462, 469 [1867]; Hennington *v.* Georgia, 163 U. S. 299, 304 [1896].

[2] Newport & C. Bridge Co. *v.* United States, 105 U. S. 470, 482 [1882]; Northern Securities Co. *v.* United States, 193 U. S. 197, 350 [1904]; Red "C" Oil Co. *v.* Board of Agriculture, 222 U. S. 380, 394 [1912].

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Sec. 1.—The Congress

"The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*." [1] "Where the means adopted by Congress are not prohibited and are calculated to effect the object intrusted to it, this Court may not inquire into the degree of their necessity; as this would be to pass the line which circumscribes the judicial department and to tread upon legislative ground." [2] "To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature, a notion foreign to our constitutional system." [3] "It would be an abuse of judicial power for the courts to attempt to interfere with the constitutional discretion of the legislature." [4]

[1] Chicago, B. & Q. R. R. Co. *v.* McGuire, 219 U. S. 549, 569 [1911].
[2] Everard's Breweries *v.* Day, 265 U. S. 545, 559 [1924]; McCulloch *v.* Maryland, 4 Wheat. 316, 423 [1819]; Legal Tender Case, 110 U. S. 421, 450 [1884]; Fong Yue Ting *v.* United States, 149 U. S. 698, 713 [1893].
[3] Purity Extract Co. *v.* Lynch, 226 U. S. 192, 202 [1912].
[4] Newport & C. Bridge Co. *v.* United States, 105 U. S. 470, 482 [1881].

Furthermore, there is no general veto power in the Supreme Court upon the legislation of Congress. The right to declare an act of Congress unconstitutional can only be exercised when a proper case between opposing parties is submitted for judicial determination. The authority to invalidate an act of Congress springs, not from a general veto power, but from the requirement that the Court, in administering the law and pronouncing judgment between the parties in the case, must enforce the Constitution as the supreme law of the land. Were the Court to express an official opinion upon the constitutional validity of an act of Congress before an actual case or controversy were presented, it would be usurping a function placed elsewhere, and thus encroaching upon executive and legislative prerogatives.[1]

[1] Muskrat *v.* United States, 219 U. S. 346, 357 [1911]; Marbury *v.* Madison, 1 Cr. 137 [1803].

Legislative bodies are exempt from judicial interference, so far as their legislative discretion extends. Hence, the Court will not enjoin the enactment of a law impairing the obligation of a contract, or a rate statute which will deprive a utility of property without due process of law. If an unconstitutional law be enacted, its enforcement may be arrested, but the Court cannot forbid the passage of an act. Legislative discretion, whether rightly or wrongfully exercised, is not subject to interference by the judiciary.[1]

[1] McChord *v.* Louisville & N. R. Co., 183 U. S. 483 [1902].

While the Court will refuse, for example, to enforce a rate statute which is confiscatory, it will not itself prescribe a new rate. "The fixing of rates is essentially legislative in its character." [1] Hence, in a given case, the Court will say that a controverted rate schedule is

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unreasonable, but it will not substitute therefor a schedule which it deems to be fair and equitable. That determination must be made by the legislature or appropriate commission. Furthermore, any attempt to confer on a constitutional Court the power to determine rates would be unconstitutional. For the Court to fix rates, even with the consent of Congress, would be to encroach upon the legislative powers vested in Congress by the first article of the Constitution.[2]

[1] McChord *v.* Louisville & N. R. Co., 183 U. S. 483 [1902].
[2] Keller *v.* Potomac Electric Power Co., 261 U. S. 428 [1923].

Article I. Sec. 2. House of Representatives. Cl. 1. Composition of and electors.

SECTION 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.*

Elections at Large.

Where the number of Representatives for a State has been increased by a new apportionment, the additional Representatives, if new districts are not created, may appropriately be elected by the State at large.[1]

[1] Smiley *v.* Holm, 285 U. S. 355, 374 [1932].

Right to Vote.

The right to vote for Members of Congress is not derived from the Constitution and laws of the State in which they are chosen, but has its foundation in the Federal Constitution.[1] Congress by appropriate legislation may protect such a right.[2]

[1] Minor *v.* Happersett, 21 Wall. 171 [1875]; Ex parte Yarbrough, 110 U. S. 651 [1884]; Wiley *v.* Sinkler, 179 U. S. 62 [1900]; Swafford *v.* Templeton, 185 U. S. 487 [1902].
[2] United States *v.* Mosley, 238 U. S. 383 [1915].

Qualifications of Voters.

The States may not prescribe the qualifications of voters for Members of Congress as such; but the qualifications prescribed by the States for electors of the most numerous branch of their legislatures are adopted by the Constitution for this purpose;[1] but this does not make the statutes and constitutional provisions of the

* For precedents of the House of Representatives as to various questions arising under this clause, e. g., effect of votes cast for ineligible candidate, what constitutes membership, length of term, status of delegates from territories, etc., *see* Clarke and Hall, Election Cases; Smith, Election Cases; Bartlett, Congressional Election Cases. *See also* Hinds' and Cannon's Precedents of the House of Representatives.

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various States in reference to the qualifications of electors parts of the Constitution or laws of the United States.[2]

[1] Ex parte Yarbrough, 110 U. S. 651 [1884].
[2] Shoshone Mining Co. *v.* Rutter, 177 U. S. 505 [1900].

Article I. Sec. 2. House of Representatives. Cl. 2. Qualifications of Members.

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.

The term "State" is used in this clause in its geographical sense and not in the sense of a political community.[1]

[1] Texas *v.* White, 7 Wall. 700, 721 [1869]; Boyd *v.* Nebraska, 143 U. S. 135 [1892]; United States *v.* Wong Kim Ark, 169 U. S. 649 [1898].

Article I. Sec. 2. House of Representatives. Cl. 3. Apportionment.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.]* The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States,† and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse 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.

* The part of this clause relating to the mode of apportionment of Representatives among the several States, was changed by the 14th Amendment, sec. 2 (p. 1007) and as to taxes on incomes without apportionment, by the 16th Amendment (p. 1025).

† The first census was ordered by act of March 1, 1790 (1 Stat. 101), to be taken "within 9 calendar months" from the first Monday in August 1790.

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District of Columbia.

In the exercise of the taxing power as a local legislature for the District of Columbia, Congress may exempt certain classes of property, or may tax them at a lower rate than other property.[1]

[1] Gibbons *v.* District of Columbia, 116 U. S. 404 [1886].

Basis of Apportionment.

The expression "excluding Indians not taxed" excluded nearly all of that race, but "meant that if there were such within a State as were taxed to support the Government, they should be counted for representation, and in the computation for direct taxes levied by the United States." [1]

[1] United States *v.* Kagama, 118 U. S. 375, 378 [1886]. *See also* Elk *v.* Wilkins, 112 U. S. 94, 99 [1884].

Apportionment of Representatives.

"Power to apportion Representatives after this enumeration is made is nowhere found among the express powers given to Congress, but it has always been acted upon as irresistibly flowing from the duty positively enjoined by the Constitution." [1]

[1] Prigg *v.* Pennsylvania, 16 Pet. 539, 619 [1842].

Under the Reapportionment Act of 1929, approved June 18, 1929 (46 Stat. 21), provision is made for reapportionment after each decennial census according to the then existing basis, effective beginning with the second Congress succeeding the census, unless Congress shall previously have enacted a new apportionment law. A considerable delay in reapportionment is thus possible. The question, however, is political rather than judicial. A State cannot claim additional representation on basis of a new census until a new apportionment law goes into effect.[1]

[1] *See* Nebraska ex rel. Cromelien *v.* Boyd, 36 Nebr. 181 [1893].

Apportionment of Direct Taxes.

In Knowlton *v.* Moore, 178 U. S. 89 [1900], the Court said that the requirement that direct taxes should be apportioned among the several States "contemplated the protection of the States, to prevent their being called upon to contribute more than was deemed their due share of the burden." [1]

[1] For cases distinguishing between direct and indirect taxes, *see* art. I, sec. 9, cl. 4, and amendment 16.

Enumeration—Scope.

While this clause expressly empowers Congress to provide for an enumeration of persons, "yet Congress has repeatedly directed an enumeration not only of free persons in the States but of free persons

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in the Territories, and not only an enumeration of persons but of statistics respecting age, sex, and production." [1]

[1] Legal Tender Cases, 12 Wall. 457, 536 [1871].

Article I. Sec. 2. House of Representatives. Cl. 4. Vacancies.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.*

Article I. Sec. 2. House of Representatives. Cl. 5. Impeachment.

The House of Representatives shall chuse their Speaker and other Officers; † and shall have the sole Power of Impeachment. ‡

The House of Representatives when acting in impeachment proceedings, has the power to compel the attendance of witnesses.[1]

[1] Kilbourn v. Thompson, 103 U. S. 168, 190 [1881].

Article I. Sec. 3. Senate. Cl. 1. Composition of.

SECTION 3. [The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one vote].#

Article I. Sec. 3. Senate. Cl. 2. Classification.

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

* For precedents under this clause, *see* I Bartlett, Election Cases, 464 (power to issue writ of election cannot be delegated); ibid. p. 9 (effect of election to serve during the special session); Clarke and Hall, Election Cases, 44, 92, and 869 (as to vacancy by resignation).

† For precedents on election of officers by the House, *see* Hinds' Precedents of the House of Representatives, vol. I, ch. VI, and Cannon's Precedents, vol. VI, ch. CLIII.

‡ For impeachment cases, *see* Hinds and Cannon, op. cit., vol. III, ch. LXIII–LXXIX; vol. VI, ch. CXCIII–CCII.

This part of sec. 3 was changed by the 17th Amendment (post, p. 1031). For precedents, *see* Taft, Senate Election Cases, pp. 96, 240, 248, 282, 312, 320, 323, 338, 426, 556, 582.

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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].*

Article I. Sec. 3. Senate. Cl. 3. Qualifications.

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.†

There have been no cases of importance decided under this clause.

Article I. Sec. 3. Senate. Cl. 4. Presiding officer.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

There have been no cases of importance decided under this clause. The Congressional Record shows many instances where the Vice President has voted and broken an equal division of the Senate.

Article I. Sec. 3. Senate. Cl. 5. Other officers.

The Senate shall chuse 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.

There have been no cases of importance decided under this clause, but as to the tenure of office of the President pro tempore the Senate adopted a resolution "that it is competent for the Senate to elect a President pro tempore, who shall hold the office during the pleasure of the Senate and until another is elected, and shall execute the duties thereof during all future absences of the Vice President until the Senate otherwise order." *See* Senate Journal, Fifty-first Congress, first session, page 165.

*This part of sec. 3 was changed by the 17th Amendment (post, p. 1031). For precedents, *see* Taft, Senate Election Cases, pp. 1, 5, 7, 16, 36; Clarke & Hall, Election Cases, 871.

†For precedents on the qualifications of Senators, *see* Hinds' and Cannon's Precedents, vol. I, ch. XIII and vol. VI, ch. CLVI.

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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.*

Article 1. Sec. 3. Senate. Cl. 6. Impeachment trials.

The Senate when trying impeachments, has power to compel the attendance of witnesses.[1]

[1] Kilbourn v. Thompson, 103 U. S. 168, 190 [1881].

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.

Article 1. Sec. 3. Senate. Cl. 7. Impeachment judgments.

There have been no cases of importance decided under this clause.

SECTION 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Article 1. Sec. 4. Elections and meetings. Cl. 1. Elections.

Shall be Prescribed in Each State by the Legislature.

The Reapportionment Act of 1911, approved Aug. 8, 1911 (37 Stat. 13), providing for the redistricting of the States "in the manner provided by the laws thereof", does not prevent the people of a State from reserving a right of approval or disapproval by referendum of a State act redistricting the State for the purpose of congressional elections.[1]

[1] Ohio v. Hildebrant, 241 U. S. 565 [1916].

The States are not precluded from providing that legislative action districting the State for congressional elections shall be subject

* For impeachment cases *see* Hinds' and Cannon's Precedents, op. cit., vol. III, ch. LXIII–LXXIX, and vol. VI, ch. CXCIII–CCII.

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to the veto power of the Governor as in other cases of the exercise of the law-making powers.[1]

[1] Smiley v. Holm, 285 U. S. 355 [1932]. *See also* Koenig v. Flynn, 285 U. S. 375 [1932]; Carroll v. Becker, 285 U. S. 380 [1932].

Power of Congress over Elections.

Prior to the adoption of the Seventeenth Amendment, this clause was the only source of power which Congress possessed over the elections of Senators and Representatives.[1]

[1] Newberry v. United States, 256 U. S. 232, 247 [1921]. *See also* Ex parte Siebold, 100 U. S. 371 [1880]; United States v. Gradwell, 243 U. S. 476 [1917].

In making regulations for the election of Representatives, it is not necessary that Congress should assume entire and exclusive control thereof. Congress under its authority to make or alter State laws regulating the time, place, and manner of holding congressional elections has a supervisory authority over the subject, and may either make entirely new regulations, or add to, alter, or modify the regulations made by the State. The authority of Congress over the subject, however, is paramount, and any regulations it may make necessarily supersede inconsistent regulations of the State.[1]

[1] Ex parte Siebold, 100 U. S. 371, 383 [1880].

The power of Congress to make such provisions as are necessary to secure the fair and honest conduct of an election at which a Member of Congress is elected, as well as the preservation, proper return and counting of votes cast thereat, and, in fact, whatever is necessary to an honest and fair certification of such election cannot be questioned. And Congress may accomplish the same ends by adopting the statutes of the States, and enforcing them by its own sanctions.[1] Thus Congress may punish a State election officer for violating his duty under a State law governing congressional elections.[2]

[1] In re Coy, 127 U. S. 731, 752 [1888].

[2] Ex parte Siebold, 100 U. S. 371 [1880]; Ex parte Clarke, 100 U. S. 399 [1880]; United States v. Gale, 109 U. S. 65 [1883].

Congress can by law protect the act of voting, the place where it is done, and the man who votes, from personal violence or intimidation and the election itself from corruption and fraud.[1]

[1] Ex parte Yarbrough, 110 U. S. 651, 661 [1884]; United States v. Mosley, 238 U. S. 383 [1915].

Under the constitutional grant of power to regulate "the manner of holding elections" of Senators and Representatives, Congress cannot fix the maximum sum which a candidate may spend or cause to be contributed and spent by others to procure his nomination at a

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primary election.[1] But Congress can punish officers and employees of the Government who solicit or receive contributions to procure the nomination of a particular candidate in a State primary election.[2]

[1] Newberry *v.* United States, 256 U. S. 232 [1921].
[2] United States *v.* Wurzbach, 280 U. S. 396 [1930].

Article 1. Sec. 4. Elections and meetings. Cl. 2. Meetings.

[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.]*

Pursuant to a resolution of the Continental Congress, the first session of the First Congress convened March 4, 1789. Up to and including May 20, 1820, 18 acts were passed providing for the meeting of Congress on other days in the year. Since that year Congress met regularly on the first Monday in December until 1934, when the Twentieth Amendment to the Constitution became effective, changing the meeting of Congress to January 3. The first and second sessions of the First Congress were held in New York City; subsequently, including the first session of the Sixth Congress, Philadelphia was the meeting place; since then Congress has convened in Washington.

Article 1. Sec. 5. Legislative proceedings. Cl. 1. Organization of Congress.

SECTION 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner and under such Penalties as each House may provide.

Extent of Power to Judge of Elections.

The powers of the House, under this clause, extend to the punishment of perjury in testifying before a notary public upon a contested election.[1]

[1] In re Loney, 134 U. S. 372 [1890].

It is not inconsistent with the powers of the two Houses separately over the elections and qualifications of their own Members of Congress to enact a law prohibiting the acceptance of compensation by Members of Congress for services before departments, and declaring persons convicted thereunder incapable of holding Federal office thereafter. Judgment under the act does not "operate, *ipso facto* to vacate the

*This clause is superseded by the 20th Amendment. For precedents of the action of Congress, *see* Hinds' Precedents, vol. I, ch. I.

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seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment." [1]

[1] Burton v. United States, 202 U. S. 344, 366–369 [1906].

Where the power of a Senate investigating committee to bring suit in Federal court was attempted to be grounded in the language of the authorizing resolution ("and to do such other acts as may be necessary in the matter of said investigation"), it was said that under this clause of the Constitution, the Senate "is fully empowered, and may determine such matters without the aid of the House of Representatives or the executive or judicial departments. That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections"; and since the Senate (as well as the House) has customarily relied on its own process to compel production of evidence, etc., in the absence of definite intention to the contrary, the resolution in the present case is not to be read as authorizing suit in Federal court.[1]

[1] Reed v. Delaware County, 277 U. S. 376, 388 [1928], citing McGrain v. Daugherty, 273 U. S. 135 [1927].

The power to judge of elections extends to an investigation of expenditures, etc., made to influence nominations at a primary election.[1]

[1] Newberry v. United States, 256 U. S. 232 [1921].

The Senate, in judging of elections under this clause, acts as a judicial tribunal, with like power to compel attendance of witnesses. In the exercise of its discretion, the Senate may issue a warrant for the arrest of a witness to procure his testimony, without previous subpoena, if there was good reason to believe that otherwise such witness would not be forthcoming.[1]

[1] Barry v. United States ex rel. Cunningham, 279 U. S. 597, 616 [1929].

Effect of a Quorum.

The capacity of the House to transact business is "created by the mere presence of a majority"; and since the Constitution does not prescribe any method of determining the presence of a majority, "it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain the fact." [1]

[1] United States v. Ballin, 144 U. S. 1, 5–6 [1892].

Effect of Refusal to Receive Credentials.

Refusal by the Senate to permit a person presenting credentials in due form to take the oath of office, does not oust its jurisdiction to inquire into the legality of the election.[1]

[1] Barry v. United States ex rel. Cunningham, 279 U. S. 597, 614 [1929].

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Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Article I. Sec. 5. Legislative proceedings. Cl. 2. Rules.

Rules of Its Proceedings.

In United States *v.* Ballin,[1] which involved the quorum rule of the House of Representatives, the Court said: "The Constitution empowers each House to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the House, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just. * * * The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the House, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."

[1] 144 U. S. 1, 5 [1892].

Where a rule of the Senate (e. g., rule XXXVIII, par. 3, providing for reconsideration of a vote confirming a nomination) affects persons other than Members of the Senate, the construction of the rule becomes a judicial question. In determining such construction, the Court must give great weight to the Senate's present construction thereof, but is not concluded by a construction arrived at by the Senate after the events in controversy.[1]

[1] United States *v.* Smith, 286 U. S. 6 [1932].

Punishment for Disorderly Behaviour.

In Kilbourn *v.* Thompson,[1] the Court "saw no reason to doubt" that the punishment of Members of Congress for disorderly behaviour "may be, in a proper case, by imprisonment, and it may be for refusal to obey some rule on that subject made by the House for the preservation of order."

[1] 103 U. S. 168,189 [1881].

Power to Expel.*

The right to expel extends to all cases where the offence is such as in the judgment of the Senate or House is inconsistent with the trust and duty of a Member.[1] A Member, for example, may be

* For further precedents on the power of the House or Senate to punish or expel Members, *see* Hinds' and Cannon's Precedents, chs. XLII and CLXXV.

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expelled for treason,[1] for conspiracy against the Government,[2] or for a high misdemeanor.[3]

[1] In re Chapman, 166 U. S. 661, 669 [1897]; Taft, Election Cases, 213, 215, 217.
[2] Taft, op. cit., 195, 199.
[3] Taft, op. cit., 74.

Power of Congress Over Members.

Congress has authority to make it an offense against the United States for a Member of that body, during his continuance in office, to receive compensation for services before a governmental department in relation to proceedings in which the United States is interested. Such a statute does not interfere with the legitimate authority of the Senate or the House over its own members.[1]

[1] Burton v. United States, 202 U. S. 344, 365 [1906].

Article I. Sec. 5. Legislative proceedings. Cl. 3. Journal.

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.

Purpose of Clause.

"The object of the whole clause is to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the Members to their respective constituents. * * *" [1]

[1] 1 Story, Constitution, sec. 840, quoted with approval in Field v. Clark, 143 U. S. 649, 670 [1892].

Conclusiveness of Journal Entries.

When the Journal of either House is put in evidence for the purpose of determining whether the yeas and nays were ordered, and what the vote was on any particular question, the Journal must be presumed to show the truth, and a statement therein that a quorum was present, though not disclosed by the yeas and nays, is final.[1]

[1] United States v. Ballin, 144 U. S. 1 [1892].

Resort to Legislative Journals.

Where the introduction of amendatory language in an act makes its provisions apparently contradictory, the legislative intent of Congress may be ascertained by a recurrence to the mode in which the embarrassing words were introduced, as shown by the journals and records.[1]

[1] Blake v. National City Bank, 23 Wall. 307, 319 [1875].

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But when an enrolled bill, which has been signed by the Speaker of the House and by the President of the Senate, in open session, receives the approval of the President and is deposited in the Department of State, its authentication as a bill that has passed Congress is complete and unimpeachable. It is not competent to show from the Journals of either House that an act so authenticated, approved, and deposited, in fact omitted one section actually passed by both Houses of Congress.[1]

[1] Marshall Field & Co. *v.* Clark, 143 U. S. 649 [1892]. *See also* Flint *v.* Stone Tracy Co., 220 U. S. 107, 143 [1911].

Article I. Sec. 5. Legislative proceedings. Cl. 4. Adjournment.

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.

Adjournments and Recesses.

The use of the word "adjourn" in this clause in connection with 3-day recesses would indicate that the words "adjourn" and "adjournment" as used in other clauses of the Constitution include an interim as well as a final adjournment of Congress.[1]

[1] Okanogan Indians *v.* United States (The Pocket Veto Case), 279 U. S. 655, 680 [1929].

Article I. Sec. 6. Rights of Members. Cl. 1. Compensation, etc.

SECTION 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Compensation for Their Services.

A Member of Congress who receives his certificate of admission, and is seated, allowed to vote, and serve on committees, is *prima facie* entitled to the seat and salary, even though the House subsequently declare his seat vacant. The one who contested the election and was subsequently chosen to fill the vacancy is entitled to salary only from the time the compensation of such "predecessor" has ceased.[1]

[1] Page *v.* United States, 127 U. S. 67 [1888].

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Privilege From Arrest.

The expression "treason, felony and breach of the peace" excepts from the operation of the privilege all criminal offenses; the privilege applies only to arrests in civil suits.[1] It does not include immunity from service of process, mesne or judicial, in civil or criminal cases.[2]

[1] Williamson *v.* United States, 207 U. S. 425, 446 [1908]; Long *v.* Ansell, 293 U. S. 76, 83 [1934].

[2] Kimberley *v.* Butler, 14 Fed. Cas. No. 7777 [1869] (cited with approval in Long *v.* Ansell, 293 U. S. 76 [1934]); United States *v.* Cooper, 4 Dall. 341 [1800]; Long *v.* Ansell, 293 U. S. 76 [1934].

Congress may enforce this privilege by authorizing a writ of habeas corpus to free a Member of Congress from an arrest in violation of this clause.[1]

[1] Story, *arguendo*, in Prigg *v.* Pennsylvania, 16 Pet. 539, 619 [1842].

Whether a Senator of the United States has waived his privilege and whether such privilege is personal only, as given for the purpose of always securing a representation of his State in the Senate, are not frivolous questions, but raise a constitutional question which may be reviewed by the Supreme Court on writ of error.[1]

[1] Burton *v.* United States, 196 U. S. 283, 295 [1905].

Privilege of Speech or Debate.

These privileges are granted not with the intention of protecting the Members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.[1]

[1] Coffin *v.* Coffin, 4 Mass. 1 [1808], referred to with approval in Kilbourn *v.* Thompson, 103 U. S. 168, 204 [1881].

The protection of this clause is not limited to words spoken in debate, but is applicable to written reports, to the act of voting, and to things generally done in a session of the House by one of its Members in relation to the business before it.[1]

[1] Kilbourn *v.* Thompson, 103 U. S. 168, 204 [1881].

Defamatory words uttered during a speech in the United States Senate Chamber are absolutely privileged, notwithstanding allegations they were not spoken in discharge of Senator's official duties.[1]

[1] Cochran *v.* Couzens, 42 F. (2d), 783 [1930], certiorari denied 282 U. S. 874 [1930].

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Article I. Sec. 6. Rights of Members. Cl. 2. Holding other office.

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 encreased 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.

Disqualification of Congressmen to Hold Federal Office.

For legislative precedents to the effect that the acceptance by Members of Congress of commissions as officers of the Volunteer or Regular Army forces of the United States and that appointments to commissions created by Congress to investigate particular matters or negotiate a special agreement are incompatible public offices, but that appointment as director or trustee of public Federal institutions, and that appointments to a commission authorized by treaty or created by the President for a similar purpose are not, *see* Hinds' and Cannon's Precedents, volumes I and VI, chapters XVI and CLVIII.

Disqualification of Congressmen to Hold Offices the Emoluments of Which Have Been Increased.

In 1907 (34 Stat. 935, 948) Congress had increased the salary of the Secretary of State from $8,000 to $12,000. At that time Philander C. Knox was a Senator from Pennsylvania. It having been announced that President-Elect Taft intended to nominate Senator Knox as Secretary of State, Congress immediately reduced the salary of the office to its former figure in order that the Senator would be eligible to the secretaryship (35 Stat. 626).

Disqualification of Federal Officers to Occupy Seats in Congress.

For legislative precedents to the effect that a contractor under the Government is not disqualified, that Federal tax-collectors, postmasters, etc., who resign before taking their seat and that a person who continues to serve as governor some months after his term begins but who resigns before presenting his credentials may be seated as Members of Congress, *see* Hinds' and Cannon's Precedents, volumes I and VI, chapters XVI and CLVIII.

SECTION 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Article I. Sec. 7. Bills and resolutions. Cl. 1. Revenue bills.

All Bills for Raising Revenue.

The construction of this limitation is practically settled by the uniform action of Congress confining it to bills to levy taxes in the

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strict sense of the word, and it has not been understood to extend to bills having some other legitimate and well defined general purpose but which incidentally create revenue.[1]

[1] United States *v.* Norton, 91 U. S. 566 [1875]; Twin City Nat. Bank *v.* Nebeker, 167 U. S. 196 [1897]; Millard *v.* Roberts, 202 U. S. 429 [1906].

Amendments by Senate.

It has been held within the power of the Senate to remove from a revenue collection bill originating in the House, a plan of inheritance taxation and substitute therefor a corporation tax.[1]

[1] Flint *v.* Stone Tracy Co., 220 U. S. 107 [1911]. *See also* Rainey *v.* United States, 232 U. S. 310 [1914]. *Cf.* United States *v.* Hill, 123 U. S. 681 [1887]—holding that "revenue law" in connection with the jurisdiction of United States courts means a law traceable directly to the power of Congress under art. I, sec. 8, to lay taxes, duties, imposts, and excises.

Article I. Sec. 7. Bills and resolutions. Cl. 2. Veto of bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Signature by President.

The duty of the President in case of approval of a bill presented to him, is to sign it, and nothing more. He need not write on the bill the word "approved", nor the date; and if no date appears on the face of the roll, the Court in determining when such act went into effect may resort to any source of information capable of conveying a

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clear and satisfactory answer.[1] It may consult the original roll or other official records.[2]

[1] Gardner *v.* Barney, 6 Wall. 499 [1868].
[2] Jones *v.* United States, 137 U. S. 202, 216 [1890].

The President is not restricted to signing on a day when Congress is in session.[1] He may sign within 10 days (Sundays excepted) after a bill is presented to him, and after final adjournment of the Congress.[2]

[1] La Abra Silver Mining Co. *v.* United States, 175 U. S. 423, 453 [1899].
[2] Edwards *v.* United States, 286 U. S. 482 [1932].

Vote on Overriding a Veto.

The two-thirds vote of each House required to pass a bill over a veto means two-thirds of a quorum—the term "House" referring to that body upon which legislative power is conferred by the Constitution, viz, a majority of the members (art. I, sec. 5).[1]

[1] Missouri P. R. Co. *v.* Kansas, 248 U. S. 276 [1919].

Shall Be a Law.

DEFINITION.

"Law" as used in this clause describes "an exertion of legislative power." [1]

[1] King Mfg. Co. *v.* Augusta, 277 U. S. 100, 103 [1928].

SUNDAYS EXCEPTED.

The use of this language is an affirmance "that this is a religious Nation."[1]

[1] Church of the Holy Trinity *v.* United States, 143 U. S. 457, 470 [1892].

EFFECTIVE DATE.

A bill becomes law on the date of its approval by the President.[1] The law may at the direction of Congress take effect as of a prior date,[2] but only where the intention of Congress to that effect is clear and imperative.[3] Where no time is fixed by the act, it is effective from its date of approval;[4] and this means the first moment of the day—fractions are not in general recognized.[5]

[1] Gardner *v.* Barney, 6 Wall. 499, 504 [1868]; Burgess *v.* Salmon, 97 U. S. 381, 383 [1878]. *See also* 3 Op. Atty. Gen. 82 [1836].
[2] United States *v.* Green, 138 U. S. 293, 296 [1891].
[3] United States *v* Heth, 3 Cr. 399, 413 [1806]. *See also* United States *v.* Burr, 159 U. S. 78, 82 [1895]; Auffmordt *v.* Rasin, 102 U. S. 620 [1881].
[4] Matthews *v.* Zane, 7 Wheat, 164, 211 [1822].
[5] Lapeyre *v.* United States, 17 Wall. 191, 198 [1873]. *See also* United States *v.* Williams, 1 Paine 261 [1814].

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This general rule is, however, subject to exceptions, where the exact time of becoming a law is important; *see*—

Maine *v.* Gilman, 11 Fed. 214, 216 [1882]; In re Richardson, 20 Fed. Cas., No. 11,777 [1843] (per. Story, J.); In re Wynne, 30 Fed. Cas., No. 18117 [1868]; United States *v.* Iselin, 87 Fed. 194 [1898]; United States *v.* Stoddard, Haserick, Richards & Co., 89 Fed. 699 [1898]. *See* especially The Ship "Cotton Planter", 6 Fed. Cas., No. 3270 [1810]—holding that where a criminal act did not specifically indicate an effective date, a reasonable time for promulgation should be afforded.

Pocket Veto.

Return by the President of a bill not approved by him is prevented within the meaning of the clause, if a Congress adjourns at the end of its first session within 10 calendar days (Sundays excepted) from date of presentation to him; and a bill so disapproved and not returned does not become law.[1]

[1] Okanogan Indians *v.* United States (The Pocket Veto Case), 279 U. S. 655 [1929].

Article I.
Sec. 7. Bills and resolutions.
Cl. 3. Presentation of resolutions, etc.

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.

A joint resolution suspending execution of an act relating to a private land claim "was one of the character mentioned in section 7 of article I, of the Constitution, to which the concurrence of the Senate and House of Representatives was necessary, and which was approved by the President, and took effect only on such approval." [1]

[1] United States ex rel. Levey *v.* Stockslager, 129 U. S. 470, 475 [1889].

Constitutional amendments need not be presented to the President for approval.[1]

[1] Hollingsworth *v.* Virginia, 3 Dall. 378 [1798]. Justice Chase remarked: "The negative of the President applies only to the ordinary cases of legislation; he has nothing to do with the proposition, or adoption, of amendments to the Constitution."

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SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Article I. Sec. 8. Powers of Congress. Cl. 1. Taxation.

Power to Tax.*

IN GENERAL.

The general power is given to Congress to lay and collect taxes of every kind and nature, without restraint, except on exports; but three rules are prescribed for their government, namely: Direct taxes must be apportioned according to population; duties, imposts, and excises must be uniform throughout the United States; and all taxes must be levied for a public purpose.[1]

[1] Hylton *v.* United States, 3 Dall. 171, 173, 174 [1796]; South Carolina *v.* United States, 199 U. S. 437, 450 [1905].

A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate the regulation of a matter in which both groups are interested and in respect of which there is a power of legislation.[1]

[1] United States *v.* Butler, 297 U. S. 1, 61 [1936], holding that the "processing taxes" under the Agricultural Adjustment Act were not taxes within the meaning of this clause.

COLLECTION OF TAXES.

In United States *v.* 288 Packages of Merry World Tobacco,[1] it was said that "the Constitution confers the power upon Congress to lay and collect taxes, but it leaves it to the wisdom of Congress to prescribe the mode, manner, and means of levying and collecting the same."

[1] 103 Fed. 453 [1900]. *See also* Den ex. dem. Murray *v.* Hoboken Land & Improv. Co., 18 How. 272 [1856]; Passavant & Co. *v.* United States, 148 U. S. 214 [1893]; Felseheld *v.* United States, 186 U. S. 126 [1902]; Graham *v.* Goodcell, 282 U. S. 409 [1931].

Congress has the power to distrain and sell either real or personal property when necessary to enforce the payment of a tax [1] and may provide that debts (including taxes) due the United States shall have priority of payment out of the assets of an insolvent debtor.[2]

[1] Springer *v.* United States, 102 U. S. 586, 593 [1881].

[2] United States *v.* Fisher, 2 Cr. 358 [1805]; Spokane County *v.* United States, 279 U. S. 80 [1929].

* *See also* pp. 649, 663, 720, 1025.

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POWER TO INCREASE AN EXCISE TAX.

Congress may increase an excise as well as a property tax on property previously taxed, at least while the property is held for sale and has not passed into the hands of the consumer.[1]

[1] Patton *v.* Brady, 184 U. S. 608 [1902].

WANT OF DUE PROCESS OF LAW.

While undoubtedly both the Fifth and Tenth Amendments qualify, insofar as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away any grant of power upon Congress to lay taxes. The right of Congress to tax, within its delegated power, being unrestrained, except as limited by the Constitution, it is within the authority conferred upon Congress to select the objects upon which the excises should be laid. It therefore follows that in exerting its power no want of due process of law can possibly result.[1]

[1] McCray *v.* United States, 195 U. S. 27 [1904]. *See also* Billings *v.* United States, 232 U. S. 261 [1914]; United States *v.* Bennett, 232 U. S. 299 [1914], and tax cases under the 5th Amendment.

Jurisdiction to Tax.

DISTRICT OF COLUMBIA AND THE TERRITORIES.

The grant is general, without limitation as to place, and therefore includes the District of Columbia and other places within the exclusive jurisdiction of Congress.[1]

[1] Loughborough *v.* Blake, 5 Wheat. 317, 319 [1820].

Congress may impose license taxes on Territorial residents to be collected solely for the use of the Territory, even though they are paid into the general fund of the Treasury and do not in fact equal the total cost of maintaining the Territorial government.[1]

[1] Binns *v.* United States 194 U. S. 486, 494 [1904].

Where the provisions of a revenue law were extended to the Philippine Islands it was held that the power of Congress to impose taxes and provide for the collection thereof in the possessions of the United States was not restricted by constitutional provisions as to uniformity and apportionment, since it was acting under article 4, section 3, clause 2 (which gives Congress power to make all needful rules and regulations respecting the Territories or other property of the United States).[1] Duties on goods imported into conquered territory prescribed by the military authorities acting under a temporary government set up by the President, are operative until superseded by legislation enacted by Congress under its constitutional authority over the territory of the United States.[2]

[1] Lawrence *v.* Wardell, 273 Fed. 405 [1921].

[2] Cross *v.* Harrison, 16 How. 164 [1853]. *See also* De Lima *v.* Bidwell, 182 U. S. 1 [1901]; Downes *v.* Bidwell, 182 U. S. 244 [1901]; Dooley *v.* United States, 183 U. S. 151 [1901].

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PERSONS OR PROPERTY OUTSIDE THE UNITED STATES.

In the case of Cook *v.* Tait,[1] it was held that Congress had the power to impose a tax upon income received by an American citizen who, at the time the income was received, was permanently resident and domiciled in a foreign country—which income was derived from property located in that country. This power to tax is based on the presumption that government by its very nature benefits the citizen and his property wherever found, and is not dependent upon the situs of the property, i. e., whether in or out of the United States.

[1] 265 U. S. 47 [1924]. *See also* United States *v.* Bennett, 232 U. S. 299, 308 [1914] and Billings *v.* United States, 232 U. S. 261 [1914] (upholding a tax on foreign-built yachts which had neither been documented nor operated in United States waters); De Ganay *v.* Lederer, 250 U. S. 376 [1919] (upholding a tax on income received under a trust by a nonresident alien from bonds and mortgages secured upon property in the United States).

Taxation of Governmental Instrumentalities.*

Implied constitutional restrictions upon the taxing power are as effectual as those expressed. Such an implied restriction prevents the taxation of a State agency by the Federal Government[1] as well as of a Federal agency by a State government.[2]

[1] Incomes of State judges (Collector *v.* Day [Buffington *v.* Day], 11 Wall. 113 [1871]); income derived from State or local government bonds (Pollock *v.* Farmers Loan & T. Co., 158 U. S. 601 [1895]); Federal tax on motorcycles sold to the police department of a municipality (Indian Motocycle Co. *v.* United States, 283 U. S. 570 [1931]). *See also* United States *v.* Baltimore & O. R. Co., 17 Wall. 322 [1873]; Mercantile Nat. Bank *v.* New York, 121 U. S. 138 [1887]; Ambrosini *v.* United States, 187 U. S. 1 [1901]; National Life Ins. Co. *v.* United States, 277 U. S. 508 [1928]; Willcutts *v.* Bunn, 282 U. S. 216 [1931]; Burnet *v.* Coronado Oil & Gas Co., 285 U. S. 393 [1932]; University of Illinois *v.* United States, 289 U. S. 48 [1933]. As to Federal tax of State-granted franchises *see* Veazie Bank *v.* Fenno, 8 Wall. 533 [1869], and Flint *v.* Stone Tracy Co., 220 U. S. 107 [1911].

[2] Operations of a branch of the United States bank (McCulloch *v.* Maryland, 4 Wheat. 316 [1819]); salary of Federal officer (Dobbins *v.* Erie County, 16 Pet. 435 [1842]); tax on gasoline sold to the Federal Government for use of the Coast Guard or a veterans' hospital (Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218 [1928]). *See also* Osborn *v.* Bank of United States, 9 Wheat. 738 [1824]; Weston *v.* Charleston, 2 Pet. 449 [1829]; New York ex rel. Bank of Commerce *v.* Com'rs of Taxes and Assessments, 2 Black 620 [1863]; New York ex rel. Bank of N. Y. Nat. Bkg. Assoc. *v.* Connelly, 7 Wall. 16 [1869]; New York ex rel. Bank of N. Y. *v.* New York County, 7 Wall. 26 [1869]; First Nat. Bank *v.* Kentucky, 9 Wall. 353 [1870]; Thomson *v.* Union P. R. Co., 9 Wall. 579 [1870]; Union P. R. Co. *v.* Peniston, 18 Wall. 5 [1873]; Van Brocklin *v.* Anderson, 117 U. S. 151 [1886]; California *v.* Central P. R. Co., 127 U. S. 1 [1888]; Home Ins. Co. *v.* New York, 134 U. S. 594 [1890]; Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664 [1899]; Gromer *v.* Standard Dredging Co., 224 U. S. 362 [1912]; Smith *v.* Kansas City Title & Trust Co., 255 U. S. 180 [1921]; Des Moines Nat. Bank *v.* Fairweather, 263 U. S. 103 [1923]; Clallam County *v.* United States, 263 U. S. 341 [1923]; Miller *v.* Milwaukee, 272 U. S. 713 [1927]; Macallen Co.

* *See also* pp. 124, 570.

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v. Massachusetts, 279 U. S. 620 [1929]; Indian Terr. Illuminating Oil Co. v. Board of Equalization, 288 U. S. 325 [1933].

But such immunity does not prevail where the State is engaged in essentially nongovernmental functions.[1]

[1] South Carolina v. United States, 199 U. S. 437 [1905]; Burnet v. A. T. Jergins Trust, 288 U. S. 508 [1933]; Ohio v. Helvering, 292 U. S. 360 [1934]; Helvering v. Powers, 293 U. S. 214 [1934].

Either the Federal Government or the States in levying an inheritance tax on the net estate of a decedent may include therein bonds issued by the other.[1] The Federal Government may tax the profits derived by an investor in municipal bonds from their sale by him at a higher price.[2]

[1] State transfer tax (Plummer v. Coler, 178 U. S. 115 [1900]); Federal transfer tax (Greiner v. Lewellyn, 258 U. S. 384 [1922]).

[2] Willcuts v. Bunn, 282 U. S. 216 [1931].

Taxation for Purpose of Regulation.

Where a tax does not violate any constitutional limitation it may not be restrained judicially because of the results which may arise from its application.[1] If the taxing statute shows on its face that its purpose is not that of raising revenue but the regulation of activities not within the scope of Federal authority, its enforcement may be restrained.[2] But where the tax bears a reasonable relation to a power conferred upon the Federal Government by the Constitution, the fact that Congress may have been equally or incidentally impelled by the motive of regulation will not invalidate it,[3] even though it may affect the conduct of a business which is subject to regulation by the State police power.[4]

[1] Tax of 10 cents per pound on artificially-colored oleomargarine (McCray v. United States, 195 U. S. 27 [1904]).

[2] Tax upon the net income of any person employing child labor, held, not an act imposing a tax under this clause and unconstitutional as an attempt to regulate State matters—Child Labor Tax Case, 259 U. S. 20 [1922]. *See also* United States v. Jin Fuey Moy, 241 U. S. 394 [1916]; Hill v. Wallace, 259 U. S. 44 [1922]; Linder v. United States, 268 U. S. 5 [1925]; Trusler v. Crooks, 269 U. S. 475 [1926]; Nigro v. United States, 276 U. S. 332 [1928]; Casey v. United States, 276 U. S. 413 [1928]; United States v. Constantine, 296 U. S. 287 [1935]; United States v. Butler, 297 U. S. 1 [1936].

[3] Fifty-cent tax on steamship companies for each immigrant brought into the country—Head Money Cases (Edye v. Robertson), 112 U. S. 580 [1884]. *See also* Veazie Bank v. Fenno, 8 Wall. 533 [1869]; Hampton, Jr. & Co. v. United States, 276 U. S. 394 [1928].

[4] Opium dealers required to register and pay tax—United States v. Doremus, 249 U. S. 86 [1919].

Congress, under the taxing power, may tax intoxicating liquors, notwithstanding their production is prohibited; and the fact that it does so for a moral end as well as to raise revenue is not a constitutional objection.[1]

[1] United States v. Yuginovich, 256 U. S. 450 [1921].

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Right to Challenge a Tax.

In general, a taxpayer cannot question expenditures from the Federal Treasury because of the supposed increase of the future burden of taxation, since obviously his interest in the Government funds is minute and indeterminable. In order to challenge the tax, he must show not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.[1]

[1] Massachusetts *v.* Mellon, 262 U. S. 447, 487 [1923]. *See also* Knights *v.* Jackson, 260 U. S. 12, 15 [1922]; Patton *v.* Brady, 184 U. S. 608, 620 [1902]; United States *v.* Realty Co., 163 U. S. 427 [1896].

But in United States *v.* Butler, 297 U. S. 1, 58 [1936], in upholding the right to challenge the processing taxes levied under the Agricultural Adjustment Act, it was held that the processors resisted the exaction "as a step in an unauthorized plan", thus clearly distinguishing Massachusetts *v.* Mellon.

Though the remedy of enjoining a particular tax has been expressly withdrawn by statute (R. S. 3224; U. S. Code 26:1543), the courts may nevertheless grant relief:

(1) In view of exceptional and extraordinary circumstances with respect to the operation of the act. Thus, in Hill *v.* Wallace,[1] a suit by members of the Chicago Board of Trade to restrain the enforcement of the Future Trading Act of August 24, 1921 (42 Stat. 187), was allowed since a sale of grain for future delivery, without paying the tax, would subject the seller to heavy criminal penalties; and to pay the heavy tax in each of many daily transactions which occur in exchange, and then sue to recover it back, would necessitate a multiplicity of suits; and for the Board of Trade to refuse to apply for a designation as a contract market, in order to test the validity of the act, would stop its 1,600 members in a branch of their business most important to themselves and to the country.

(2) Where a so called "tax" is in fact a penalty. Thus, in Lipke *v.* Lederer,[2] Revised Statutes 3224 was declared inapplicable where penalties for alleged violations of the Prohibition Act were about to be collected by distraint of property without notice and opportunity to be heard.

[1] 259 U. S. 44 [1922]. *See also* Miller *v.* Standard Nut Margarine Co. of Florida, 284 U. S. 498 [1932].

[2] 259 U. S. 557 [1922], followed in Regal Drug Co. *v.* Wardell, 260 U. S. 386 [1922].

Duties, Imposts, and Excises.

The Constitution uses "duties, imposts, and excises" in a natural sense and in antithesis to "direct taxes."[1] "Duties" and "imposts" are nearly synonymous terms [2] and are both definable as a tax levied

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upon articles imported from foreign countries,[3] while an excise is an inland tax generally imposed upon manufactures, but sometimes upon consumption and upon retail sales.[2] The tax on employers of eight or more persons, imposed by title IX of the Social Security Act (49 Stat. 620, 639) was held to be an excise, though the question of classification was "in truth not of critical importance."[4] And on the strength of this decision the further taxes on employers, and on employees, under title VIII were upheld.[5]

[1] Pollock *v.* Farmers Loan & Trust Co., 158 U. S. 601, 619 [1895]; Thomas *v.* United States, 192 U. S. 363 [1904].
[2] Pacific Ins. Co. *v.* Soule, 7 Wall. 433, 445 [1869].
[3] Woodruff *v.* Parham, 8 Wall. 123, 132 [1869].
[4] Steward Machine Co. *v.* Davis, 301 U. S. 548 [1937].
[5] Helvering *v.* Davis, 301 U. S. 619 [1937].
See also Hinson *v.* Lott, 8 Wall. 148 [1869]; Spreckels Sugar Ref. Co. *v.* McClain, 192 U. S. 397 [1904]; Hamilton *v.* Dillin, 21 Wall. 73 [1875]; Scholey *v.* Rew, 23 Wall. 331 [1875].

To Pay the Debts.

The power to pay the debts is broad enough to include claims of citizens arising on obligations of right and justice.[1] It justifies section 602½, Revenue Act of 1934, which set apart for the use of the Philippines the revenue from a processing tax on coconut oil of Philippine production, as being in pursuance of a moral obligation to protect and promote the welfare of the people of the Islands.[2]

[1] United States *v.* Realty Co., 163 U. S. 427 [1896].
[2] Cincinnati Soap Co. *v.* United States, 301 U. S. 308 [1937].

To Provide for the General Welfare.

The phrase "to provide for the general welfare" qualifies the power "to lay and collect taxes." "The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that if it were adopted 'it is obvious that under color of the generality of the words, to "provide for the common defence and general welfare," the Government of the United States is, in reality, a Government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers.'[1] The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the Nation's debts and making provision for the general welfare. * * * Since the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a Government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to

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the Congress. * * * Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantative power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This Court has noticed the question, but has never found it necessary to decide which is the true construction. Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position.[2] * * * Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." [3]

[1] Citing Story, Commentaries on the Constitution of the United States, 5th ed., vol. I, sec. 907.

[2] *Loc. cit.* ch. XIV, *passim.*

[3] United States *v.* Butler, 297 U. S. 1, 64–66 [1936].

The Court in the case of Helvering *v.* Davis,[1] applied for the first time the Hamilton and Story construction of the "general welfare clause" which it had approved in the Butler case. It directly sanctioned and upheld taxation and appropriation by Congress for a purpose other than the exercise of a so-called granted power; namely, to finance a scheme of Federal old-age benefits. In upholding this title of the Social Security Act, the Court speaking through Justice Cardozo said: "The scheme of [old-age] benefits * * * is not in contravention of the limitations of the Tenth Amendment. Congress may spend money in aid of the 'general welfare', Constitution, art. I, sec. 8; United States *v.* Butler, 297 U. S. 1, 65; Steward Machine Co. *v.* Davis, supra [301 U. S. 548]. There have been great statesmen in our history who have stood for other views. * * * The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. * * * Nor is the concept of general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical

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or urgent changes with the times. * * * When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the States. So the concept be not arbitrary, the locality must yield. Constitution, art. VI, par. 2."

[1] 301 U. S. 619, 640–645 [1937].

Uniformity of Taxes.

This requirement applies only to duties, imposts and excises.[1] It has been held that geographical uniformity only is required, i. e., the statute must operate with the same force and effect in every place where the subject of it is found;[2] it has no application to goods "imported" into Puerto Rico or the Philippine Islands from the United States.[3]

[1] Knowlton *v.* Moore, 178 U. S. 41 [1900].

[2] Head Money cases [Edye *v.* Robertson] 112 U. S. 580 [1884]; Nicol *v.* Ames, 173 U. S. 509, 521 [1899]; Brushaber *v.* Union P. R. Co., 240 U. S. 1 [1916]; Patton *v.* Brady, 184 U. S. 608 [1902].

[3] Puerto Rico Brokerage Co. *v.* United States, 76 F. (2d) 605 [1935].

An inheritance tax which increased progressively with the size of the estate as well as with the remoteness of the recipient's relationship to the decedent was held not to violate the requirement of uniformity.[1]

[1] Knowlton *v.* Moore, 178 U. S. 41 [1900].

Similarly, a Federal inheritance tax which permitted the deduction of a like tax paid to the State did not lack uniformity because one State levied no tax.[1]

[1] Florida *v.* Mellon, 273 U. S. 12 [1927]. *See also* Gottlieb *v.* White, 69 F. (2d) 792 [1934], certiorari denied 292 U. S. 657 [1934].

The Congress shall have Power * * * To borrow Money on the credit of the United States;

Article I. Sec. 8. Powers of Congress. Cl. 2. To borrow money.

The Power in General.

This is a power vested in the National Government for the safety and welfare of the whole people, and is not to be construed in a restricted sense. It is a power to raise money for the public use on the pledge of the public credit, and may be exercised to meet either present or anticipated expenses and liabilities of the Government.[1]

[1] Legal Tender Case, 110 U. S. 421, 444 [1884].

"In authorizing the Congress to borrow money, the Constitution empowers the Congress to fix the amount to be borrowed and the terms of payment. By virtue of the power to borrow money 'on the credit of the United States' the Congress is authorized to pledge that

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credit as an assurance of payment as stipulated—as the highest assurance the Government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government."[1]

[1] Perry v. United States, 294 U. S. 330, 351 [1935].

Exemption of Government Obligations From Taxation.*

Obligations issued for loans made to the Government are evidence of a debt created by exercise of the borrowing power. A State tax upon such obligations is a tax upon the exercise of the power to borrow on the credit of the United States, and constitutes to an extent, depending on the will of a distinct government, a burden on the operations of the United States Government, and is therefore unconstitutional.[1]

[1] McCulloch v. Maryland, 4 Wheat. 316 [1819]; Weston v. Charleston, 2 Pet. 449 [1829]; New York ex rel. Bank of Commerce v. Comrs. of Taxes and Assessments, 2 Black 620 [1863]; New York ex rel. Bank of Commonwealth v. Comrs. of Taxes and Assessments (Bank Tax Case), 2 Wall. 200 [1865]; Smith v. Kansas City Title Co., 255 U. S. 180 [1921]; Missouri v. Gehner, 281 U. S. 313 [1930]; James v. Dravo Contracting Co., 302 U. S. 134 [1937].

But it was held, while acknowledging this general principle, that national bank shares (the capital of such banks being invested in Government securities) may be taxed in the hands of shareholders; [1] and that a tax on savings societies measured by the daily deposits is valid, though part of the investments of the society are in tax-exempt Government securities.[2] So a State may lay a tax on corporations measured by current dividends, although such dividends be derived in part from interest on capital invested in United States bonds.[3]

[1] Van Allen v. The Assessors [Churchill v. Utica] 3 Wall. 573 [1866]; Bradley v. Illinois, 4 Wall. 459 [1867]; First National Bank [of Louisville] v. Kentucky, 9 Wall. 353 [1870]; Lionberger v. Rowse, 9 Wall. 468 [1870].
[2] Society for Savings v. Coite, 6 Wall. 594 [1868].
[3] Home Insurance Co. v. New York, 134 U. S. 594 [1890].

A State tax may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them; [1] but it becomes a more serious attack upon immunity when they are its obvious end.[2]

[1] Plummer v. Coler, 178 U. S. 115 [1900].
[2] Miller v. Milwaukee, 272 U. S. 713 [1927].

It was held that certificates of indebtedness issued to creditors, for supplies furnished the United States during the Civil War, were obligations protected against taxation by the States.[1] And similarly,

* *See also* pp. 124, 570.

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notes issued under acts of 1862 and 1863, intended to be circulated as money, were obligations because on their face they engaged to pay to bearer a certain sum in dollars, i. e., coined dollars of the United States.[3]

[1] New York ex rel. Bank of N. Y. Nat. Bkg. Asso. v. Connelly, 7 Wall. 16 [1869].

[2] Bank of New York v. New York County, 7 Wall. 26 [1869]. *See also* Mitchell v. Leavenworth County, 91 U. S. 206 [1876].

War savings certificates, though containing certain conditions to validity prescribed by the Secretary of the Treasury, were held to be obligations of the United States within the meaning of certain criminal laws (secs. 37, 148, 151 of the Criminal Code).[1]

[1] United States v. Sacks, 257 U. S. 37 [1921]; United States v. Janowitz, 257 U. S. 42 [1921].

The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article I. Sec. 8. Powers of Congress. Cl. 3. Regulate commerce.

The Grant of Power.

TO CONGRESS.

It is Congress, and not the judicial department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject.[1]

[1] Parkersburg & O. River Transportation Co. v. Parkersburg, 107 U. S. 691, 701 [1883].

TO REGULATE.

To regulate, in the sense intended, is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.[1] It includes the power to prohibit in cases where such prohibition is in aid of the lawful protection of the public.[2] While it has no limitations other than those prescribed in the Constitution, it does not carry with it the right to destroy or impair those limitations and guaranties which are placed in the Constitution and amendments.[3]

[1] Mondou v. New York, N. H. & H. R. Co. (Second Employers' Liability Cases), 223 U. S. 1, 47 [1912]. *See also* Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 U. S. 548 [1930]; Virginian R. Co. v. System Federation No. 40, 300 U. S. 515 [1937]; National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 [1937]; Associated Press v. National Labor Relations Board, 301 U. S. 103 [1937].

[2] Champion v. Ames (Lottery Case), 188 U. S. 321 [1903]; Hoke v. United States, 227 U. S. 308 [1913]. *See also* Rhodes v. Iowa, 170 U. S. 412 [1898]; United States v. Joint-Traffic Association, 171 U. S. 505 [1898]; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211 [1899]; Reid

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v. Colorado, 187 U. S. 137 [1902]; Hipolite Egg Co. *v.* United States, 220 U. S. 45 [1911]; Caminetti *v.* United States, 242 U. S. 470 [1917]; Weber *v.* Freed, 239 U. S. 325 [1915]; Clark (James) Distilling Co. *v.* Western Maryland R. Co., 242 U. S. 311 [1917]; Brooks *v.* United States, 267 U. S. 432 [1925].

[3] United States *v.* Joint-Traffic Association, 171 U. S. 505, 571 [1898]. *See also* Monongahela Nav. Co. *v.* United States, 148 U. S. 312, 336 [1893]; Interstat Commerce Commission *v.* Brimson, 154 U. S. 447, 479 [1894]; Dayton-Goose Creek R. Co. *v.* United States, 263 U. S. 456 [1924]; Greenleaf-Johnson Lumber Co. *v.* Garrison, 237 U. S. 251 [1915].

The power of Congress extends only to the external commerce of the States and reaches the interior of every State only so far as it may be necessary to protect the products of other States and countries from discrimination by reason of their foreign origin.[1] A State may not use its taxing power or police power with the aim and effect of establishing an economic barrier against competition with products of another State or labor of its residents, and restrictions so imposed are an undue burden on interstate commerce.[2] The power of Congress has no application to commerce which is purely internal;[3] the grant of power to Congress virtually denies the power to interfere with the internal trade and business of the separate States,[4] except as a necessary and proper means of carrying into execution some other power expressly granted.[5] It extends to acts done on land which interfere with the due exercise of the power to regulate commerce, including navigation.[6]

[1] Guy *v.* Baltimore, 100 U. S. 434 [1880].

[2] Baldwin *v.* G. A. F. Seelig, Inc., 294 U. S. 511 [1935].

[3] Gibbons *v.* Ogden, 9 Wheat. 1 [1824]; United States *v.* Dewitt, 9 Wheat. 41 [1870]; Lord *v.* Goodall, N. & P. S. S. Co., 102 U. S. 541 [1881]; Nicol *v.* Ames, 173 U. S. 509 [1899].

[4] Illinois Central R. Co. *v.* McKendree, 203 U. S. 514 [1906].

[5] Baltimore, & O. R. Co. *v.* Interstate Commerce Commission, 221 U. S. 612 [1911]; Southern R. Co. *v.* United States, 222 U. S. 20 [1911]; Houston, E. & W. T. R. Co. *v.* United States, 234 U. S. 342 [1914]; Illinois Central R. Co. *v.* Public Utilities Commission, 245 U. S. 493 [1918]; Railroad Commission *v.* Chicago, B. & Q. R. Co., 257 U. S. 563 [1922].

[6] United States *v.* Coombs, 12 Pet. 72 [1838]. *See also* Pacific Mail S. S. Co. *v.* Joliffe, 2 Wall. 450, 459 [1865]; *cf.* Gibbons *v.* Ogden, 9 Wheat. 1 [1824].

With Foreign Nations.

The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution.[1] Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone

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directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than 70 years, regulating the degree of strength of drugs, medicines, and chemicals entitled to admission into the United States and excluding such as did not equal the standards adopted.[2]

[1] Champion *v.* Ames (Lottery Case), 188 U. S. 321, 353–356 [1903]; Leisy (Gus.) & Co. *v.* Hardin, 135 U. S. 100, 108 [1890].

[2] Buttfield *v.* Stranahan, 192 U. S. 470, 492 [1904]. *See also* Gibbons *v.* Ogden, 9 Wheat. 1, 193, 196–197 [1824]; Oceanic Steam Nav. Co. *v.* Stranahan, 214 U. S. 320, 334, 335 [1909]; The "Abby Dodge" *v.* United States, 223 U. S. 166, 176 [1912]; Brolan *v.* United States, 236 U. S. 216 [1915]; Weber *v.* Freed, 239 U. S. 325, 329 [1915]; Hampton (J. W.) Jr. & Co. *v.* United States, 276 U. S. 394, 411 [1928]; University of Illinois *v.* United States, 289 U. S. 48 [1933].

Among the Several States.

This phrase marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more States, and commerce which is confined to a single State and does not affect the other States, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally.[1]

[1] Mondou *v.* New York, N. H. & H. R. Co. (Second Employers' Liability Cases), 223 U. S. 1, 46 [1912].

Relation to Admiralty and Maritime Jurisdiction.*

The scope of the maritime law and that of commercial regulation are not coterminous, but the latter embraces much of the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrollment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime.[1]

[1] Rodd *v.* Heartt (The "Lottawanna"), 21 Wall. 558, 577 [1875]; Providence & N. Y. S. S. Co. *v.* Hill Mfg. Co., 109 U. S. 578, 589 [1883].

The act of February 26, 1845 (5 Stat. 726), extending the jurisdiction of district courts to cases of contract or tort arising in connection with steamboats upon the lakes and navigable water connecting the same and employed in commerce and navigation between ports in different States, is not referable to the commerce clause, but was enacted under the clause granting maritime and admiralty jurisdiction to the Federal courts.[1] The power of Congress to legislate on the

* *See also* p. 456.

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subject of the right of recovery for death by negligence on the high seas has been derived both from the power to regulate commerce and from the admiralty jurisdiction.[2]

[1] The "Genesee Chief" v. Fitzhugh, 12 How. 443 [1852].
[2] Old Dominion S. S. Co. v. Gilmore, 207 U. S. 398, 404 [1907].

Applicability of Common Law.

Except so far as they are modified by congressional enactment, the principles of the common law are operative upon all interstate commercial transactions.[1]

[1] Western U. Teleg. Co. v. Call Pub. Co., 181 U. S. 92, 101 [1901].

What Constitutes Interstate and Foreign Commerce.

DEFINITION AND NATURE IN GENERAL.

As used in the Constitution, the word "commerce" is the equivalent of the phrase "intercourse for the purposes of trade," and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different States.[1]

[1] Carter v. Carter Coal Co., 298 U. S. 238, 298 [1936]. *See also* Smith v. Turner (Passenger Cases), 7 How. 283, 401 [1849]; Welton v. Missouri, 91 U. S. 275, 280 [1876]; Pensacola Teleg. Co. v. Western U. Teleg. Co., 96 U. S. 1, 9 [1878]; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 241 [1899]; Mondou v. New York, N. H. & H. R. Co. (Second Employers' Liability Cases), 223 U. S. 1, 46 [1912]; Foster-Fountain Packing Co. v. Haydel., 278 U. S. 1 [1928].

Transactions wholly within a State are not subject to regulation by Congress. The fact that the products of domestic enterprise in agriculture and manufactures, or in the arts, may ultimately become the subjects of foreign commerce, affords no basis for the conclusion that the control of the means of the encouragement by which enterprise is fostered and protected is legitimately within the import of the phrase foreign commerce, or fairly implied in any investiture of the power to regulate such commerce.[1] But although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.[2]

[1] Veazie v. Moor, 14 How. 568, 573 [1853]; Coronado Co. v. United Mine Workers of America, 268 U. S. 295, 310 [1925]; Schechter Poultry Corp. v. United States, 295 U. S. 495, 547 [1935]. *See also* Kidd v. Pearson, 128 U. S. 1, 20 [1888]; United States v. Knight (E. C.) Co., 156 U. S. 1, 13 [1895]; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 241 [1899]; United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 407 [1922]; Oliver Iron Min. Co. v. Lord, 262 U. S. 172, 178 [1923]; United Leather Workers International Union v. Herkert & M. Trunk Co., 265 U. S. 457, 465 [1924]; Industrial Asso. v. United States, 268 U. S. 64, 82 [1925].

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[3] Schechter Poultry Corp. v. United States, 295 U. S. 495, 547 [1935], cited with approval in National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 37 [1937]. *See also* Houston, E. & W. T. R. Co. v. United States (Shreveport Case), 234 U. S. 342, 351, 352 [1914]; (Wisconsin) R. Comm. v. Chicago, B. & Q. R. Co., 257 U. S. 563, 588 [1922]; Florida v. United States, 282 U. S. 194, 210, 211 [1931]; Southern R. Co. v. United States, 222 U. S. 20 [1911]; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612 [1911].

It is not within the power of the parties by the form of their contract to convert a local business into an interstate business protected by the commerce clause, when the contract avails nothing else.[1]

[1] Browning v. Waycross, 233 U. S. 16 [1914]. *See also* Superior Oil Co. v. Mississippi ex rel. Knox, 280 U. S. 390 [1930]; Banker Bros. Co. v. Pennsylvania 222 U. S. 210 [1911]. *Cf.* Baltimore & O. S. W. R. Co. v. Settle 260 U. S. 166 [1922].

WHAT CONSTITUTES A "STREAM" OR "FLOW" OF COMMERCE.

In upholding the validity of the Packers and Stockyards Act (42 Stat. 481) regulating the charges of commission men in the stockyards, the Court (following Swift & Co. v. United States, 196 U. S. 375 [1905]) found that the stockyards were but a "throat" through which the current of commerce flowed and the transactions which there occurred could not be separated from that movement. Hence the sales at the stockyards were not regarded as merely local transactions, for while they created "a local change of title" they did not "stop the flow," but merely changed the private interests in the subject of the current.[1]

[1] Stafford v. Wallace, 258 U. S. 495, [1922]. *See also* Board of Trade v. Olsen, 262 U. S. 1, 32 [1923]; *cf.* Hill v. Wallace, 259 U. S. 44, 69 [1922]; Tagg Bros. & Moorhead v. United States, 280 U. S. 420 [1930]; Lemke v. Farmers' Grain Co., 258 U. S. 50 [1922].

COMMERCE CARRIED ON BY CORPORATIONS.

The grant of power is general, making no reference to the agencies by which commerce is carried on. It includes commerce by whomsoever conducted, whether by individuals or corporations.[1] While a State may absolutely exclude corporations seeking to do a purely intrastate business,[2] where the corporation is engaged in interstate commerce it may enter and transact its business without State interference or restraint.[3]

[1] Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 214 [1885].
[2] Paul v. Virginia, 8 Wall 168, 169 [1869].
[3] Pensacola Teleg. Co. v. Western U. Teleg. Co., 96 U. S. 1 [1878].

In Crutcher v. Kentucky, 141 U. S. 47, 57 [1891], the court said: "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities as a matter of convenience in carrying on their business cannot have the effect

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of depriving them of such right unless Congress should see fit to interpose some contrary regulation of the subject."

Congress has visitatorial power over State corporations in the exercise of its power to regulate interstate commerce.[1]

[1] Interstate Commerce Commission *v.* Goodrich Transit Co., 224 U. S. 194 [1912].

For purposes of local taxation and regulation it is often necessary to determine whether a particular business is local or interstate in character.

In International Text-Book Co. *v.* Pigg, 217 U. S. 91 [1910], the court held that the conducting of a "correspondence school" is interstate commerce since it involved the solicitation of students in one State by local agents who are to collect and forward the fees, and systematic intercourse by correspondence between the company and its students, wherever situated, and also the interstate transportation of books, papers, etc.

In New York L. Ins. Co. *v.* Deer Lodge County, 231 U. S. 495 [1914], the court reaffirmed the earlier case of Paul *v.* Virginia, 8 Wall. 168 [1869], and held that the issuance of insurance by a foreign corporation through resident agents within a State is a personal contract and does not constitute interstate commerce. The fact that the use of the mails between the States was declared to be necessary to the centralization of the control and supervision of the details of the insurance business, was declared not material; nor was it material that the insurance company was in one State and the purchasers of policies in other States.

Transportation of Persons and Property.

IN GENERAL.

The transportation of persons[1] and goods[2] between different States is interstate commerce; freight carried from a point without the State to some point within the State, and freight carried from some point within that State to other States is as much commerce among the States as that which passes entirely through a State.[3] Transportation between two points in a State, when a large part of the route is on a loop outside the State, is interstate commerce, and the action of the State commission fixing the rates for continuous transportation over such route is invalid.[4]

[1] Hoke *v.* United States, 227 U. S. 308 [1913].

[2] Philadelphia & S. Mail S. S. Co. *v.* Pennsylvania, 122 U. S. 326 [1887].

[3] Fargo *v.* Stevens (Fargo *v.* Michigan), 121 U. S. 230, 238 [1887].

[4] Hanley *v.* Kansas City Southern R. Co., 187 U. S. 617, 619 [1903], distinguishing Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 202 [1892].

See also Missouri Pac. R. Co. *v.* Stroud, 267 U. S. 404 [1925]; Western U. Teleg. Co *v.* Speight, 254 U. S. 17 [1920]; Atchison, T. & S. F. R. Co. *v.* Harold, 241 U. S. 371 [1916]; Louisville & N. R. Co. *v.* Behlmer, 175 U. S.

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648 [1900]; Baltimore & O. S. W. R. Co. *v.* Settle, 260 U. S. 166 [1922]; Gulf, C. & S. F. R. Co. *v.* Texas, 204 U. S. 403 [1907]; Chicago, M. & St. P. R. Co. *v.* Iowa, 233 U. S. 334 [1914].

Commerce among the several States includes navigation of public waters for transporting persons and property.[1] Where a vessel of the United States, although running between two ports of the same State, goes upon the high seas, she, together with the business in which engaged, is subject to regulation by Congress.[2] A steamer plying between two points within the same State on inland waters is engaged in interstate commerce so far as she is employed in transporting goods destined for other States.[3]

[1] Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 203 [1885]. *See also* New Jersey *v.* Sargent, 269 U. S. 328 [1926]; Seattle *v.* Oregon & W. R. Co., 255 U. S. 56 [1921]; London Guarantee & Acci. Co. *v.* Industrial Acci. Comm., 279 U. S. 109 [1929].

[2] Lord *v.* Goodall, N. & P. S. S. Co., 102 U. S. 541 [1881]. *See also* Cox *v.* Lott (State Tonnage Tax Cases), 12 Wall. 204, 214 [1871]; Henderson *v.* New York, 92 U. S. 259, 270 [1876]; Gilman *v.* Philadelphia, 3 Wall. 713, 724 [1866]; Leovy *v.* United States, 177 U. S. 621, 632 [1900]; Escanaba & L. M. Transport Co. *v.* Chicago, 107 U. S. 678 [1883].

[3] The "Daniel Ball" *v.* United States, 10 Wall. 557 [1871]. *See also* Norfolk & W. R. Co. *v.* Pennsylvania, 136 U. S. 114 [1890].

Commerce embraces appliances necessarily employed in carrying on transportation by land and water;[1] the power of Congress over commerce extends to all the instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce.[2]

[1] Chicago & N. W. R. Co. *v.* Fuller, 17 Wall. 560, 568 [1873].

[2] Northern Securities Co. *v.* United States, 193 U. S. 197, 344 [1904].

"* * * in all cases which have come to this Court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce and one which is nothing more than a charge for a local facility provided for the transaction of such commerce." [1]

[1] Hopkins *v.* United States, 171 U. S. 578, 597 [1898].

A bridge company operating a span between United States and Canada, charging tolls for its use but not itself carrying goods or persons across the bridge, is not engaged in "interstate commerce" within the meaning of statutes imposing an annual privilege fee on corporations and excepting from computation thereof property exclusively used in interstate commerce.[1]

[1] Detroit International Bridge Co. *v.* Corporation Tax Appeal Bd., 294 U. S. 83 [1935].

TRANSPORTATION OF LIVESTOCK.

The transportation of livestock from State to State is a branch of interstate commerce, and any specified rule or regulation in respect

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of such transportation, which Congress may lawfully prescribe or authorize and which may properly be deemed a regulation of such commerce, is paramount throughout the Union.[1]

[1] Reid *v.* Colorado, 187 U. S. 137, 146 [1902].

TRANSPORTATION OF OIL OR GAS IN PIPE LINES.

The transportation of oil or gas in pipe lines from one State to another is interstate commerce, and this is so though the oil transported belongs to the owner of the pipe lines, and is subject to the regulating power of Congress when the owner of the lines refuses to transport for others but purchases the oil from the producers and thus controls the business in the territory served by the lines.[1]

[1] United States *v.* Ohio Oil Co., 234 U. S. 548 [1914]. *See also* State Corp. Commission *v.* Wichita Gas Co., 290 U. S. 561 [1934]; Eureka Pipe Line Co. *v.* Hallanan, 257 U. S. 265 [1921]; United Fuel Gas Co. *v.* Hallanan, 257 U. S. 277 [1921]; Missouri ex rel. Barrett *v.* Kansas Natural Gas Co., 265 U. S. 298 [1924].

STORAGE OF OIL IN TANKS.

Oil shipped from a point without a State is not necessarily out of interstate commerce when stored in tanks. If the storage is temporary and the oil is to continue in transit it is still interstate commerce. But if it is to be distributed from the storage tanks to local consumers, the interstate movement has ended.[1]

[1] Atlantic Coast Line R. Co. *v.* Standard Oil Co., 275 U. S. 257 [1927]. *See also* State (Florida) ex rel. R. Comrs. *v.* Seaboard Air Line R. Co., 92 Florida 61 [1926], certiorari denied, 273 U. S. 729 [1926]; Carson Petroleum Co. *v.* Vial, 279 U. S. 95 [1929].

MOVING GOODS FROM PLATFORM TO FREIGHT WAREHOUSE.

Moving goods shipped from a point without the State, from a platform at the depot to the freight warehouse, is a part of interstate commerce transportation.[1]

[1] Rhodes *v.* Iowa, 170 U. S. 412 [1898].

ACCOMMODATIONS FOR PASSENGERS OF DIFFERENT RACES.*

Whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with passengers of another race is a question of interstate commerce and to be determined by Congress alone.[1]

[1] Louisville N. O. & T. R. Co. *v.* Mississippi, 133 U. S. 587, 590 [1890].

A Louisiana statute requiring interstate carriers to permit Negroes and whites to intermingle freely in all parts of their trains or ships was held to be a regulation of interstate commerce and therefore invalid.[1] But where an interstate railroad established rules and regulations requiring white and colored passengers to occupy separate compartments, and Congress had not made any regulation in the

* *See also* p. 962.

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matter, it was held a reasonable regulation, irrespective of the fact that a State statute also required that there be separate accommodations.[2]

[1] Hall v. De Cuir, 95 U. S. 485 [1878].

[2] Chiles v. Chesapeake & O. R. Co., 218 U. S. 71 [1910]. *See also* McCabe v. Atchison, T. & S. F. R. Co., 235 U. S. 151 [1914]; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388 [1900].

A Kentucky street railway may be required by a statute of that State to furnish either separate cars or separate compartments in the same car for white and Negro passengers, although its principal business is the carriage of passengers in interstate commerce between Cincinnati and Kentucky cities across the Ohio River. Such a requirement affects interstate commerce only incidentally, and does not subject it to unreasonable demands.[1]

[1] South Covington & C. St. R. Co. v. Kentucky, 252 U. S. 399 [1920]. *See also* South Covington & C. St. R. Co. v. Covington, 235 U. S. 537 [1915].

USE OF LOCAL RATES OR BILLS OF LADING AS BETWEEN CONNECTING CARRIERS.

When goods shipped under a through bill of lading from a point in one State to a point in another are received in transit by a State common carrier, under a conventional division of the charges such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce.[1]

[1] Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 193 [1896]. *See also* Baer Bros. Mercantile Co. v. Denver, & R. G. R. Co., 233 U. S. 479 [1914].

Manufacture and Sale of Goods.*

IN GENERAL.

Where the contract is for the sale of the article and for its delivery in another State the transaction is one of interstate commerce, although the seller may have also agreed to manufacture it in order to fulfill his contract of sale.[1] The Court further said: "It is almost needless to add that we do not hold that every private enterprise which may be carried on chiefly or in part by means of interstate shipments is therefore to be regarded as so related to interstate commerce as to come within the regulating power of Congress. Such enterprises may be of the same nature as the manufacturing of refined sugar in the Knight case, 156 U. S. 1 [1895]—that is, the parties may be engaged as manufacturers of a commodity which they thereafter intend at some time to sell, and possibly to sell in another State; but such sale we have already held an incident to and not the direct result of the

* *See also* p. 197.

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manufacture, and so is not a regulation of, or an illegal interference with, interstate commerce."

[1] Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 246 [1899]. *See also* Furst *v.* Brewster, 282 U. S. 493 [1931].

SALE WITHIN STATE OF COMMODITY SHIPPED FROM ANOTHER STATE.

Transactions by which wholesale paper dealers sell to retailers in the same State, the shipments being from a mill in another State to or for the retailer, constitute interstate commerce; and agreements between such wholesalers by which they fix prices to be charged retailers within the State are within the jurisdiction of the Federal Trade Commission.[1]

[1] Federal Trade Commission *v.* Pacific States Paper Trade Asso., 273 U. S. 52 [1927].

INTERSTATE CONTRACTS CALLING FOR ERECTION, ETC.

A contract entered into for the erection of a factory which is to be supervised and operated by the officers of a foreign corporation is not a transaction of interstate commerce in the constitutional sense merely because of the fact that the products of the factory are largely to be sold and shipped to other factories.[1] In Browning *v.* Waycross, 233 U. S. 16 [1914], it was held that the installation of lightning rods sold by a foreign corporation was not interstate commerce, although provided for in the contract of purchase. Similarly in General Railway Signal Co. *v.* Virginia, ex rel. State Corp. Commission, 246 U. S. 500 [1918], where a foreign corporation installed signals in Virginia, bringing in materials, supplies, and machinery from without the State, the Court held that local business was involved, separate and distinct from interstate commerce, and subject to the licensing power of the State. However, in an interstate contract for the sale of a complicated ice-making plant, where it was stipulated that the parts should be shipped into the purchaser's State and the plant there assembled and tested under the supervision of an expert to be sent by the seller, it was held that services of the expert did not constitute the doing of a local business subjecting the seller to regulations of Texas concerning foreign corporations.[2]

[1] Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611, 616 [1903].

[2] York Mfg. Co. *v.* Colley, 247 U. S. 21 [1918]. *See also* Kansas City Structural Steel Co. *v.* Arkansas, 269 U. S. 148 [1925].

SALE F. O. B.

The sale of coal f. o. b. cars at the mine, the cars when loaded to be forwarded promptly to the purchasers in other States, is interstate commerce.[1]

[1] Pennsylvania R. Co. *v.* Sonman Shaft Coal Co., 242 U. S. 120 [1916]. *See also* Pennsylvania R. Co. *v.* Clark Bros. Coal Min. Co., 238 U. S. 456 [1915]; Flanagan *v.* Federal Coal Co., 267 U. S. 222 [1925].

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SHIPMENT C. O. D.

A shipment of merchandise c. o. d. from one State into another constitutes interstate commerce, as the right of parties to make a contract in another State than that of the residence of the purchaser, for the sale and purchase of merchandise, and in doing so to fix by agreement the time when, and the condition on which, the completed title should pass, is beyond question.[1]

[1] American Express Co. *v.* Iowa, 196 U. S. 133, 143 [1905]. *See also* Adams Express Co. *v.* Iowa, 196 U. S. 147 [1905].

DELIVERY BY AGENT AFTER BREAKING BULK.

The soliciting of orders by an agent of a nonresident principal, to be filled by putting up the objects of several orders in distinct packages and forwarding them to the agent for delivery, each package being labeled for the customer (except that in the case of one class of goods, viz, brooms, they were tagged and marked like the other articles, according to the number ordered, but then tied together into bundles of about a dozen, and wrapped up conveniently for shipment) is interstate commerce, and a municipal ordinance imposing a license fee for engaging in such business is void.[1]

[1] Rearick *v.* Pennsylvania, 203 U. S. 507 [1906].

SALE OF GOODS AFTER ARRIVAL IN A STATE.

A State statute, imposing a tax on persons selling, storing, and distributing gasoline, held not to impose a property tax on gasoline, but an excise or privilege tax on the business of selling, storing, and withdrawing it.[1]

[1] American Airways *v.* Wallace, 57 F. (2d) 877 [1932], affirmed in 287 U. S. 565 [1932].

Where the goods sold are supplied from a warehouse maintained within the State, such sale does not constitute a part of interstate commerce.[1]

[1] Duncan *v.* State, 105 Ga. 457 [1898]; Muskegon *v.* Zeeryp, 134 Mich. 181 [1903]. *See also* Kehrer *v.* Stewart, 197 U. S. 60 [1905].

SALE THROUGH AGENTS.

The importer has a right to sell goods in original packages, not only personally but also by an agent.[1]

[1] Schollenberger *v.* Pennsylvania, 171 U. S. 1, 24 [1898].

Other Transactions.

COMMUNICATION BY TELEGRAPH AND TELEPHONE.*

Communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between different States it is interstate commerce and directly within the power of regulation

* *See also* pp. 186, 968 992.

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conferred upon Congress and free from the control of State regulations, except such as are strictly of a police character.[1] A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself. A State tax on each message sent by a telegraph company is unconstitutional so far as it includes messages sent out of the State or for the Federal Government.[2]

[1] Leloup *v.* Port of Mobile, 127 U. S. 640, 645 [1888]. *See also* Western U. Teleg. Co. *v.* Commercial Milling Co., 218 U. S. 406 [1910]; Western U. Teleg. Co. *v.* James, 162 U. S. 650, 654 [1896]; Western U. Teleg. Co. *v.* (Alabama) Seay, 132 U. S. 472 [1889]; Western U. Teleg. Co. *v.* Pendleton, 122 U. S. 347, 356 [1887]; Pensacola Teleg. Co. *v.* Western U. Teleg. Co., 96 U. S. 1, 9 [1878]; Western U. Teleg. Co. *v.* Speight, 254 U. S. 17 [1920]; Western U. Teleg. Co. *v.* Pennsylvania R. Co., 195 U. S. 540 [1904].

[2] Western U. Teleg. Co. *v.* Texas, 105 U. S. 460 [1882].

New York stock quotations furnished by telegraph to subscribers in Massachusetts held interstate commerce.[1]

[1] Western U. Teleg. Co. *v.* Foster, 247 U. S. 105 [1918].

The rules applicable to telegraph companies apply equally to telephone companies.[1] When their lines run from one State into another they are carriers of interstate commerce.[2]

[1] Delaware & Atlantic Teleg. & Teleph. Co. *v.* Delaware, 50 Fed. 677 [1892].

[2] Muskogee Nat. Tel. Co. *v.* Hall, 118 Fed. 382 [1902].

TRANSMISSION OF NEWS.

The transmission of news to and from various parts of the country by means of the telephone and telegraph constitutes interstate commerce within the meaning of the National Labor Relations Act and the Constitution.[1]

[1] Associated Press *v.* National Labor Relations Board, 301 U. S. 103 [1937].

RADIO BROADCASTING.

The radio broadcaster, in conducting under a Federal license the business of broadcasting advertising programs for hire, to listeners within and without the State, is engaged in interstate commerce and cannot be subjected to an occupation tax measured by the gross receipts of the business.[1]

[1] Fisher's Blend Station, Inc., *v.* State Tax Commission, 297 U. S. 650 [1936].

TRANSMISSION OF ELECTRICITY.

The generation of electricity from water power and the transmission from the generator to consumers in another State are distinct processes, the one local and the other interstate; therefore a State

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license tax on the electricity produced at a plant within the State is valid as to that which is transmitted to another State.[1]

[1] Utah Power & Light Co. *v.* Pfost, 286 U. S. 165 [1917].

HANDLING AND SLAUGHTERING OF ANIMALS.

When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.[1] But the local business of commission merchants at the Kansas City Live Stock Exchange was held not commerce among the States, even though the brokers handled large amounts of livestock shipped from other States and sold as meat for shipment to various markets in other States.[2]

[1] Swift *v.* United States, 196 U. S. 375, 398 [1905]. *See also* Stafford *v.* Wallace, 258 U. S. 495 [1922]; Local 167 I. B. T. C. *v.* United States, 291 U. S. 293 [1934].

[2] Hopkins *v.* United States, 171 U. S. 578 [1898]. *See also* Anderson *v.* United States, 171 U. S. 604 [1898]; Minnesota *v.* Blasius, 290 U. S. 1 [1933].

REGULATION OF SLAUGHTERING OF POULTRY.

The slaughtering of poultry in the defendants' slaughterhouses within the State and sales by defendants to retail poultry dealers and butchers within the State, who sold directly to consumers, were held not transactions in interstate commerce, though almost all of the poultry originated outside the State; accordingly, the provisions of the Live Poultry Code of Fair Competition for the Metropolitan New York Area, promulgated by the President under authority of the National Industrial Recovery Act, fixing maximum hours and minimum wages of employees, were held invalid as a regulation of intrastate transactions not directly affecting interstate commerce.[1]

[1] Schechter Poultry Corp. *v.* United States, 295 U. S. 495, 524ff. [1935].

INSURANCE.

The issuance of an insurance policy is not a transaction in commerce, and a State statute providing that no insurance company not incorporated under its law may carry on business, is valid.[1]

[1] Paul *v.* Virginia, 8 Wall. 168 [1869]. *See also* New York L. Ins. Co. *v.* Deer Lodge County, 231 U. S. 495 [1914]; New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 401 [1900]; Fire Assoc. of Philadelphia *v.* New York, 119 U. S. 110 [1886]; Bothwell *v.* Buckbee-Mears Co., 275 U. S. 274 [1927]; Metropolitan Casualty Ins. Co. *v.* Brownell, 294 U. S. 580 [1935].

CORRESPONDENCE SCHOOL.

The business of conducting a correspondence school in other States than the home State of the school is interstate commerce.[1]

[1] International Text-Book Co. *v.* Pigg, 217 U. S. 91 [1910].

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PURCHASE, SALE, AND STORAGE OF GRAIN.

The business of buying in one State grain practically all of which is intended for shipment to other States, is interstate commerce which a State may not regulate by a statute which has the effect of controlling and burdening such commerce.[1] But the regulation of boards of trade, prescribed by the Future Trading Act of August 24, 1921 (42 Stat. 187), with a so-called tax on all futures, imposed by way of penalty to coerce boards of trade and their members into compliance, cannot be sustained under the commerce clause, there being no limitation on the application of the tax to interstate commerce, or that which Congress may deem, from evidence before it, to be an obstruction of interstate commerce, but on the contrary, it being clear that Congress sought to use the taxing power to give validity to the act, and did not have the exercise of its power under the commerce clause in mind.[2]

[1] Shafer *v.* Farmers' Grain Co., 268 U. S. 189 [1925]. *See also* Dahnke-Walker Milling Co. *v.* Bondurant, 257 U. S. 282 [1921]; Langer *v.* Grandin Farmers Co-op. Elevator Co., 5 F. Supp. 425 [1934], affirmed 292 U. S. 605 [1934].

[2] Hill *v.* Wallace, 259 U. S. 44 [1922]; Trusler *v.* Crooks, 269 U. S. 475 [1926]. *See also* Board of Trade *v.* Olsen, 262 U. S. 1 [1923] (upholding Grain Futures Act of 1922 as a valid exercise of commerce power).

Commencement and Termination of Power.

WHEN PROTECTION ATTACHES.

The fact that an article is purchased [1] or manufactured [2] for export to a foreign State does not of itself make it an article of interstate commerce or free it from State control. Goods do not cease to be a part of the general mass of property taxable within the State, until they have been shipped, or deposited with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.[3] It is sufficient that goods destined and marked for other States have been put on board a vessel plying wholly within the limits of the State.[4]

[1] Myers *v.* Baltimore County, 83 Md. 385 [1896].

[2] Kidd *v.* Pearson, 128 U. S. 1, 24 [1888]. *See also* United States *v.* Knight (E. C.) Co., 156 U. S. 1, 13 [1895]; Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211 [1899]; Crescent Cotton Oil Co. *v.* Missisippi, 257 U. S. 129 [1921]; Heisler *v.* Thomas Colliery Co., 260 U. S. 245 [1922].

[3] Coe *v.* Errol, 116 U. S. 517, 527 [1886]. *See also* Texas & N. O. R. Co. *v.* Sabine Tram Co., 227 U. S. 111 [1913]; Southern Pacific Terminal Co. *v.* Interstate Commerce Commission, 219 U. S. 498 [1911]; Bacon *v.* Illinois, 227 U. S. 504 [1913]; McCluskey *v.* Marysville & N. R. Co., 243 U. S. 36 [1917]; Middleton *v.* Texas Power & Light Co., 249 U. S. 152 [1919]; Arkadelphia Mill. Co. *v.* St. Louis Southwestern R. Co., 249 U. S. 134 [1919]; Railroad Commission *v.* Texas & P. R. Co. 229 U. S. 336 [1913].

[4] The "Daniel Ball" *v.* United States, 10 Wall. 557, 565 [1871].

HOW LONG PROTECTION CONTINUES.

The commerce power of the Federal Government continues until the commodity has ceased to be the subject of discriminating

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legislation by reason of its foreign character. That power protects it, even after it has entered the States, from any burdens imposed by reason of its foreign origin [1]—until it becomes mingled with and a part of the property of the latter.[2]

[1] Welton *v.* Missouri, 91 U. S. 275, 282 [1876]. *See also* Anglo-Chilean Nitrate Sales Corp. *v.* Alabama, 288 U. S. 218 [1933].

[2] Howe Mach. Co. *v.* Gage, 100 U. S. 676, 678 [1880].

TEMPORARY DETENTION IN TRANSIT.

Logs, under control of their owner, which are being floated in a river in continuous movement from one State to another, or which, in the course of their interstate journey, are being temporarily detained by a boom to await subsidence of high waters and for the sole purpose of saving them from loss, are in interstate commerce and are not subject to State taxation.[1] Oil shipped in tanks to a distributing point in a State, is subject there to taxation and inspection though it is intended for further transportation to other States in barrels and other smaller vessels.[2]

[1] Champlain Realty Co. *v.* Brattleboro, 260 U. S. 366 [1922].

[2] General Oil Co. *v.* Crain, 209 U. S. 211 [1908]. *See also* Diamond Match Co. *v.* Ontonagon, 188 U. S. 82, 96 [1903]; Kelley *v.* Rhoads, 188 U. S. 1, 7 [1903]; Pittsburg & S. Coal Co. *v.* Bates, 156 U. S. 577, 584 [1895]; Brown *v.* Houston, 114 U. S. 622 [1885]; Susquehanna Coal Co. *v.* South Amboy, 228 U. S. 665 [1913]; Hartford Accident & Indemnity Co. *v.* Illinois ex rel. McLaughlin, 298 U. S. 155 [1936].

WHEN THE PROTECTION CEASES.

The point of time when the prohibition ceases and the power of the State to tax commences is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country.[1] However, no discrimination may be made against them as goods from another State nor may they be taxed by reason of being brought from another State except in the usual way as other goods are.[2]

[1] Leisy (Gus.) & Co. *v.* Hardin, 135 U. S. 100, 110 [1890]. *See also* Minnesota *v.* Blasius, 290 U. S. 1 [1933].

[2] Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 497 [1887]. *See also* Liggett (Louis K.) Co. *v.* Lee, 288 U. S. 517 [1933].

Coal in flat-boats, owned by nonresidents, which has arrived at its destination and has been put up for sale by the agents of the owners, has become a part of the general mass of property in the State.[1]

[1] Brown *v.* Houston, 114 U. S. 622, 632 [1885]. *See also* Wiloil Corp. *v.* Pennsylvania, 294 U. S. 169 [1935]; Pacific States Box & Basket Co. *v.* White, 296 U. S. 176 [1935]; Highland Farms Dairy, Inc., *v.* Agnew, 300 U. S. 608 [1937].

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Original Packages.*

DEVELOPMENT OF THE DOCTRINE.

The original package doctrine, as first announced in Brown *v.* Maryland, 12 Wheat. 419 [1827], was, briefly, that goods shipped in foreign commerce are exempt from State regulation or taxation until sale in the original package, or until the breaking of such package. But Mr. Chief Justice Marshall there indicated that "we suppose the principles laid down in this case * * * apply equally to importations from a sister State."

In the next three cases involving this point,[1] Marshall's dictum was repudiated by holding that the "tax on imports" clause applied only to goods from a foreign country. In Bowman *v.* Chicago & N. W. R. Co., 125 U. S. 465 [1888], however, the court indicated that the doctrine would be applied to interstate commerce, and it was so held subsequently in Leisy (Gus.) & Co. *v.* Hardin, 135 U. S. 100 [1890]—which in effect repudiated Woodruff *v.* Parham, 8 Wall. 123 [1870], although that case was unnoticed except in the dissenting opinions. In Schollenberger *v.* Pennsylvania, 171 U. S. 1 [1898], a State statute prohibiting the sale of uncolored oleomargarine was declared invalid as to products of other States; but in Plumley *v.* Massachusetts, 155 U. S. 461 [1894], it was held that a State could prohibit the sale of oleomargarine colored to resemble butter.

[1] Thurlow *v.* Massachusetts (The License Cases), 5 How. 504, 594 [1847]; Woodruff *v.* Parham, 8 Wall. 123, 139 [1869]; Hinson *v.* Lott, 8 Wall. 148 [1869]. *See also* Waring *v.* Mobile, 8 Wall. 110 [1869]; Pervear *v.* Massachusetts, 5 Wall. 475 [1867].

The "original package" test, as applied to the validity of a burden imposed by a State in respect of goods brought into the State, is not inflexible and final, but merely marks a convenient boundary sufficiently precise save in exceptional conditions.[1] It is now settled that a State may levy a property tax on,[2] or tax the resale,[3] of goods imported from a sister State so long as it does not discriminate against such goods. Under the Hawes-Cooper Act (45 Stat. 1024), States may prohibit the sale of prison-made goods even though in original packages.[4]

[1] Baldwin *v.* G. A. F. Seelig, Inc., 294 U. S. 511 [1935]. *See also* Williams *v.* Walsh, 222 U. S. 415 [1912].

[2] Brown *v.* Houston, 114 U. S. 622 [1885]; American Steel & Wire Co. *v.* Speed, 192 U. S. 500 [1904].

[3] Sonneborn Bros. *v.* Keeling (Cureton), 262 U. S. 506 [1923].

[4] Whitfield *v.* Ohio, 297 U. S. 431 [1936].

* *See also* pp. 210, 362.

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WHAT CONSTITUTES AN ORIGINAL PACKAGE.

Cigarettes.

What constitutes an original package is not determined by the size of the package in which the importation is actually made, but by the size of the package in which bona fide transactions are carried on between the manufacturer and the wholesaler residing in different States.[1] Thus, paper packages of cigarettes, 3 inches long and 1¼ inches in width, each containing 10 cigarettes which were shipped thrown loosely into a basket, were held not original packages protected against interference by the State while in the hands of the importer.[2]

[1] Austin *v.* Tennessee, 179 U. S. 343, 359 [1900]. *See also* Cook *v.* Marshall County, 196 U. S. 261 [1905]; Price *v.* Illinois, 238 U. S. 446 [1915].
[2] Austin *v.* Tennessee, 179 U. S. 343, 350 [1900].

Intoxicating liquors.

Under a contract by which the purchaser was to buy malt liquor in casks and cases, and by which the agreed prices were per cask containing 10 dozen bottles and per case containing 6 dozen bottles, respectively, each separate bottle cannot be considered as an original package in the light of the transactions contemplated between the manufacturer and local dealer.[1] But bottles shipped separately in individual packages have been treated as original packages.[2]

[1] Purity Extract & Tonic Co. *v.* Lynch, 226 U. S. 192 [1912].
[2] Tinker *v.* State (Ala.), 96 Ala. 115 [1892].

Oleomaragarine.

In Schollenberger *v.* Pennsylvania, 171 U. S. 1, 24 [1898], a 10-pound package of oleomargarine was held to be an original package; and in Commonwealth (Pa.) *v.* Paul, 148 Pa. 559 [1892], the sale of 2 pounds of oleomargarine, taken from a 10-pound tub and packed in a suitable paper package, which was marked, branded, and stamped in the manner prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, was not a sale in an original package.

Natural gas.

Where natural gas was purchased outside the State and piped in under high pressure which was released when it reached local mains, the treatment and division of the gas is like the breaking of an original package, thereby permitting the levy by the State of an excise tax based on the gross receipts from the sale.[1]

[1] East Ohio Gas Co. *v.* Tax Commission, 283 U. S. 465 [1931]. *Cf.* State Tax Commission *v.* Interstate Natural Gas Co., 284 U. S. 41 [1931].

Milk.

A State law which prohibits the sale of milk imported from another State unless the price paid in that other State to the producer was up to the minimum prescribed by the first State for purchases from local

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producers, is a direct burden on interstate commerce as to milk sold by the importer in the original cans (as well as to milk sold by the importer in bottles in which it was put after importation).[1]

[1] Baldwin *v.* G. A. F. Seelig, Inc., 294 U. S. 511 [1935]. *See also* Hebe Co. *v.* Shaw, 248 U. S. 297 [1919].

Exclusiveness of Power of Congress.

IN GENERAL.

Congress alone has the power to occupy, by legislation, the whole field of interstate commerce.[1] Whether the power in any given case is vested exclusively in the General Government depends upon the nature of the subject to be regulated.[2]

[1] Champion *v.* Ames (Lottery Case), 188 U. S. 321, 358 [1903].
[2] Gilman *v.* Philadelphia, 3 Wall. 713, 727 [1866].

It is only direct interferences with the freedom of interstate commerce that bring a case within the exclusive domain of Federal legislation.[1]

[1] Field *v.* Barber Asphalt Paving Co., 194 U. S. 618, 623 [1904].

As early as 1824, in Gibbons *v.* Ogden, 9 Wheat. 1, it was held that the State of New York could not grant an exclusive franchise to operate steamboats within its borders and deny the right of operation to one who had complied with the Federal laws on this subject; and in 1827, Brown *v.* Maryland, 12 Wheat. 419, was decided mainly upon the ground that the tax imposed by the State of Maryland upon the sale of foreign imports in "original packages" violated article I, section 2, and also the Commerce Clause. But 2 years later, in Willson *v.* Blackbird Creek Marsh Co., 2 Pet. 245 [1829], the court upheld a Delaware statute granting plaintiff the right to construct a dam across a navigable stream—apparently upon the theory that it constituted a valid exercise of the police power and only incidentally affected interstate commerce.

In New York *v.* Miln, 11 Pet. 102 [1837], a State law was upheld which required masters of all vessels arriving at the port of New York to make reports as to passengers carried, and imposed fines in case this was not done. The Court said "we are of the opinion that the act is not a regulation of commerce, but of police."

In Thurlow *v.* Massachusetts (License Cases), 5 How. 504 [1847], State laws fixing conditions of, and requiring licenses for, the sale of goods imported from other States were held valid, partly on the concurrent theory of the Federal and State powers and partly on the police power of the States.

But in Smith *v.* Turner (Passenger Cases), 7 How. 283 [1849], a law of New York which authorized State health commissioners to collect certain fees from captains of ships arriving in ports of that State, and a law of Massachusetts requiring captains of ships to give certain bonds as to immigrants landed, etc., were both held invalid, though no opinion representing the majority of the court was rendered.

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In Cooley *v.* Port Wardens, 12 How. 299 [1851], the Court upheld a pilotage law of Pennsylvania upon the ground that though it was a regulation of commerce, it was with reference to a matter properly lending itself to local State control, and one for which Congress had not legislated. The doctrine of this case is still accepted.[1]

[1] Bowman *v.* Chicago, & N. W. R. Co., 125 U. S. 465 [1888].

EXERCISE OF POLICE POWER BY STATES.*

Consistent with the power of Congress to regulate commerce among the States, the States possess, because they have never surrendered, the power to protect the public health, the public morals, and public safety, by any legislation appropriate to that end which does not encroach upon rights guaranteed by the national Constitution, nor come in conflict with acts of Congress passed in pursuance of that instrument.[1] But the police power of the State cannot draw within its jurisdiction subject matter which has been confided to Congress exclusively by the Constitution.[2]

[1] Missouri, K. & T. R. Co. *v.* Haber, 169 U. S. 613, 628 [1898]. *See also* Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 215 [1885]; Sioux Remedy Co. *v.* Cope, 235 U. S. 197 [1914]; New Mexico ex rel. McLean (E. J.) & Co. *v.* Denver & R. G. R. Co., 203 U. S. 38 [1906]; Bowman *v.* Chicago & N. W. R. Co., 125 U. S. 465, 489 [1888]; Robbins *v.* Taxing Dist. of Shelby County, 120 U. S. 489, 493 [1887]; Hannibal & St. J. R. Co. *v.* Husen, 95 U. S. 465, 470 [1878]; Lake Shore & M. S. R. Co. *v.* Ohio ex rel. Lawrence, 173 U. S. 285, 292 [1899]; New York, N. H. & H. R. Co. *v.* New York, 165 U. S. 628, 631 [1897]; Sligh *v.* Kirkwood, 237 U. S. 52 [1915]; Southern R. Co. *v.* Reid, 222 U. S. 424 [1912]; Houston, & T. C. R. Co. *v.* Mayes, 201 U. S. 321 [1906]; Simpson *v.* Shepard (Minnesota Rate Cases), 230 U. S. 352 [1913]; Mintz *v.* Baldwin, 289 U. S. 346 [1933]; Kelly *v.* Washington ex rel. Foss Co., 302 U. S. 1 [1937].

[2] Henderson *v.* New York, 92 U. S. 259, 271 [1876].

It is a well-established principle that Congress may circumscribe its regulation of interstate commerce and occupy a limited field, and the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be implied unless the latter fairly interpreted is in actual conflict with the State law.[1]

[1] Townsend *v.* Yoemans, 301 U. S. 441, 454 [1937], citing Savage *v.* Jones, 225 U. S. 501, 533 [1912]; Atlantic Coast Line *v.* Georgia, 234 U. S. 280, 293, 294 [1914]; Illinois C. R. Co. *v.* Public Utilities Commission, 245 U. S. 493, 510 [1918]; Carey *v.* South Dakota, 250 U. S. 118, 122 [1919]; Lehigh Valley R. Co. *v.* Public Utility Comrs., 278 U. S. 24, 35 [1928]; Atchison, T. & S. F. R. Co. *v.* Railroad Commission, 283 U. S. 380, 392, 393 [1931]; Hartford Indemnity Co. *v.* Illinois, 298 U. S. 155, 158 [1936].

The principle that a State may enact local laws under its police power in the interest of the welfare of the people, although they affect interstate commerce, and that such laws may stand at least until Congress takes possession of the field under its superior authority

*See also pp. 154, 174, 337, 565, 719, 827, 969.

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to regulate such commerce, has no application where the State passes beyond the exercise of its legitimate authority, and undertakes to regulate interstate commerce by imposing burdens upon it.[1]

[1] Lemke *v.* Farmers' Grain Co., 258 U. S. 50 [1922]. *See also* Kansas City Southern R. Co. *v.* Kaw Valley Drainage Dist., 233 U. S. 75 [1914]; Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142 [1896]; McDermott *v.* Wisconsin, 228 U. S. 115 [1913]; Brennan *v.* Titusville, 153 U. S. 289, 299 [1894]; Hannibal & St. J. R. Co. *v.* Husen, 95 U. S. 465, 472 [1878]; Dahnke-Walker Milling Co. *v.* Bondurant, 257 U. S. 282 [1921].

EFFECT OF NONACTION BY CONGRESS.

Where the power of Congress to regulate is exclusive, i. e., subjects national in character, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulations of the subject by the States, except in matters of local concern only, is repugnant to such freedom.[1]

[1] Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 493 [1887]. *See also* Southern R. Co. *v.* Reid, 222 U. S. 424 [1912]; Western U. Teleg. Co. *v.* James, 162 U. S. 650, 655 [1896]; United States *v.* E. C. Knight Co., 156 U. S. 1, 11 [1895]; Pittsburg & S. Coal Co. *v.* Bates, 156 U. S. 577, 588 [1895]; Wilkerson *v.* Rahrer (In re Rahrer), 140 U. S. 545, 555 [1891]; Leisy & Co. *v.* Hardin, 135 U. S. 100, 110 [1890]; Philadelphia & S. Mail S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 336 [1887]; Walling *v.* Michigan, 116 U. S. 446, 455 [1886]; Escanaba & L. M. Transp. Co. *v.* Chicago, 107 U. S. 678 [1883]; Welton *v.* Missouri, 91 U. S. 275, 282 [1876]; Brennan *v.* Titusville, 153 U. S. 302 [1894]; United States *v.* Rio Grande Dam & Irrig. Co., 174 U. S. 690 [1899]; Kelly *v.* Washington ex rel. Foss Co., 302 U. S. 1 [1937].

Where the subjects on which the power may be exercised are local in their nature or operation, or constitute mere aids to commerce, the authority of the State may be exerted for their regulation and management until Congress interferes and supersedes it.[1]

[1] Escanaba & L. M. Transp. Co. *v.* Chicago, 107 U. S. 678, 687 [1883]. *See also* Cardwell *v.* American River Bridge Co., 113 U. S. 205, 210 [1885]; Simpson *v.* Shepard (Minnesota Rate Cases), 230 U. S. 352 [1913].

EFFECT OF ACTION BY CONGRESS.

When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the General Government.[1] But the action of Congress must be specific in order to be paramount.[2]

[1] Lake Shore & M. S. R. Co. *v.* Ohio, 173 U. S. 285, 297 [1899]. *See also* Gulf, C. & S. F. R. Co. *v.* Hefley, 158 U. S. 98, 104 [1895]; Missouri, K. & T. R. Co. *v.* Harris, 234 U. S. 412 [1914]; Erie R. Co. *v.* New York, 233 U. S. 671 [1914]; Asbell *v.* Kansas, 209 U. S. 251 [1908]; Smith *v.* Alabama, 124 U. S. 465, 473 [1888]; Smith *v.* Turner (Passenger Cases), 7 How. 283, 396 [1849]; Savage *v.* Jones, 225 U. S. 501 [1912]; Chicago, R. I. & P.

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R. Co. v. Hardwick Farmers Elevator Co., 226 U. S. 426 [1913]; Missouri Pac. R. Co. v. Porter, 273 U. S. 341 [1927].

[3] Missouri P. R. Co. v. Larabee Flour Mills, 211 U. S. 612 [1909].

A law of Congress regulating commerce with foreign nations or among the several States is the supreme law, and if the law of a State is in conflict with it, the law of Congress must prevail and the State law cease to operate so far as it is repugnant.[1]

[1] Thurlow v. Massachusetts (License Cases), 5 How. 504, 574 [1847]. *See also* McDermott v. Wisconsin, 228 U. S. 115 [1913]; Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412 [1914]; Southern R. Co. v. Reid, 222 U. S. 424 [1912]; Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559 [1913]; Railroad Commission v. Southern P. Co., 264 U. S. 331 [1924]; Kelly v. Washington ex rel. Foss Co., 302 U. S. 1 [1937].

When Congress exercises its exclusive powers over interstate commerce, the States cannot legislate on the subject, and the situation is covered as much by what is not done by Congress or the Interstate Commerce Commission, as by the regulations it has made, and the State has no power to fill what it may regard as an hiatus left by Congress and the Interstate Commerce Commission.[1]

[1] Whish v. Public Service Commission, 240 N. Y. 677 [1925]. *See also* Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 627 [1898]; Michigan C. R. Co. v. Vreeland, 227 U. S. 59 [1913].

Even when an act of Congress does not go into effect until a certain time following its passage, State legislation is immediately superseded upon the enactment of the Federal statute.[1]

[1] Northern P. R. Co. v. Washington ex rel. Atkinson, 222 U. S. 370 [1912].

NATIONAL SUBJECTS REQUIRING UNIFORM REGULATION.

The power to regulate commerce among the States, etc., is an absolute and exclusive grant of power to Congress—so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade among the States.[1] Whenever the subject matter of regulation is in its nature national, or admits of only one uniform system or plan of regulation, the power of Congress is exclusive; but if the subject matter is local in its nature, the State may regulate it, even although it be a regulation of interstate commerce.[2]

[1] Pittsburgh & S. Coal Co. v. Bates, 156 U. S. 577, 587 [1895].

[2] Cooley v. Board of Port Wardens, 12 How. 299 [1851]. *See also* Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204 [1885]; Walling v. Michigan, 116 U. S. 446, 455 [1886]; Henderson v. New York, 92 U. S. 259, 271 [1876]; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 471 [1878]; McDermott v. Wisconsin, 228 U. S. 115 [1913]; Savage v. Jones, 225 U. S. 501 [1912]; Pittsburg & S. Coal Co. v. Louisiana use of Charity Hospital, 156 U. S. 590, 597 [1895]; Ex parte McNiel, 13 Wall. 236, 240 [1872]; Welton v. Missouri, 91 U. S. 275, 280 [1876]; Mobile County v. Kimball, 102 U. S. 691, 702 [1881]; Robbins v. Taxing Dist. of Shelby County, 120 U. S. 489, 493 [1887].

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SUBJECTS NOT REQUIRING UNIFORM REGULATION.

The power to regulate commerce among the States is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them, with a view to local needs and circumstances, until Congress otherwise directs; but the power thus exercised by the States is not identical in its extent with the power to regulate commerce among the States. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries, and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity, and to the protection, the safety, and the welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the States, except so far as falling within the scope of a power confided to the General Government. Where the subject matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the States; but where, in relation to the subject matter, different rules may be suitable for different localities, the States may exercise powers which, though they may be said to partake of the nature of the power granted to the General Government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power.[1]

[1] Leisy & Co. *v.* Hardin, 135 U. S. 100, 108 [1890]. *See also* Minnesota Rate Cases (Simpson *v.* Shepard), 230 U. S. 352 [1913]; Southern R. Co. *v.* Reid, 222 U. S. 424 [1912]; Escanaba & L. M. Transp. Co. *v.* Chicago, 107 U. S. 678, 683 [1883]; Mobile County *v.* Kimball, 102 U. S. 691, 698 [1881]; Gilman *v.* Philadelphia, 3 Wall. 713, 726 [1866]; Cummings *v.* Chicago, 188 U. S. 410 [1903]; Gring *v.* Ives, 222 U. S. 365 [1912]; Hendrick *v.* Maryland, 235 U. S. 610 [1915]; Morris *v.* Duby, 274 U. S. 135 [1927]; Sproles *v.* Binford, 286 U. S. 374 [1932]; Townsend *v.* Yeomans, 301 U. S. 441 [1937]; Kelly *v.* Washington ex rel. Foss Co., 302 U. S. 1 [1937].

As to the effect of the delegation of power to the Interstate Commerce Commission, see Missouri Pac. R. Co. *v.* Larabee Flour Mills Co.,[1] 211 U. S. 612, 623 [1909], in which it was said that "Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has entrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the State in these incidental matters. A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb the authority of the State. It is not contended that the commission has taken any action in respect to the

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particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the State in merely incidental matters remains undisturbed."

[1] *See also* Missouri, K. & T. R. Co. *v.* Harris, 234 U. S. 412 [1914].

Power of Congress.

IN GENERAL.

The power to regulate commerce conferred by the Constitution upon Congress is that which previously existed in a State.[1] It is complete in itself, may be exercised to the utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.[2] But it is subject to all the limitations imposed by the Constitution, including the Fifth Amendment.[3] Congress, in determining the character of the regulations to be adopted, has a large discretion which is not to be controlled by the courts simply because, in their opinion, such regulations may not be the best or most effective that could be employed.[4]

[1] South Carolina *v.* Georgia, 93 U. S. 4, 10 [1876].

[2] Gibbons *v.* Ogden, 9 Wheat. 1, 197 [1824]. *See also* McDermott *v.* Wisconsin, 228 U. S. 115 [1913]; Hoke *v.* United States, 227 U. S. 308 [1913]; Mondou *v.* New York, N. H. & H. R. Co. (Second Employers' Liability Cases), 223 U. S. 1 [1912]; University of Illinois *v.* United States, 289 U. S. 48 [1933].

[3] Monongahela Nav. Co. *v.* United States, 148 U. S. 312, 336 [1893]. *See also* Adair *v.* United States, 208 U. S. 161 [1908]; United States *v.* Chicago, M. & St. P. R. Co., 282 U. S. 311 [1931]; Railroad Retirement Board *v.* Alton R. Co., 295 U. S. 330 [1935]. *Cf.* Dubuque & S. C. R. Co. *v.* Richmond, 19 Wall. 584 [1874].

[4] Champion *v.* Ames (Lottery Case), 188 U. S. 321, 356 [1903]. *See also* Buttfield *v.* Stranahan, 192 U. S. 470, 492 [1904].

"The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement' (The "Daniel Ball", 10 Wall. 557, 564 [1871]); to adopt measures 'to promote its growth and insure its safety,' (Mobile County *v.* Kimball, 102 U. S. 691, 696, 697 [1881]); 'to foster, protect, control and restrain * * * no matter what the source of the dangers which threaten it'. Mondou *v.* New York, N. H. & H. R. Co. (Second Employers' Liability Cases), 223 U. S. 1, 47 [1912]." [1]

[1] National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U. S. 1, 36–37 [1937].

In regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States, but must be exercised wherever the subject exists.[1] It reaches the

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interior of every State in the Union, so far as it may be necessary to protect the products of other States and countries from discrimination by reason of their foreign origin;[2] but does not comprehend the purely internal commerce which is carried on between man and man within a State or between different parts of the same State.[3]

[1] Gibbons *v.* Ogden, 9 Wheat. 195 [1824].

[2] Guy *v.* Baltimore, 100 U. S. 434, 443 [1880]. *See also* United States *v.* California, 297 U. S. 175 [1936].

[3] Kidd *v.* Pearson, 128 U. S. 1, 17 [1888]. *See also* Veazie *v.* Moor, 14 How. 568, 574 [1853]; United States *v.* Dewitt, 9 Wall. 41, 44 [1870]; License Tax Cases, 5 Wall. 462, 470 [1867]; cf. Federal Trade Commission *v.* Pacific States Paper Trade Asso., 273 U. S. 52 [1927].

Federal Police Power.*

The means necessary or convenient to the exercise of the power of Congress over interstate commerce may have the quality of police regulations.[1]

[1] Hoke *v.* United States, 227 U. S. 308 [1913]. *See also* St. Louis, I. M. & S. R. Co. *v.* Taylor, 210 U. S. 281 [1908], Safety Appliance Act; Northern Pacific R. Co. *v.* Washington ex rel. Atkinson, 222 U. S. 370 [1912], hours of employees upon interstate railways; Champion *v.* Ames (Lottery Case), 188 U. S. 321, 358 [1903], and Hipolite Egg Co. *v.* United States, 220 U. S. 45 [1911], transportation of lottery tickets and impure goods.

In Hammer *v.* Dagenhart, 247 U. S. 251 [1918], it was held that Congress had exceeded its power under the Commerce Clause in enacting the provisions of the act of September 1, 1916 (39 Stat. 675), which prohibited the transportation in interstate commerce of manufactured goods the product of a factory in which, within 30 days prior to the removal of the goods, children under 14 have been employed more than 8 hours in a day, or more than 6 days in a week, or between 7 in the evening and 6 in the morning.[1]

[1] *Cf.* Keller *v.* United States, 213 U. S. 138 [1909].

Injunctions to Restrain Obstructions.

The Federal Government may appeal to the courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, may invoke their aid in removing or restraining such obstructions.[1]

[1] In re Debs, 158 U. S. 564, 599 [1895].

Incidental Control of Intrastate Matters.

The execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere.[1]

[1] Simpson *v.* Shepard (Minnesota Rate Cases), 230 U. S. 352 [1913].

* *See also* pp. 149, 174, 337, 565, 719, 827, 969.

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Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. While Congress does not possess authority to regulate the internal commerce of a State, as such, it does possess power to foster and protect interstate commerce, although in taking necessary measures so to do it may be necessary to control intrastate transactions of interstate carriers.[1]

[1] Houston, E. & W. T. R. Co. *v.* United States (Shreveport Case), 234 U. S. 342 [1914]. *See also* Baltimore & O. R. Co. *v.* Interstate Commerce Commission, 221 U. S. 612 [1911]; Southern R. Co. *v.* United States, 222 U. S. 20 [1911]; Mondou *v.* New York, N. H. & H. R. Co. (Second Employers' Liability Cases), 223 U. S. 1, 48, 51 [1912]; Railroad Commission *v.* Chicago, B. & Q. R. Co., 257 U. S. 563 [1922]; Alabama *v.* United States, 279 U. S. 229 [1929]; Colorado *v.* United States, 271 U. S. 153 [1926]; Florida *v.* United States, 282 U. S. 194 [1931]; Florida *v.* United States, 292 U. S. 1 [1934]; Pennsylvania Railroad Co. *v.* Illinois Brick Co., 297 U. S. 447 [1936]; National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U. S. 1 [1937].

Where interstate and intrastate commerce are served by the same instrumentalities of a common carrier and a regulation of the State applied directly to the intrastate business in fact burdens the interstate, Congress may remove the burden, since State regulation must yield to adequate interstate service.[1]

[1] Pacific Teleph. & Teleg. Co. *v.* Washington, 297 U. S. 403 [1936].

Power to Enact Criminal Laws.

The power to regulate commerce includes the power to regulate navigation, as connected with the commerce with foreign nations and among the States. It extends to the punishment of such acts, done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations and among the States.[1]

[1] United States *v.* Coombs, 12 Pet. 72 [1838]. *See also* Di Santo *v.* Pennsylvania, 273 U. S. 34 [1927].

Delegation of Power.*

To District of Columbia.—Congress cannot delegate to the District of Columbia power to regulate commerce between the District and the States.[1]

[1] Stoutenburgh *v.* Hennick, 129 U. S. 141 [1889].

To Interstate Commerce Commission.—Congress has authority under its sovereign and exclusive power to regulate commerce, to create a commission for the purpose of supervising, investigating, and reporting upon matters or complaints connected with or growing out of interstate and foreign commerce. The powers and duties of the

* *See also* pp. 95, 234, 252, 258, 549.

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Commission are prescribed by Congress, and it performs for the Federal Government, in respect to that commerce committed by the Constitution to the exclusive care and jurisdiction of Congress, the same functions which State commissioners exercise in respect to local or intrastate commerce, over which the States appointing them have exclusive control. Their validity in their respective spheres of operation stands upon the same footing.[1]

[1] Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co., 37 Fed. 567 [1889], appeal dismissed 149 U. S. 777 [1893]. *See also* Interstate Commerce Commission *v.* Brimson, 154 U. S. 447 [1894]; United States *v.* Great Northern R. Co., 157 Fed. 288 [1907], writ of error dismissed, 214 U. S. 530 [1909].

RAILROADS AND EXPRESS COMPANIES.*

In General.

By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce and those who are employed in transporting them.[1]

[1] Baltimore & O. R. Co. *v.* Interstate Commerce Commission, 221 U. S. 612 [1911].

Construction of Railroads.

Under the power given by this clause, Congress has the right to authorize the construction of railroads and terminal facilities; [1] and may exempt such facilities from State taxation.[2]

[1] California *v.* Central P. R. Co., 127 U. S. 1, 39 [1888].
[2] Thomson *v.* Union P. R. Co., 9 Wall. 579, 589 [1870].

In exercising the power of eminent domain, Congress has a right to grant a railroad right-of-way through lands owned by an Indian nation where the road will have relation to interstate commerce.[1]

[1] Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641 [1890].

State Railroad Engaging in Interstate Commerce.

When a State railroad corporation voluntarily engaged as a common carrier in interstate commerce by making an arrangement for a continuous carriage or shipment of goods, it is subjected, so far as such traffic is concerned, to the regulating power of Congress; [1] likewise, a railroad company which has become a link in a through line of road over which, as part of its business, freight and passengers are carried into and out of the State is engaged in interstate commerce.[2]

[1] Interstate Commerce Commission *v.* Detroit, G. H. & M. R. Co., 167 U. S. 633, 642 [1897].
[2] Norfolk & W. R. Co. *v.* Pennsylvania, 136 U. S. 114 [1890].

* *See also* pp. 177, 660, 808, 966, 991.

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Directing Abandonment of Intrastate Branch of Interstate Railroad.

Under Interstate Commerce and Transportation Acts, the Interstate Commerce Commission has power to authorize abandonment, as respects both intrastate and interstate traffic, of a branch line of a railroad, lying wholly within the State of the owning company's incorporation, upon the ground that local conditions are such that public convenience and necessity do not require continued operation, and that such operation will result in large deficits constituting an undue burden upon interstate commerce.[1]

[1] Colorado *v.* United States, 271 U. S. 153 [1926].

Uniform System of Accounting.

Act of Congress of June 29, 1906, authorizing the Interstate Commerce Commission to regulate the entire system of bookkeeping of interstate carriers, including its intrastate accounts, held valid.[1]

[1] Interstate Commerce Commission *v.* Goodrich Transit Co., 224 U. S. 194 [1912]. *See also* Kansas City Southern R. Co. *v.* United States, 231 U. S. 423 [1914].

Regulation of Rates.*

In General.—Congress may legislate in respect to interstate commerce to the same extent both as to rates and all other matters of regulation as the States may do in respect to purely local or internal commerce;[1] State requirements as to rates for interstate commerce are not operative.[2] In the absence of congressional action, however, minor State regulation is permissible.[3]

[1] Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co., 37 Fed. 567, appeal dismissed, 149 U. S. 777 [1893].

[2] Wabash St. L. & P. R. Co. *v.* Illinois, 118 U. S. 557 [1886]; Hanley *v.* Kansas City Southern R. Co., 187 U. S. 617 [1903].

[3] Chicago & N. W. R. Co. *v.* Fuller, 17 Wall. 560 [1873].

Express Rates.—The long- and short-haul clause of section 4 of the Interstate Commerce Act, as amended by the act of June 18, 1910, is valid.[1] Likewise, the so-called uniform zone or block system of express rates established by the Interstate Commerce Commission, which prohibits charging higher interstate rates than intrastate rates, and which may be complied with by reducing the interstate rates to the local scale, or by raising the local rates to the interstate scale, or by reducing one and raising the other until equality is reached in an intermediate scale, is a valid exercise of the commerce power.[2]

[1] United States *v.* Atchison, T. & S. F. R. Co. (Intermountain Rate Cases), 234 U. S. 476 [1914].

[2] American Exp. Co. *v.* South Dakota ex rel. Caldwell, 244 U. S. 617 [1917].

Abrogating Passes Granted for Life.—That provision of the Interstate Commerce Act providing that no carrier should issue or give any interstate free ticket is not invalid as applied to the case of

* *See also* pp. 177, 342, 644, 791.

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an agreement made many years previously to issue free passes for life in compromise of a claim for damages for injuries.[1]

[1] Louisville & N. R. Co. v. Mottley, 219 U. S. 467 [1911].

OBTAINING TRANSPORTATION AT LESS THAN PUBLISHED RATES.—Congress may penalize shippers for securing transportation of goods in interstate commerce at less than the carrier's published rates within any district through which the transportation may have been conducted.[1] No contract of a carrier can reduce the amount of charges legally payable to it under its tariff for an interstate shipment, or release from liability a shipper who has assumed their payment; nor can any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by the person liable.[2]

[1] Armour Packing Co. v. United States, 209 U. S. 56 [1908]. *See also* Chicago & A. R. Co. v. Kirby, 225 U. S. 155 [1912].

[2] Louisville & N. R. Co. v. Central Iron & Coal Co., 265 U. S. 59 [1924].

PROHIBITING COMBINATIONS BETWEEN COMPETING ROADS.—Congress has the power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroads entered into for the purpose of establishing and maintaining interstate rates and fares for transportation on any of the roads of the parties to the contract or combination, even though the rates and fares thus established are reasonable.[1]

[1] United States v. Joint Traffic Asso., 171 U. S. 505 [1898].

Prohibiting Transportation of Commodities Produced by Carrier.

The so-called commodities clause of the Hepburn amendment of June 29, 1906 (34 Stat. 584), construed as prohibiting transportation of commodities in which the carrier had, at the time of transportation, a proprietary interest, held to be within the power of Congress under this clause.[1]

[1] United States v. Delaware & H. Co., 213 U. S. 366 [1909]. *See also* Delaware, L. & W. R. Co. v. United States, 231 U. S. 363 [1914]; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361 [1906]; Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 452 [1910].

Safety Appliance Acts.

The safety appliance acts (27 Stat. 531, 32 Stat. 943) were within the power of Congress to enact (*a*) as applied to vehicles used on any railroad that is a highway of interstate traffic, whether or not engaged in interstate traffic;[1] and (*b*) as creating a liability on the part of the railroads to an employee not engaged in interstate commerce.[2]

[1] Southern R. Co. v. United States, 222 U. S. 20 [1911]. *See also* United States v. Atlantic Coast Line R. Co., 153 Fed. 918 [1907].

[2] Texas & P. R. Co. v. Rigsby, 241 U. S. 33 [1916]; United States v. California, 297 U. S. 175 [1936].

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Liability for Loss or Injury to Property.

The power of Congress comprehends power to regulate contracts between the shipper and the carrier by defining the liability of the carrier for loss, delay, injury, or damage to property shipped.[1] The provisions of the Carmack amendment (June 20, 1906, 34 Stat. 584), the effect of which is to hold the initial carrier as having contracted for through carriage to destination and liable to the shipper for loss or injury to property on a connecting line, are valid.[2]

[1] Adams Express Co. *v.* Croninger, 226 U. S. 491 [1913]. *See also* Chicago, B. & Q. R. Co. *v.* Miller, 226 U. S. 513 [1913]; Michigan Cent. R. Co. *v.* Owen & Co., 256 U. S. 427 [1921]; Adams Exp. Co. *v.* Darden, 265 U. S. 265 [1924]; Missouri Pac. R. Co. *v.* Porter, 273 U. S. 341 [1927].

[2] Atlantic Coast Line *v.* Riverside Mills, 219 U. S. 186 [1911]. *See also* Missouri, K. & T. R. Co. *v.* Harriman Bros. 227 U. S. 657 [1913]; Boston & M. R. Co. *v.* Hooker, 233 U. S. 97 [1914]; Atchison, T. & S. F. R. Co. *v.* Robinson, 233 U. S. 173 [1914]; Norfolk & W. R. Co. *v.* Dixie Tobacco Co., 228 U. S. 593 [1913]; St. Louis S. W. R. Co. *v.* Alexander, 227 U. S. 218 [1913]; Galveston, H. & S. A. R. Co. *v.* Wallace, 223 U. S. 481 [1912]; Cincinnati, N. O. & T. P. R. Co. *v.* Rankin, 241 U. S. 319 [1916].

Liability for Injury or Death of Employees.*

Congress may regulate the matter of compensation for injury or death, with the qualification that the particulars in which these matters are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged.[1] The right of action under the Federal Employers' Liability Act is based solely on negligence. A carrier cannot be held for negligence under the act upon the ground that the employee was under 16 years of age, employed in violation of a statute of the State penalizing employment of infants of his years for work on any railroad.[2]

[1] Mondou *v.* New York, N. H. & H. R. Co. (Second Employers' Liability Cases), 223 U. S. 1 [1912], upholding Federal Employers' Liability Act, 35 Stat. 65. *See also* Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59 [1913]; Illinois Cent. R. Co. *v.* Peery, 242 U. S. 292 [1916]; New York Cent. R. Co. *v.* White, 243 U. S. 188 [1917]; Chicago, B. & Q. R. Co. *v.* Harrington, 241 U. S. 177 [1916]; Louisville & N. R. Co. *v.* Parker, 242 U. S. 13 [1916]; Illinois Cent. R. Co. *v.* Behrens, 233 U. S. 473 [1914]; St. Louis, S. F. & T. R. Co. *v.* Seale, 229 U. S. 156 [1913]; Pedersen *v.* Delaware & L. W. R. Co., 229 U. S. 146 [1913]; Erie R. Co. *v.* Welsh, 242 U. S. 303 [1916]; Lehigh Valley R. Co. *v.* Barlow, 244 U. S. 183 [1917]; Southern R. Co. *v.* Puckett, 244 U. S. 571 [1917]; Reed *v.* Director General of Railroads, 258 U. S. 92 [1922].

[2] Chesapeake & O. R. Co. *v.* Stapleton, 279 U. S. 587 [1929].

As to earlier employers' liability acts—

See Howard *v.* Illinois C. R. Co. (Employers' Liability Cases), 207 U. S. 463 [1908]; El Paso & N. E. R. Co. *v.* Gutierrez, 215 U. S. 87 [1909]; Hyde *v.* Southern R. Co., 31 App. D. C. 466 [1908].

* *See also* pp. 162, 182, 235, 257, 783, 964.

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Qualifications and Duties of Employees.

Congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in interstate commerce, and such legislation will supersede any State action on the subject.[1] The act of June 1, 1898 (30 Stat. 424), making it a criminal offense against the United States for an agent or officer of an interstate carrier, having full authority in the premises from the carrier, to discharge an employee from service simply because of his membership in a labor organization, cannot be sustained under the power of Congress to regulate commerce, and is unconstitutional.[2]

[1] Nashville, C. & St. L. R. Co. *v.* Alabama, 128 U. S. 96, 99 [1888].
[2] Adair *v.* United States, 208 U. S. 161 [1908]. *Cf.* Coppage *v.* Kansas, 236 U. S. 1 [1915].

The Hours of Service Act (34 Stat. 1451) is not invalid as applied to those who are engaged in both interstate and intrastate service, that is, as to all employees connected with the movement of trains in interstate transportation; but intrastate railroads and employees engaged in purely and wholly local business are not affected by its provisions.[1]

[1] Baltimore & O. R. Co. *v.* Interstate Commerce Commission, 221 U. S. 612 [1911]. *See also* Northern P. R. Co. *v.* Washington ex rel. Atkinson, 222 U. S. 370 [1912]; Erie R. Co. *v.* New York, 233 U. S. 671 [1914].

The act of September 3, 1916 (39 Stat. 721), fixing an 8-hour workday for, and temporarily regulating the wages of, railway employees engaged in the operation of trains in interstate commerce, is valid.[1]

[1] Wilson *v.* New, 243 U. S. 332 [1917].

Retirement of Employees.

The Railroad Retirement Act (48 Stat. 1283) establishing compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act was held unconstitutional as an unreasonable regulation of interstate commerce, and not related to promotion of efficiency, economy, or safety in transportation. It disregarded fitness to work by authorizing pensions for all employees voluntarily retiring after 30 years' service. Moreover, it was arbitrary in authorizing pensions for employees attaining 65 years, regardless of length of service, and even if discharged for cause before reaching 65, though amount of annuity was proportionally reduced if total term of employment was less than 30 years.[1]

[1] Railroad Retirement Bd. *v.* Alton R. Co., 295 U. S. 330 [1935].

Disputes Between Carriers and Employees.

Provision of Railway Labor Act of 1926 (44 Stat. 577), preventing interference by either party with organization or designation of repre-

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sentatives by the other, is within constitutional authority of Congress.[1] Similarly, "back shop" employees of an interstate carrier, who are engaged in making heavy repairs on locomotives and cars withdrawn from service for that purpose for long periods (an average of 105 days for locomotives and 109 days for cars), were held to be within the terms of the act as amended in 1934 (48 Stat. 1185). "The activities in which these employees are engaged have such a relation to the other confessedly interstate activities of the [carrier] that they are to be regarded as a part of them. All taken together fall within the power of Congress over interstate commerce." [2]

[1] Texas & N. O. R. Co. *v.* Brotherhood of R. & S. S. Clerks, 281 U. S. 548 [1930].

[2] Virginian R. Co. *v.* System Federation No. 40, 300 U. S. 515, 556 [1937]. *See also* Baltimore & O. R. Co. *v.* Interstate Commerce Commission, 221 U. S. 612, 619 [1911]; Pedersen *v.* Delaware, L. & W. R. Co., 229 U. S. 146 [1913].

SHIPS AND SHIPPING.*

In General.

The power to regulate commerce includes navigation as well as traffic in its ordinary signification, and embraces ships and vessels as the instruments of intercourse and trade as well as officers and seamen employed in their navigation.[1] The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an act of the legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the State law must give way; and this without regard to the source of power whence the State legislature derived its enactment.[2]

[1] Cox *v.* Lott (State Tonnage Tax Cases), 12 Wall. 204, 216 [1871]. *See also* Sherlock *v.* Alling, 93 U. S. 99, 103 [1876]; Street *v.* Shipowners' Asso., 263 U. S. 334 [1923].

[2] Sinnot *v.* Davenport, 22 How. 227, 243 [1859]. *See also* The "Daniel Ball" *v.* United States, 10 Wall. 557, 564 [1871].

When a Vessel Is Engaged in Interstate Commerce.

It is entirely possible for a vessel to be engaged in interstate commerce although all the ports touched by her are in the same State, and, in the absence of evidence to the contrary, it may be inferred from the route pursued by the boat and the connection between the boat and railroads at each end of her route, that the boat is so engaged. The extent to which she is engaged in interstate commerce is immaterial.[1]

[1] The "Hazel Kirke", 25 Fed. 601 [1885]. *See also* Lord *v.* Goodall, N. & P. S. S. Co., 102 U. S. 541 [1881]; The "Gretna Green", 20 Fed. 901 [1883].

* *See also* pp. 189, 211.

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Enrolling and Licensing of Vessels.

The power of Congress to require vessels to be enrolled and licensed is derived from the commerce clause, but such enrollment does not of itself exclude the right of a State to exact a license from her own citizens on account of their ownership and use of such property having its situs within the State.[1]

[1] Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 377 [1883].

Limitation of Vessel Owners' Liability.

The act of June 19, 1886 (24 Stat. 79, sec. 4), which extends the limited liability acts to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters, was passed in amendment of the maritime law, and the power to make such amendments is coextensive with such law. The admiralty power of Congress is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce.[1]

[1] Ex Parte Garnett, 141 U. S. 1, 12 [1891]. *See also* Providence & N. Y. S. S. Co. *v.* Hill Mfg. Co., 109 U. S. 578 [1883].

Recording Conveyances of Vessels.

The act of July 29, 1850, requiring the recordation of any bill of sale, mortgage, etc., of a vessel, is constitutional. As Congress under its power to regulate commerce has made regulations pertaining to vessels of the United States, its power may be extended to the security and protection of the rights and title of all persons dealing in such property.[1]

[1] White's Bank *v.* The "Robert Emmett", 7 Wall. 646, 650 [1869] *See also* Aldrich *v.* Aetna Ins. Co., 8 Wall. 491 [1869]; Shaw *v.* McCandless 36 Miss. 296 [1858].

Regulating Payment of Seamen's Wages.

The act of Congress (30 Stat. 763) making it unlawful to pay any seaman wages in advance, held valid as applied to contracts of sailors for interstate and foreign service.[1]

[1] Patterson *v.* The "Eudora", 190 U. S. 169, 173 [1903]. *See also* Kenney *v.* Blake, 125 Fed. 672 [1903].

Longshoremen's and Harbor Workers' Compensation Act.

In virtue of its control over navigable waters and its power to alter or revise the maritime law, Congress may provide that where employees in maritime employment are disabled or die from accidental injuries arising out of or in the course of their employment upon the navigable waters of the United States, their employers shall pay reasonable compensation, without regard to fault as the cause of injury, and be thereby relieved from other liability.[1]

[1] Crowell *v.* Benson, 285 U. S. 22 [1932].

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NAVIGATION AND NAVIGABLE WATERS.*

In General.

The power of Congress to regulate navigable waters is not expressly granted in the Constitution, but is a power incidental to the express power to regulate commerce.[1] All the powers which existed in the States before the adoption of the Constitution are the powers possessed by Congress over navigable waters under its authority to regulate commerce.[2] This power involves the control of the waters of the United States which are navigable in fact.[3]

[1] Leovy *v.* United States, 177 U. S. 621, 632 [1900].

[2] Gilman *v.* Philadelphia, 3 Wall. 713, 725 [1866].

[3] Escanaba & L. M. Transp. Co. *v.* Chicago, 107 U. S. 678, 682 [1883]. *See also* United States *v.* Holt State Bank, 270 U. S. 49, 54 [1926].

See also Miller *v.* New York, 109 U. S. 385, 395 [1883]; Pennsylvania *v.* Wheeling & B. Bridge Co., 18 How. 421 [1856]; Cardwell *v.* American River Bridge Co., 113 U. S. 205 [1885]; Gibson *v.* United States, 166 U. S. 269 [1897]; The "Abby Dodge" *v.* United States, 223 U. S. 166 [1912]; Hill *v.* United States, 149 U. S. 593 [1893]; Manigault *v.* Springs, 199 U. S. 473 [1905].

All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States, and individual users under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution.[1]

[1] Gibson *v.* United States, 166 U. S. 269 [1897]. *See also* United States *v.* Chandler-Dunbar Water Power Co., 229 U. S. 53 [1913]; Greenleaf-Johnson Lumber Co. *v.* Garrison, 237 U. S. 251 [1915]; United States *v.* Cress, 243 U. S. 316 [1917]; McCready *v.* Virginia, 94 U. S. 391 [1877]; Illinois C. R. Co. *v.* Illinois, 146 U. S. 387 [1892]; Shively *v.* Bowlby, 152 U. S. 1 [1894]; United States *v.* Rio Grande Dam & Irrig. Co., 174 U. S. 690 [1899]; Wisconsin *v.* Illinois, 278 U. S. 367, 415 [1929]; United States *v.* River Rouge Improv. Co., 269 U. S. 411, 419 [1926]; Seattle *v.* Oregon & W. R. Co., 255 U. S. 56, 63 [1921]; Economy Light & Power Co. *v.* United States, 256 U. S. 113 [1921]; Henry Ford & Son *v.* Little Falls Fibre Co., 280 U. S. 369 [1930].

The power to regulate commerce includes the regulation of navigation and comprehends navigation within the limits of every State in the Union so far as that navigation may be in any manner connected with the commerce over which Congress has jurisdiction.[1]

[1] Gibbons *v.* Ogden, 9 Wheat. 195 [1824]. *See also* Cooley *v.* Board of Port Wardens, 12 How. 299 [1851]; The "City of Salem", 37 Fed. 846 [1889]; The "Hazel Kirke", 25 Fed. 607 [1885]; Foster *v.* Davenport, 22 How. 244 [1859]; Pennsylvania *v.* Wheeling & B. Bridge Co., 18 How. 421 [1856]; Gilman *v.* Philadelphia, 3 Wall. 713, 725 [1866]; Union Bridge Co. *v.* United States, 204 U. S. 364 [1907]; Kansas City Southern R. Co. *v.* Kaw Valley Drainage Dist., 233 U. S. 75 [1914]; New Jersey *v.* Sargent, 269 U. S. 328 [1926].

* *See also* p. 190.

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Improvement of Navigation.

Power to regulate interstate commerce embraces power to keep navigable rivers of the United States free from, and to remove obstructions to navigation, since "commerce" includes navigation. Wilson Dam and its hydroelectric power plant held to have been validly constructed for purposes of national defense and improvement of navigation under Federal war and commerce powers.[1] So Congress may place an obstruction in one channel of a navigable stream, for the improvement of navigation in another channel;[2] or authorize a dam across the Colorado River, without regard to the jurisdiction of an adjoining State in respect of the appropriation, use, and distribution of its equitable share of water;[3] or authorize levee work along the Mississippi River.[4]

[1] Ashwander *v.* Tennessee Valley Authority, 297 U. S. 288 [1936].
[2] South Carolina *v.* Georgia, 93 U. S. 4, 13 [1876].
[3] United States *v.* Arizona, 295 U. S. 174 [1935].
[4] Bedford *v.* United States, 192 U. S. 217 [1904]. *See also* Jackson *v.* United States, 230 U. S. 1 [1913].

Under the power to regulate commerce, Congress may improve the harbors of the navigable waters of the United States, establish harbor lines or limits beyond which deposits shall not be made or structures built in the navigable waters.[1]

[1] Philadelphia Co. *v.* Stimson, 223 U. S. 605 [1912]. *See also* Legal Tender Cases, 12 Wall. 457, 537 [1871].

OTHER SUBJECTS OF REGULATION.

Admission and Exclusion of Aliens.*

Congress has the power to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may enter (including the levy of a duty of 50 cents for each alien arriving by vessel—which is not a tax in the constitutional sense, but a mere incident in the regulation of commerce),[1] and may have its declared policy in that regard enforced exclusively through executive officers without judicial intervention.[2] So, the power to expel aliens, or any specified class of aliens, from the country may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend; and may provide a system of registration and identification of the members of that class within the country and take all proper means to carry out the system which it provides.[3] But when Congress chooses to exercise such a policy by subjecting persons whom it would exclude from the United States to infamous punishment at hard labor, or by confiscating their property, such legislation should provide for a judicial trial in order to be constitutional.[4] The Immigration Act of 1907 (34 Stat. 898, sec. 3), so far as it makes it punishable to keep

* *See also* pp. 283, 645, 657, 957 for other cases involving aliens.

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an alien woman for any immoral purpose within 3 years after she shall have entered the United States, does not constitute a valid exercise of the commerce power.[5]

[1] Edye v. Robertson (Head Money Cases), 112 U. S. 580, 595 [1884].
[2] Lem Moon Sing v. United States, 158 U. S. 538, 547 [1895]. *See also* Lees v. United States, 150 U. S. 476, 480 [1893]; Lapina v. Williams, 232 U. S. 78 [1914]; Bugajewitz v. Adams, 228 U. S. 585 [1913]; Yamataya v. Fisher, 189 U. S. 86 [1903].
[3] Fong Yue Ting v. United States, 149 U. S. 698, 714 [1893].
[4] Wong Wing v. United States, 163 U. S. 228 [1896].
[5] Keller v. United States, 213 U. S. 138 [1909].

Bridges.

The paramount power of regulating bridges that affect navigation is in Congress. It comes from the power to regulate commerce [1] and may be exercised directly, or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce.[2]

[1] Newport & C. Bridge Co. v. United States, 105 U. S. 470, 475 [1882]. *See also* Stone v. Southern Illinois & M. Bridge Co., 206 U. S. 267 [1907]; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 12 [1888]; Monongahela Bridge Co. v. United States, 216 U. S. 177 [1910]; Gilman v. Philadelphia, 3 Wall. 713 [1866].
[2] Luxton v. North River Bridge Co., 153 U. S. 525, 530 [1894].

An act of 1852 declaring certain bridges across a river between two States "to be lawful structures in their present positions and elevations and shall be so held and taken to be, anything in the law or laws of the United States to the contrary notwithstanding," is a constitutional exercise of the power of Congress to regulate commerce and annuls a prior judgment of the Court finding such bridge to be an actual obstruction of navigation.[1]

[1] Pennsylvania v. Wheeling & B. Bridge Co., 18 How. 421, 429 [1856]. *See also* Union Bridge Co. v. United States, 204 U. S. 364 [1907]; Gray v. Chicago, I. & N. R. Co. (Clinton Bridge), 10 Wall. 454, 462 [1870].

A bridge over an interstate waterway, though erected under the sanction of a State, and not an illegal structure or an unreasonable obstruction to navigation in the condition of commerce and navigation when erected, must be taken as having been constructed with knowledge of the paramount power of Congress to regulate commerce, and subject to the possibility that Congress might, at some time after its construction, exert its constitutional power to protect free navigation against unreasonable obstructions.[1]

[1] Monongahela Bridge Co. v. United States, 216 U. S. 177 [1910].

An act of Congress authorizing the Secretary of War, when he deems any railroad or other bridge over any of the navigable waterways of the United States to be an unreasonable obstruction to the free navigation of such waters on account of insufficient height

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width of span, or otherwise, to require the alteration of the bridge so as to render navigation under it reasonably unobstructed does not deprive States of authority to grant power to bridge navigable streams, but simply creates an additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce.[1]

[1] Lake Shore & M. S. R. Co. *v.* Ohio ex rel. Humphrey, 165 U. S. 365 [1897].

Canals.

Congress had power to construct the Panama Canal through territory acquired by treaty with the Republic of Panama.[1]

[1] Wilson *v.* Shaw, 204 U. S. 24 [1907]. *See also* Stockton *v.* Baltimore & N. Y. R. Co., 32 Fed. 9 [1887].

Cattle.

Congress has power to provide measures, as in the Animal Industry Act of March 3, 1905, for quarantining and disinfecting cattle in a State to prevent spread of disease to other States.[1]

[1] Thornton *v.* United States, 271 U. S. 414 [1926].

Embargo.

Every subject falling within the legitimate sphere of commercial regulation may be partially or wholly excluded when either measure shall be demanded by the safety or by the important interests of the entire Nation. Such exclusion cannot be limited to particular classes or descriptions of commercial subjects; it may embrace manufactures, bullion, coin, or any other thing. The power once conceded, it may operate on any and every subject of commerce to which the legislative discretion may apply it.[1]

[1] United States *v.* Marigold, 9 How. 560, 566 [1850].

In Gibbons *v.* Ogden, 9 Wheat. 1, 191 [1824], the Court said: "The universally acknowledged power of the Government to impose embargoes, must also be considered as showing, that all America is united in that construction which comprehends navigation in the word 'commerce.'"

Ferries.

Transportation by ferry from one State to another is interstate commerce and immune from the interference of State legislation which directly burdens such commerce by taxation or otherwise.[1] But where ferries are operated across boundary waters between States simply as a means of transit from shore to shore, they may be deemed instruments of local convenience and subject to local regulation to the extent that in the absence of congressional action each State may act with respect to the ferriage from its shore.[2]

[1] Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196 [1885].
[2] Vidalia *v.* McNeely, 274 U. S. 676 [1927].

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Foods and Drugs.*

The Food and Drugs Act, making unlawful the shipment of food products misbranded by reason of a misleading label, or sale under name of another article, was held a legitimate exercise of the power to regulate commerce.[1] The provision of the act authorizing confiscation of misbranded articles, etc., was upheld as applied to articles which had been the subject of interstate commerce and were still in the original packages in the hands of the importers.[2]

[1] Weeks *v.* United States, 245 U. S. 618 [1918]. *See also* Seven Cases *v.* United States, 239 U. S. 510 [1916].

[2] Hipolite Egg Co. *v.* United States, 220 U. S. 45 [1911].

Game.

The act of May 25, 1900, prohibiting the shipment or transportation in interstate commerce of game killed in violation of local laws, and requiring all packages containing game shipped in interstate commerce to be plainly marked showing the name and address of the shipper and the nature of the contents, and making the violation of such provisions a criminal offense, is within the power of Congress.[1]

[1] Rupert *v.* United States, 181 Fed. 87 [1910].

Importation of Prize-Fight Films.†

The act of July 31, 1912, prohibiting the importation and interstate transportation of prize-fight films or pictorial representations of prize fights was held valid.[1]

[1] Weber *v.* Freed, 239 U. S. 325 [1915].

Imports.

Congress, by an exertion of its power to regulate foreign commerce, has the authority to forbid merchandise carried in such commerce from entering the United States.[1]

[1] The "Abby Dodge" *v.* United States, 223 U. S. 166 [1912]. *See also* University of Illinois *v.* United States, 289 U. S. 48 [1933].

Congress may determine what articles may be imported into this country. If it sees fit to lay an embargo or to prohibit altogether the importation of specified articles, it can do so, and no State by virtue of any interest of its own would be entitled to override the restriction. Congress may impose duties under its power to regulate commerce, and it is for the Congress to say to what extent the States and their instrumentalities shall be relieved of the duties on articles imported by them.[1]

[1] University of Illinois *v.* United States, 289 U. S. 48 [1933].

In Gibbons *v.* Ogden, 9 Wheat. 1, 191 [1824], the Court said: "The universally acknowledged power of the Government to impose

**See also* p 193.

†*See also* pp. 203, 851.

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embargoes, must also be considered as showing, that all America is united in that construction which comprehends navigation in the word 'commerce.' "

Insects.

The power of the States to quarantine against importation of farm produce likely to convey injurious insects from infested localities, was suspended in so far as concerns interstate commerce, by the act of August 20, 1912, investing the Secretary of Agriculture with full authority over the subject.[1]

[1] Oregon-Washington R. & Nav. Co. *v.* Washington, 270 U. S. 87 [1926].

Intoxicating Liquors.*

After the decision in Leisy & Co. *v.* Hardin, 135 U. S. 100 [1890], holding a State prohibition law invalid as applied to liquor shipped in interstate commerce, Congress provided in the Wilson Act (26 Stat. 313): "that all liquors transported into any State should upon arrival be subject to the operation and effect of the laws of such State." In upholding the act in Wilkerson *v.* Rahrer (in re Rahrer), 140 U. S. 545, 561 [1891], the Court said: "Congress has not attempted to delegate power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt State laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in State laws in dealing with such property. * * * No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.'' [1]

[1] *See also* American Exp. Co. *v.* Iowa, 196 U. S. 133 [1905]; Pabst Brewing Co. *v.* Crenshaw, 198 U. S. 17 [1905]; Foppiano *v.* Speed, 199 U. S. 501 [1905]; Heyman *v.* Southern R. Co., 203 U. S. 270 [1906]; Delamater *v.* South Dakota, 205 U. S. 93 [1907]; Adams Exp. Co. *v.* Kentucky, 206 U. S. 129 [1907]; Adams Exp. Co. *v.* Kentucky, 206 U. S. 138 [1907]; American Exp. Co. *v.* Kentucky, 206 U. S. 139 [1907]; Phillips *v.* Mobile, 208 U. S. 472 [1908]; Adams Exp. Co. *v.* Kentucky, 214 U. S. 218 [1909]; Louisville & N. R. Co. *v.* Cook Brewing Co., 223 U. S. 70 [1912]; DeBary *v.* Louisiana, 227 U. S. 108 [1913]; Kirmeyer *v.* Kansas, 236 U. S. 568 [1915]; Rossi *v.* Pennsylvania, 238 U. S. 62 [1915]; Rosenberger *v.* Pacific Exp. Co., 241 U. S. 48 [1916]; Rhodes *v.* Iowa, 170 U. S. 412 [1898].

The Webb-Kenyon Act (37 Stat. 699), which in substance prohibits the shipment or transportation, from one State or Territory into another of intoxicating liquors which are intended "by any person interested therein, to be received, possessed, or sold, or in any manner used, either in the original package or otherwise, in violation of any

*See also pp. 203, 850, 976.

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law of such State" is a valid exercise of the power of Congress. It differs from the Wilson Act in that it positively forbids the transportation of intoxicating liquor into any State which prohibits its use. It had the effect of withdrawing interstate shipments of liquor from the protection afforded to interstate shipments by the Federal Constitution, and made them subject to State law, in case such interstate shipments were intended, by any person interested therein, to be received, etc., or used in violation of a State statute.[1]

[1] Clark Distilling Co. *v.* Western Maryland R. Co. 242 U. S. 311, 326 [1917]. *See also* Seaboard Air Line R. Co. *v.* North Carolina, 245 U. S. 298 [1917]; Adams Exp. Co. *v.* Kentucky, 238 U. S. 190 [1915].

The Reed amendment (39 Stat. 1069), prohibiting the transportation of liquor into any State or Territory, the laws of which prohibited the manufacture or sale of the same for beverage purposes, was held constitutional, though construed to include transportation on the person for personal use, and though the transportation was into a State which permitted the introduction of liquor for personal use in limited quantities.[1]

[1] United States *v.* Hill, 248 U. S. 420 [1919].

Labor Relations.

The National Labor Relations Act (49 Stat. 449), which prohibits unfair labor practices "affecting [i. e., burdening or obstructing] interstate commerce" was held valid under the commerce clause as applied to employees of an international news agency,[1] a steel corporation[2] and a trailer manufacturing plant[3] whose activities extend into many States, to an interstate bus transportation company,[4] and to a clothing manufacturing establishment.[5]

[1] Associated Press *v.* National Labor Relations Board, 301 U. S. 103 [1937].

[2] National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U. S. 1 [1937].

[3] National Labor Relations Board *v.* Fruehauf Trailer Co., 301 U. S. 49 [1937].

[4] Washington, Virginia & Maryland Coach Co. *v.* National Labor Relations Board, 301 U. S. 142 [1937].

[5] National Labor Relations Board *v.* Friedman-Harry Marks Clothing Co., 301 U. S. 58 [1937].

In the Jones & Laughlin case, supra, the Court declared that it was not material that the employees in the production plant were not themselves engaged in interstate commerce. The power of Congress under the commerce clause "is not limited to transactions which can be deemed to be an essential part of the 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources."

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Lottery Tickets.

The power to prohibit the carriage of lottery tickets is included in the plenary power of Congress to regulate commerce.[1]

[1] Lottery Case (Champion *v.* Ames), 188 U. S. 321 [1903]. As to exclusion of lottery tickets from the mails, *see* In re Rapier, 143 U. S. 110 [1892]; Horner *v.* United States, 147 U. S. 449 [1893].

Obscene Publications.

Section 245 of the Penal Code (35 Stat. 1138) declaring it an offense knowingly to deposit with an express company an obscene, lewd, lascivious, or filthy book, for carriage from one State to another, is valid.[1]

[1] Clark *v.* United States, 211 Fed. 916 [1914].

Oil.

The act of March 2, 1867, declaring "that no person shall mix for sale * * * or knowingly sell or keep for sale," etc., illuminating oil made from petroleum, inflammable at less than 110° Fahrenheit, was held to be a police regulation affecting the internal trade of the State, and valid only where the legislative authority of Congress excludes, territorially, all State legislation, as, for example, in the District of Columbia.[1]

[1] United States *v.* Dewitt, 9 Wall. 41, 44 [1870].

Pilots.*

The power of Congress to regulate commerce is without limitation and extends to all subjects of commerce, and to all persons engaged in it, and embraces traffic, navigation, and intercourse, and the whole subject of pilots and pilotage, but the Constitution does not in terms exclude the exercise of any authority by the States to regulate pilots, and the States have authority to regulate the subject in the absence of congressional legislation.[1] Mr. Justice Curtis, in delivering the opinion of the Court in Cooley *v.* Board of Port Wardens, 12 How. 299, 315 [1851], said: "When we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution." [2]

[1] The "South Cambria," 27 Fed. 525, 526 [1886]. *See also* Steamship Co. *v.* Portwardens, 6 Wall. 31 [1867]; Gibbons *v.* Ogden, 9 Wheat. 1,207 [1824]; Spraigue *v.* Thompson, 118 U. S. 90 [1886]; Anderson *v.* Pacific Coast S. S. Co., 225 U. S. 187 [1912]; Olsen *v.* Smith, 195 U. S. 332, 341 [1904].

[2] *See also* Pacific Mail S. S. Co. *v.* Joliffe, 2 Wall. 450 [1865]; Anderson *v.* Pacific Coast S. S. Co., 225 U. S. 187 [1912].

* *See also* pp. 199, 470.

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Prison-Made Goods.

In providing by the Hawes-Cooper Act (45 Stat. 1024) that convict-made goods transported into any State shall upon arrival be subject to the operation and effect of its laws and shall not be exempt therefrom by reason of being introduced in the original package, Congress did not delegate power to the States.[1]

[1] Whitfield *v.* Ohio, 297 U. S. 431 [1936].

The Ashurst-Sumners Act (49 Stat. 494), which makes it unlawful knowingly to transport in interstate or foreign commerce goods made by convict labor into any State where the goods are intended to be received, possessed, or sold in violation of its laws and provides that packages containing convict-made goods must be plainly labeled so as to show the names and addresses of shipper and consignee, the nature of the contents, and the name and location of the penal institution where produced, is a valid exercise of the power of Congress to regulate interstate commerce.[1]

[1] Kentucky Whip & Collar Co. *v.* Illinois Cent. R. Co., 299 U. S. 334 [1937].

Sponges.

The act of June 20, 1906, making it unlawful to land, deliver, cure, or offer for sale in the United States any sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida, can not be applied to sponges taken from the territorial waters of a State, but must be construed as confined to sponges taken outside of such waters.[1]

[1] The "Abby Dodge" *v.* United States, 223 U. S. 166 [1912].

Trade-Marks.

Legislation respecting trade-marks, which is not confined to the case of a trade-mark used in foreign or interstate commerce, but which has the broad purpose of establishing a universal system of trade-mark registration for the benefit of all who had already used a trade-mark, or who wished to adopt one for the future, without regard to the character of the trade to which it was applied or the residence of the owner, is not within the power of Congress under this clause.[1]

[1] Trade-Mark Cases (United States *v.* Steffens), 100 U. S. 82 [1879].

In United States *v.* Koch, 40 Fed. 250 [1889], the Court said: "In what are known as the trade-mark cases * * * the Supreme Court decided that the act of 1870 was beyond the power of Congress. It suggested in the opinion that under the commerce clause, perhaps, Congress had the power to legislate with reference to trade-marks used in commerce between this country and foreign nations, between the States, and with the Indian tribes. Immediately thereafter the act

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of 1881 was passed by Congress, providing for the registration of trade-marks which might be used in foreign commerce and commerce with the Indian tribes." [1]

[1] *See also* Leschen & Sons Rope Co. *v.* Broderick & B. Rope Co., 201 U. S. 166 [1906]; Rossman *v.* Garnier, 211 Fed. 401 [1914]; Elgin Nat. Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 677 [1901].

In 1905, a new measure was passed, based on the commerce clause, and accordingly applicable to marks used in interstate commerce as well as commerce with foreign countries and the Indian tribes (33 Stat. 724, c. 592). So far the constitutionality of this act has not been challenged.

Transportation of Women for Immoral Purposes.

The White Slave Traffic Act of 1910 is a valid exercise of the power of Congress.[1]

[1] Hoke *v.* United States, 227 U. S. 308 [1913]. *See also* Athanasaw *v.* United States, 227 U. S. 326 [1913]; Bennett *v.* United States, 227 U. S. 333 [1913]; Harris *v.* United States, 227 U. S. 340 [1913]; Wilson *v.* United States, 232 U. S. 563 [1914]; Caminetti *v.* United States, 242 U. S. 470 [1917].

Trusts and Monopolies.*

Under this grant of power Congress may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the nature and direct effect of such contract will be, when carried out, directly, and not as a mere incident to other and innocent purposes, to regulate to any substantial extent interstate commerce.[1]

[1] Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 244 [1899], wherein the Court said: "Where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade." *See also* United States *v.* Trans-Missouri Freight Assn., 166 U. S. 290 [1897]; United States *v.* Joint Traffic Assn., 171 U. S. 505 [1898]; Montague & Co. *v.* Lowry, 193 U. S. 38 [1904]; Northern Securities Co. *v.* United States, 193 U. S. 197, 332 [1904]; Swift & Co. *v.* United States, 196 U. S. 375 [1905]; Loewe *v.* Lawlor, 208 U. S. 274 [1908]; Standard Oil Co. *v.* United States, 221 U. S. 1 [1911]; United States *v.* American Tobacco Co., 221 U. S. 106 [1911]; Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418 [1911]; Standard Sanitary Mfg. Co. *v.* United States, 226 U. S. 20 [1912]; Binderup *v.* Pathe Exchange, 263 U. S. 291 [1923]; Coronado Coal Co. *v.* United Mine Workers, 268 U. S. 295 [1925]; Bedford Cut Stone Co. *v.* Journeymen Stone Cutters' Asso., 274 U. S. 37

* *See also* pp. 835, 971.

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[1927]. *Cf.* United States *v.* E. C. Knight Co., 156 U. S. 1, 12 [1895]; Hopkins *v.* United States, 171 U. S. 578 [1898]; Anderson *v.* United States, 171 U. S. 604 [1898]; Board of Trade *v.* United States, 246 U. S. 231 [1918]; Industrial Assn. *v.* United States, 268 U. S. 64 [1925]; Levering & G. Co. *v.* Morrin, 289 U. S. 103 [1933].

Wharves.

Though the use of public wharves may be regulated by Congress as a part of the commerce power, it certainly does not belong to that class of subjects which are in their nature national, requiring a single uniform rule, but to that class which are in their nature local, requiring a diversity of rules and regulations.[1]

[1] Parkersburg & O. River Transportation Co. *v.* Parkersburg, 107 U. S. 691, 702 [1883].

Power of the States.

IN GENERAL

The power which the Constitution bestows upon Congress over commerce does not exhaust the subject of the control of commerce, for there is a commerce which lies beyond the power of Congress to control. The States have a commerce of their own and they are as supreme in its control as Congress is supreme in the control of interstate and foreign commerce. This has never been disputed since the case of Gibbons *v.* Ogden, 9 Wheat. 1 [1824].[1]

[1] Lord *v.* Goodall, N. & P. S. S. Co., 102 U. S. 541, 543 [1881]. *See also* Thurlow *v.* Massachusetts (License Cases), 5 How. 504, 574 [1847]; Smith *v.* Turner (Passenger Cases), 7 How. 283, 415 [1849]; Sinnot *v.* Davenport, 22 How. 227, 243 [1859]; Hall *v.* De Cuir, 95 U. S. 485, 488 [1878]; Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 247 [1899]; Simpson *v.* Shepard (Minnesota Rate Cases), 230 U. S. 352 [1913]; Houston, E. & W. T. R. Co. *v.* United States, 234 U. S. 342 [1914].

When States May Exercise Power.

The power to regulate commerce among the States is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances until Congress otherwise directs; but the power thus exercised by the States is not identical in its extent with the power to regulate commerce among the States. The power to pass laws in respect to internal commerce, inspection laws,[1] quarantine and health laws,[2] and laws in relation to bridges, ferries, and highways belongs to the class of power pertaining to locality, essential to local intercommunication, to the protection, the safety, and the welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the States, except so far as falling within the scope of a power confided to the general Government. Where the subject matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress and can not be encroached upon by the State; but where in relation to the subject matter different rules may be

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suitable for different localities, the States may exercise powers which, though they may be said to partake of the nature of the power granted to the general Government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress.[1]

[1] Foster v. Master and Wardens of Port of New Orleans, 94 U. S. 246 [1877]. *See also* Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380 [1912]; New Mexico ex. rel. McLean v. Denver & R. G. R. Co., 203 U. S. 38 [1906]; Arbuckle v. Blackburn, 191 U. S. 405, 414 [1903]; Pittsburgh & S. Coal Co. v. Louisiana, 156 U. S. 590, 597 [1895]; Savage v. Jones, 225 U. S. 501 [1912]; Vance v. Vandercook Co., 170 U. S. 438, 455 [1898]; Turner v. Maryland, 107 U. S. 38 [1883]; Standard Stock Food Co. v. Wright, 225 U. S. 540 [1912]; Hinson v. Lott, 8 Wall, 148 [1869]; Scott v. Donald, 165 U. S. 58 [1897]; Pabst Brewing Co. v. Crenshaw, 198 U. S. 17 [1905]; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345 [1898]; Foote v. Stanley, 232 U. S. 494 [1914]; Pure Oil Co. v. Minnesota, 248 U. S. 158 [1918]; Standard Oil Co. v. Graves, 249 U. S. 389 [1919].

[2] Smith v. Turner (Passenger Cases) 7 How. 283, 400 [1849]. *See also* Louisiana v. Texas, 176 U. S. 1, 21 [1900]; Minnesota v. Barber, 136 U. S. 313, 319 [1890]; Compagnie Francaise de Navigation v. Louisiana, 186 U. S. 380, 385 [1902]; Reid v. Colorado, 187 U. S. 137, 151 [1902]; Asbell v. Kansas, 209 U. S. 251 [1908]; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 471 [1878]; Kimmish v. Ball, 129 U. S. 217, 220 [1889]; Rasmussen v. Idaho, 181 U. S. 198 [1901]; Smith v. St. Louis & S. W. R. Co., 181 U. S. 248 [1901]; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 636 [1898]; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 465 [1886]; Mintz v. Baldwin, 289 U. S. 346 [1933].

[3] Leisy (Gus.) & Co. v. Hardin, 135 U. S. 100, 108 [1890]. *See also* Simpson v. Shepard (Minnesota Rate Cases), 230 U. S. 352 [1913]; Southern R. Co. v. Reid, 222 U. S. 424 [1912]; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 683 [1883]; Mobile County v. Kimball, 102 U. S. 691, 698 [1881]; Gilman v. Philadelphia, 3 Wall. 713, 727 [1866]; Cardwell v. American River Bridge Co., 113 U. S. 205, 210 [1885]; Stone v. Farmers Loan & T. Co. (Railroad Commission Cases), 116 U. S. 307 [1886]; Peik v. Chicago & N. W. R. Co., 94 U. S. 164 [1877]; Smith v. Turner (Passenger Cases), 7 How. 283 [1849]; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 209 [1894]; Western U. Teleg. Co. v. Kansas ex rel. Coleman, 216 U. S. 1 [1910]; Cummings v. Chicago, 188 U. S. 410 [1903]; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 27 [1904]; Valley S. S. Co. v. Wattawa, 244 U. S. 202 [1917]; Interstate Transit v. Lindsey, 283 U. S. 183 [1931].

Police Powers of the States.*

Consistent with the power of Congress to regulate commerce, the States possess, because it was reserved, the power to protect the public health, the public morals, and the public safety by any legislation appropriate to that end which does not encroach upon rights guaranteed by the National Constitution nor come in conflict with acts of Congress.[1] But while a State can do nothing which will directly or indirectly [2] burden or impede interstate commerce, and the police power does not justify a direct interference with such commerce,[3] it may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although

* *See also* pp. 149, 154, 337, 565, 719, 827, 969.

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in their operation they may have an effect upon interstate commerce.[4] A statute prohibiting tobacco advertising on billboards and placards was held not an unreasonable restraint on interstate commerce, and valid.[5]

[1] Missouri, K. & T. R. Co. *v.* Haber, 169 U. S. 613, 628 [1898]. *See also* Sioux Remedy Co. *v.* Cope, 235 U. S. 197 [1914]; New Mexico ex rel. McLean & Co. *v.* Denver & R. G. R. Co., 203 U. S. 38 [1906]; Houston & T. C. R. Co. *v.* Mayes, 201 U. S. 321 [1906]; Bowman *v.* Chicago & N. W. R. Co., 125 U. S. 465, 489 [1888]; Robbins *v.* Shelby County, 120 U. S. 489, 493 [1887]; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 215 [1885]; Hannibal & St. J. R. Co. *v.* Husen, 95 U. S. 465, 470 [1878]; Lake Shore & M. S. R. Co. *v.* Ohio ex rel. Lawrence, 173 U. S. 285, 292 [1899]; New York, N. H. & H. R. Co. *v.* New York, 165 U. S. 628, 631 [1897]; Sligh *v.* Kirkwood, 237 U. S. 52 [1915]; Western U. Teleg. Co. *v.* Kansas ex rel. Coleman, 216 U. S. 1, 26 [1910].

[2] Northern Securities Co. *v.* United States, 193 U. S. 197, 350 [1904]. *Cf.* Western Distributing Co. *v.* Public Service Commission, 285 U. S. 119 [1932].

[3] New York, N. H. & H. R. Co. *v.* New York, 165 U. S. 628, 631 [1897]. *See also* Henderson *v.* New York, 92 U. S. 259 [1876]; Chy Lung *v.* Freeman, 92 U. S. 275 [1876]; New York *v.* Compagnie Générale Transatlantique, 107 U. S. 59 [1883]; Illinois Cent. R. Co. *v.* Illinois ex rel. Butler, 163 U. S. 142 [1896]; McDermott *v.* Wisconsin, 228 U. S. 115 [1913]; Savage *v.* Jones, 225 U. S. 501 [1912]; Brennan *v.* Titusville, 153 U. S. 289, 299 [1894]; Schollenberger *v.* Pennsylvania, 171 U. S. 1, 12 [1898]; Seaboard Air Line R. Co. *v.* Blackwell, 244 U. S. 310 [1917]; Lemke *v.* Farmers Grain Co., 258 U. S. 50 [1922]; Clyde Mallory Lines *v.* Alabama, 296 U. S. 261 [1935]; Di Santo *v.* Pennsylvania, 273 U. S. 34 [1927]; Missouri P. R. Co. *v.* Castle, 224 U. S. 541 [1912].

[4] Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 488 [1903]. *See also* South Covington & C. St. R. Co. *v.* Covington, 235 U. S. 537 [1915]; Asbell *v.* Kansas, 209 U. S. 251 [1908]; Sherlock *v.* Alling, 93 U. S. 99, 103 [1876]; Louisville & N. R. Co. *v.* Kentucky, 183 U. S. 503, 518 [1902]; Standard Oil Co. *v.* Tennessee, 217 U. S. 413 [1910].

[5] Packer Corp. *v.* Utah, 285 U. S. 105, 185 [1932].

Effect of Action by Congress.

Generally it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the Nation.[1]

[1] Gulf, C. & S. F. R. Co. *v.* Hefley, 158 U. S. 98, 104 [1895]. *See also* Chicago, R. I. & P. R. Co. *v.* Hardwick Farmers Elevator Co., 226 U. S. 426 [1913]; Missouri, K. & T. R. Co. *v.* Haber, 169 U. S. 613, 627 [1898]; Michigan C. R. Co. *v.* Vreeland, 227 U. S. 59 [1913]; Illinois C. R. Co. *v.* De Fuentes, 236 U. S. 157 [1915]; Railroad Commission (California) *v.* Southern P. R. Co., 264 U. S. 33 [1924].

Even when an act of Congress does not go into effect until a certain time following its passage, State legislation is immediately superseded upon the enactment of the Federal statute.[1]

[1] Northern Pacific R. Co. *v.* Washington ex rel. Atkinson, 222 U. S. 370 [1912].

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An unconstitutional act of Congress does not so manifest a purpose to take control of the subject matter of the statute as to supersede State legislation on the same subject; a void statute is not law for any purpose.[1]

[1] Chicago, I. & L. R. Co. *v.* Hackett, 228 U. S. 559, 566 [1913].

Effect of Nonaction by Congress.

Where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; any regulations of the subject by the States, except in matters of local concern only, is repugnant to such freedom.[1]

[1] Robbins *v.* Shelby County, 120 U. S. 489, 493 [1887]. *See also* Southern R. Co. *v.* Reid, 222 U. S. 424 [1912]; Western U. Teleg. Co. *v.* James, 162 U. S. 650, 655 [1896]; United States *v.* E. C. Knight Co., 156 U. S. 1, 11 [1895]; Pittsburgh & S. Coal Co. *v.* Bates, 156 U. S. 577, 588 [1895]; Wilkerson *v.* Rahrer (In re Rahrer). 140 U. S. 545, 555 [1891]; Leisy & Co. *v.* Hardin, 135 U. S. 100, 110 [1890]; Philadelphia & S. Mail S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 336 [1887]; Walling *v.* Michigan, 116 U. S. 446, 455 [1886]; Escanaba & L. M. Transp. Co. *v.* Chicago, 107 U. S. 678, 687 [1883]; Welton *v.* Missouri, 91 U. S. 275, 282 [1876]; Brennan *v.* Titusville, 153 U. S. 289, 302 [1894]; Bowman *v.* Chicago & N. W. R. Co., 125 U. S. 465, 482 [1888]; Smith *v.* Alabama, 124 U. S. 465, 473 [1888]; Ex parte Siebold, 100 U. S. 371, 385 [1880]; Mobile County *v.* Kimball, 102 U. S. 691, 699 [1881]; Ouachita & M. River Packet Co. *v.* Aiken, 121 U. S. 444 [1887]; Chicago, R. I. & P. R. Co. *v.* Hardwick Farmers Elevator Co., 226 U. S. 426 [1913]; Hendrick *v.* Maryland, 235 U. S. 610 [1915]; Minnesota *v.* Barber, 136 U. S. 313 [1890].

The fact that Congress has entrusted power to the Interstate Commerce Commission does not, in the absence of action by the Commission, change the rule which existed prior to its creation. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the State in incidental matters. A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb the authority of the State.[1]

[1] Missouri Pac. R. Co. *v.* Larabee Flour Mills Co., 211 U. S. 612 [1909].

Discrimination Against Foreign Products.

Any local regulation which, in terms or by its necessary operation, denies to owners of articles of commerce in other States the right to compete in the markets of the State upon terms of equality with the owners of like articles within the State, "is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and, therefore, void." [1] Thus the imposition of a State license tax upon local agents to whom automobiles are consigned for sale by their nonresident manufacturers, which discriminates in favor of the product of resident manufacturers, is an unconstitutional attempt by the State to regulate interstate com-

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merce, it being in effect a tax upon the importation of the automobiles into the State.[2] But the specification of a particular asphalt for a municipal improvement, the asphalt being a product of a foreign country and there being deposits in other States within the United States from which suitable asphalt could be had, is not an interference with, and a regulation of, interstate commerce, in violation of the exclusive right of Congress.[3]

[1] Brimmer *v.* Rebman, 138 U. S. 78, 82 [1891]. *See also* Voight *v.* Wright, 141 U. S. 62 [1891]; Webber *v.* Virginia, 103 U. S. 344, 351 [1881].
[2] Bethlehem Motors Corp. *v.* Flynt, 256 U. S. 421 [1921].
[3] Field *v.* Barber Asphalt Paving Co., 194 U. S. 618, 622 [1904].

RAILROADS AND EXPRESS COMPANIES.*

In General.

Until Congress acts in reference to the relations of the railroad companies to interstate commerce, it is within the power of the State to regulate its affairs, so far as they are of domestic concern.[1] A railroad corporation organized under the laws of the United States is subject to the control of the State in all matters of taxation, rates for transportation, and other police regulations when there is nothing in the act of Congress creating it which indicates an intention on the part of Congress to remove it in all its operations from the control of the State, and there is nothing prescribed by State statute which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress.[2]

[1] Peik *v.* Chicago & N. W. R. Co., 94 U. S. 164 [1877].
[2] Reagan *v.* Mercantile Trust Co. 154 U. S. 413, 416 [1894].

Where a railroad extends through several States and is incorporated in each, it is, as far as concerns the regulation of its business within the State, a domestic corporation; and the establishment of a board of railroad commissioners with power to regulate traffic, fix charges, and prevent discriminations, but prohibited from interfering with charges for transportation of persons or property interstate, is not invalid as being a regulation of interstate commerce.[1]

[1] Railroad Commission Cases (Stone *v.* Farmers' Loan & T. Co.), 116 U. S. 307 [1886].

Consolidation of Railroads.

A State law prohibiting the consolidation of parallel and competing roads does not conflict with the commerce clause.[1]

[1] Mobile, J. & K. C. R. Co. *v.* Mississippi, 210 U. S. 187 [1908]. *See also* Louisville & N. R. Co. *v.* Kentucky, 161 U. S. 677, 701 [1896].

Rates for Transportation.†

POWER OF STATES LIMITED TO INTRASTATE RATES.—A State has power to limit the amount of charges (including apportionment

* *See also* pp. 156, 660, 808, 966, 991.
† *See also* pp. 157, 342, 644, 791.

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of joint rates) [1] by railroad companies for the transportation of persons and property within its own jurisdiction, unless what is done amounts to a regulation of interstate or foreign commerce.[2] State statutes regulating rates must have reference only to the value of intrastate portion of the property.[3] Since the decision in Wabash R. Co. *v.* Illinois, 118 U. S. 557 [1886], it must be regarded as settled, whatever doubts may have been previously entertained, that a regulation, as by prescribing rates, of such transportation as is deemed interstate as distinguished from wholly domestic carriage is exclusively given to Congress.[4]

[1] Minneapolis & St. L. R. Co. *v.* Minnesota ex rel Railroad & W. Commission, 186 U. S. 257, 260 [1902].

[2] Railroad Commission Cases (Stone *v.* Farmers' Loan & T. Co.). 116 U. S. 307 [1886]. *See also* Georgia R. & B. K. G. Co. *v.* Smith, 128 U. S. 174 [1888]; Peik *v.* Chicago & N. W. R. Co., 94 U. S. 164, 178 [1877]; Chicago, B. & Q. R. Co. *v.* Cutts (Iowa), 94 U. S. 155, 161 [1877].

[3] Louisville & N. R. Co. *v.* Railroad Commission, 196 Fed. 800 [1912], citing Smyth *v.* Ames, 169 U. S. 466 [1898].

[4] Wilmington Transp. Co. *v.* Railroad Commission, 236 U. S. 151 [1915].

Congress has not in the interstate commerce act and its amendments interfered with the power of the States to regulate intrastate rates.[1] But a State statute penalizing collection of an amount greater than specified in the bill of lading, was held, as applied to an interstate shipment, inconsistent with provisions of the interstate commerce act requiring collection of rates specified in published tariff schedules.[2]

[1] Minnesota Rate Cases (Simpson *v.* Shepard), 230 U. S. 352 [1913]. *See also* Missouri Rate Cases (Knott *v.* Chicago, B. & Q. R. Co.), 230 U. S. 474 [1913].

[2] Gulf C. & F. R. Co. *v.* Hefley, 158 U. S. 98 [1895].

Incidental Effect on Interstate Rates.—In the absence of action by Congress the reduction of intrastate rates below the level of interstate rates in those instances in which they had been maintained on a parity in competitive areas crossed by a State line, so as to alter the existing relations between State and interstate rates as to places within those zones of competition, does not render such State rates invalid.[1]

[1] Chicago, M. & St. P. R. Co. *v.* State Public Utilities Commission, 242 U. S. 333 [1917]. *See also* Simpson *v.* Shepard (Minnesota Rate Cases), 230 U. S. 352 [1913]; Knott *v.* Chicago, B. & Q. R. Co. (Missouri Rate Cases), 230 U. S. 474 [1913]; Chesapeake & O. R. Co. *v.* Conley, 230 U. S. 513 [1913]; Oregon R. & Nav. Co. *v.* Campbell, 230 U. S. 525 [1913]; Southern P. Co. *v.* Campbell, 230 U. S. 537 [1913]; Allen *v.* St. Louis, I. M. & S. R. Co., 230 U. S. 553 [1913].

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REQUIRING RAILROADS TO POST THEIR SCHEDULES OF RATES.—A State law requiring railroad companies to post their rates of fare and freight and imposing penalties for nonobservance is not a regulation of commerce but is valid as a police regulation.[1]

[1] Chicago & N. W. R. R. Co. *v.* Fuller, 17 Wall. 560 [1873].

INTERSTATE PASSES.—A State statute prohibiting a railway company from giving free passes or free transportation, but authorizing the issue of transportation in payment for printing and advertising, cannot, as to the exception, be allowed to operate in view of the act of Congress prohibiting free interstate transportation.[1]

[1] Chicago, I. & L. R. Co. *v.* United States, 219 U. S. 486 [1911].

RATES ON PART OF INTERSTATE SHIPMENT WITHIN THE STATE.—States may prohibit discrimination on the long-and-short haul theory if the regulations are restricted to those who own or operate a railroad within the State.[1] A State statute attempting to prohibit discrimination in rates as applied to long-and-short hauls on interstate transportation held void.[2]

[1] Louisville & N. R. Co. *v.* Kentucky, 183 U. S. 503, 511 [1902]. *See also* Missouri P. R. Co. *v.* McGrew Coal Co., 244 U. S. 191 [1917]; Louisville, & N. R. Co. *v.* Eubank, 184 U. S. 27, 33 [1902].

[2] Wabash, St. L. & P. R. Co. *v.* Illinois, 118 U. S. 557, 577 [1886]. *See also* Stone *v.* Farmers' Loan & T. Co. (Railroad Commission Cases), 116 U. S. 307, 325 [1886]; Atchison, T. & S. F. R. Co. *v.* Denver & N. O. R. Co., 110 U. S. 667 [1884].

Operation of Trains.*

It is within the undoubted province of a State to make regulations with regard to all operations of trains and in which the lives and health of people are concerned, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections and unquestionably valid.[1] A Federal statute, as e. g., the Hours of Service Act of 1907,[2] or The Safety Appliance Act,[3] supersedes State enactments on the specific point.

[1] Crutcher *v.* Kentucky, 141 U. S. 47, 61 [1891]. *See also* Hennington *v.* Georgia, 163 U. S. 299 [1896]; Erb *v.* Morasch, 177 U. S. 584 [1900]; Lawrence *v.* St. Louis-San Francisco R. Co., 274 U. S. 588 [1927].

[2] Erie R. Co. *v.* New York, 233 U. S. 671 [1914].

[3] Southern R. Co. *v.* Railroad Commission, 236 U. S. 439 [1915].

* *See also* p. 235.

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Thus there have been upheld State laws, regulations or orders:

(1) Requiring passenger train service on a State-chartered branch line.[1]

(2) Requiring consent of State Commission to discontinuance of intrastate service by an interstate railroad.[2]

(3) Requiring stoppage of all passenger trains at county seats.[3]

(4) Penalizing operation of freight trains unless manned by at least three brakemen.[4]

(5) Requiring examination and license of trainmen.[5]

(6) Requiring use of electric headlight of specified minimum capacity.[6]

(7) Grade crossing regulations.[7]

(8) Requiring construction of union passenger station.[8]

(9) Requiring semimonthly payment of wages, of railway employees both State and interstate—the effect on interstate commerce being merely incidental.[9]

(10) Prohibiting heating of passenger cars by stoves kept inside the car or suspended therefrom.[10]

(11) Requiring separate cars for white and colored passengers, as applied to travel between points in the State.[11]

[1] Missouri P. R. Co. *v.* Kansas ex rel. Taylor, 216 U. S. 262 [1910].

[2] St. Louis-San Francisco R. Co. *v.* Alabama Pub. Serv. Commission, 279 U. S. 560 [1929].

[3] Gladson *v.* Minnesota, 166 U. S. 427, 430 [1897]; but cf. Cleveland, C. C. & St. L. R. Co. *v.* Illinois ex rel. Jett, 177 U. S. 514, 521 [1900], holding invalid a similar law requiring stoppage day or night regardless of fact that a "local" was scheduled to stop at the same station within a few minutes before or after the train in question; cf. further Railroad Commission *v.* Eastern Texas R. Co., 264 U. S. 79 [1924], where a requirement of passenger service was held not to require operation for full charter period in face of reasonable certainty of pronounced loss. See also Illinois Central R. Co. *v.* Illinois ex rel. Butler, 163 U. S. 142, 153 [1896]; Lake Shore & M. S. R. Co. *v.* Ohio ex rel. Lawrence, 173 U. S. 285 [1899]; Mississippi R. Commission *v.* Illinois C. R. Co., 203 U. S. 335 [1906]; Atlantic Coast Line R. Co. *v.* Wharton, 207 U. S. 328 [1907]; Herndon *v.* Chicago, R. I. & P. R. Co., 218 U. S. 135 [1910]; Chicago, B. & Q. R. Co. *v.* Railroad Commission, 237 U. S. 220 [1915]; Missouri P. R. Co. *v.* Kansas ex rel. Taylor, 216 U. S. 262 [1910]; Missouri, K. & T. R. Co. *v.* Texas, 245 U. S. 484 [1918]; Gulf, C. & S. F. R. Co. *v.* Texas, 246 U. S. 58 [1918]; St. Louis & S. F. R. Co. *v.* Public Service Commission, 254 U. S. 535 [1921]; St. Louis-San Francisco R. Co. *v.* Public Service Commission, 261 U. S. 369 [1923].

[4] Chicago, R. I. & P. R. Co. *v.* Arkansas, 219 U. S. 453 [1911]. *See also* St. Louis, I. M. & S. R. Co. *v.* Arkansas, 240 U. S. 518 [1916]; Missouri P. R. Co. *v.* Norwood, 283 U. S. 249 [1931].

[5] Smith *v.* Alabama, 124 U. S. 465, 480 [1888]. *See also* McCall *v.* California, 136 U. S. 104 [1890]; Nashville, C. & St. L. R. Co. *v.* Alabama, 128 U. S. 96 [1888]; Missouri, K. & T. R. Co. *v.* Haber, 169 U. S. 613, 633 [1898].

[6] Atlantic Coast Line R. Co. *v.* Georgia, 234 U. S. 280 [1914]. *See also* Vandalia R. Co. *v.* Public Service Commission, 242 U. S. 255 [1916].

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[7] Southern R. Co. *v.* King, 217 U. S. 524 [1910]. *See also* Seaboard Airline R. Co. *v.* Blackwell, 244 U. S. 310 [1917]; Erie R. Co. *v.* Public Utilities Comrs. 254 U. S. 394 [1921].

[8] Atchison, T. & S. F. R. Co. *v.* Railroad Commission, 283 U. S. 380 [1931].

[9] Erie R. Co. *v.* Williams, 233 U. S. 685 [1914].

[10] New York, N. H. & H. R. Co. *v.* New York, 165 U. S. 628, 629 [1897]. *See also* Chicago, M. & St. P. R. Co. *v.* Solan, 169 U. S. 133, 137 [1898].

[11] Chesapeake & O. R. Co. *v.* Kentucky, 179 U. S. 388 [1900]. *See also* McCabe *v.* Atchison, T. & S. F. R. Co., 235 U. S. 151 [1914]; Louisville, N. O. & T. R. Co. *v.* Mississippi, 133 U. S. 587, 588 [1890]; Chiles *v.* Chesapeake & O. R. Co., 218 U. S. 71 [1910]; South Covington & C. St. R. Co. *v.* Kentucky, 252 U. S. 399 [1920].

Conversely, a statute which, as construed by State court, required interstate carriers to extend to persons traveling in the State equal privileges in all parts of its trains, was held invalid (Hall *v.* DeCuir, 95 U. S. 485, 487 [1878]). A statute requiring a street railway to furnish separate cars or compartments was upheld although most of its business was carriage of interstate passengers (South Covington & C. Street R. Co. *v.* Kentucky, 252 U. S. 399 [1920]).

Liability of Carriers for Loss of or Damage to Goods.

Until Congress has legislated upon the subject, the liability of a carrier, exercising its calling within a particular State, although engaged in the business of interstate commerce, for loss or damage to property, may be regulated by the law of the State. Such regulations would fall within that class of regulations which it is competent for a State to make, growing out of the territorial jurisdiction of the State over such carriers and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed within its limits, although interstate commerce may be indirectly affected.[1] A statute penalizing failure to adjust within a specified time claims for loss is valid as applied to an interstate shipment when the loss occurred within the State.[2]

[1] Adams Exp. Co. *v.* Croninger, 226 U. S. 491 [1913]. *See also* Chicago, M. & St. P. R. Co., *v.* Solan, 169 U. S. 133, 137 [1898]; Smith *v.* Alabama, 124 U. S. 465, 476 [1888]; Atlantic Coast Line R. Co. *v.* Ford, 287 U. S. 502 [1933]; Richmond & A. R. Co. *v.* Patterson Tobacco Co., 169 U. S. 311, 312 [1898]; Missouri, K. & T. R. Co. *v.* McCann, 174 U. S. 583, 587 [1899]; Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 491 [1903].

[2] Atlantic Coast Line R. Co. *v.* Mazursky, 216 U. S. 122 [1910].

The so-called Carmack amendment supersedes State statutes invalidating contracts limiting recovery for loss or injury to goods in transportation to an agreed or declared value.[1]

[1] Atchison, T. & S. F. R. Co. *v.* Harold, 241 U. S. 371 [1916]. *See also* Chicago, R. I. & P. R. Co. *v.* Cramer, 232 U. S. 490 [1914]; Adams Exp. Co. *v.* Croninger, 226 U. S. 491 [1913]; Chicago, B. & Q. R. Co. *v.* Miller, 226 U. S. 513 [1913]; Missouri P. R. Co. *v.* Porter, 273 U. S. 341 [1927]; Missouri, K. & T. R. Co. *v.* Harriman Bros., 227 U. S. 657 [1913]; Charleston & W. C. R. Co. *v.* Varnville Furniture Co., 237 U. S. 597 [1915].

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By this amendment, Congress has so far occupied the field of regulation as to invalidate the provisions of a municipal ordinance, as applied to the interstate business of an express company, requiring every owner of a public express company to give a bond for each of their vehicles conditioned on the safe and prompt delivery of all baggage.[1]

[1] Barrett *v.* New York, 232 U. S. 14 [1914].

The imposition upon the initial or any connecting carrier of the duty of tracing the freight and informing the shipper in writing when, where, how, and by which carrier the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official position, by whom the truth of the facts set out in the information can be established, is, when applied to interstate commerce, a violation of the commerce clause.[1]

[1] Central of Georgia R. Co. *v.* Murphey, 196 U. S. 194, 202 [1905].

Liability of Carriers for Personal Injuries.*

The Federal employers' liability acts supersede the laws of the States on the same subject,[1] as well as the common law right of action.[2]

[1] Mondou *v.* New York, N. H. & H. R. Co. (Second Employers' Liability Cases), 223 U. S. 1 [1912]. *See also* Missouri, K. & T. R. Co. *v.* Wulf, 226 U. S. 570 [1913]; Chicago, R. I. & T. R. Co. *v.* Devine, 239 U. S. 52 [1915]; Wabash R. Co. *v.* Hayes, 234 U. S. 86 [1914]; Seaboard Air Line R. Co. *v.* Horton, 233 U. S. 492 [1914]; St. Louis, S. F. & T. R. Co. *v.* Seale, 229 U. S. 156 [1913]; St. Louis, I. M. & S. R. Co. *v.* Hesterly, 228 U. S. 702 [1913]; Taylor *v.* Taylor, 232 U. S. 363 [1914]; Toledo, St. L. & W. R. Co. *v.* Slavin, 236 U. S. 454 [1915]; Chesapeake & O. R. Co. *v.* Stapleton, 279 U. S. 587 [1929].

[2] New York C. & H. R. R. Co. *v.* Tonsellito, 244 U. S. 360 [1917].

The fact that a railroad company is in a general sense engaged in interstate commerce does not prevent the operation of a State workmen's compensation act as to employees not engaged in interstate commerce.[1] But a State act, requiring an employer to respond for injuries occurring where it is not chargeable with negligence, is not operative in the case of an employee engaged in interstate commerce at the time of injury.[2] A statute making a railroad liable for injury to a railway postal clerk as if he were an employee of the railroad does not, in the absence of legislation by Congress, conflict with the commerce clause.[3]

[1] New York C. R. Co. *v.* White, 243 U. S. 188 [1917]. Raymond *v.* Chicago, M. & St. P. R. Co., 243 U. S. 43 [1907]. *See also* Boston & M R. Co. *v.* Armburg, 285 U. S. 234 [1932].

[2] New York C. R. Co. *v.* Winfield, 244 U. S. 147 [1917]; Erie R. Co. *v.* Winfield, 244 U. S. 170 [1917].

[3] Martin *v.* Pittsburg & L. E. R. Co., 203 U. S. 284 [1906].

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* *See also* pp. 159, 162, 235, 257, 783, 964.

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Allowance of Attorneys' Fees.

A statute providing for the recovery of reasonable attorney's fees in actions on small claims against all classes of defendants, individual and corporate, is valid as applied to claims based upon freight lost in interstate commerce, in the absence of Federal legislation on the subject, and the Interstate Commerce Act does not interfere.[1]

[1] Missouri, K. & T. R. Co. *v.* Harris, 234 U. S. 412 [1914]. *See also* Chicago & N. W. R. Co. *v.* Nye Schneider Fowler Co., 260 U. S. 35 [1922].

Furnishing Cars.

A statute, the material requirement of which was that when a shipper made requisition in writing for a number of cars to be furnished at any point indicated within a certain number of days, and deposited one-fourth of the freight with the agent of the company, the company failing to furnish them should forfeit $25 per day for each such car not furnished, the only proviso being that the law "shall not apply in cases of strikes or other public calamity", was held invalid, as sufficient allowance was not made for the practical difficulties in the administration of the law.[1] When such a statute was construed by the State court as merely declaratory of the common law, and any reasonable excuse for failure to furnish cars might be interposed,[2] and where it merely requires a railroad to furnish cars within a reasonable time after demand made, where the question as to what is a reasonable time is to be determined in view of the requirements of interstate commerce,[3] it is valid. But by the Interstate Commerce Act, as amended, Congress has specifically concerned itself with the subject of furnishing cars for interstate traffic, and this supersedes any legislation by the States on that subject.[4]

[1] Houston & T. C. R. Co. *v.* Mayes, 201 U. S. 321 [1906]. *See also* St. Louis S. W. R. Co. *v.* Arkansas, 217 U. S. 136 [1910].

[2] Hampton *v.* St. Louis, I. M. & S. R. Co., 227 U. S. 456 [1913]. *See also* Missouri P. R. Co. *v.* Larabee Flour Mills Co., 211 U. S. 612 [1909]; St. Louis S. W. R. Co. *v.* Arkansas, 217 U. S. 136 [1910].

[3] Illinois C. R. Co. *v.* Mulberry Hill Coal Co., 238 U. S. 275 [1915].

[4] Chicago, R. I. & P. R. Co. *v.* Hardwick Farmers Elevator Co., 226 U. S. 426 [1913].

Penalties for Nonfeasance, etc.

A statute which penalizes a carrier which refuses to receive freight for transportation whenever tendered at a regular station is invalid, as Congress had, by statute, occupied the whole field of rate making and has provided that no carrier "shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act."[1]

[1] Southern R. Co. *v.* Reid, 222 U. S. 424 [1912]; Southern R. Co. *v.* Burlington Lumber Co., 225 U. S. 99 [1912].

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Where a State court considered that a statute forbidding a delivery of goods except upon surrender and cancellation of the bills of lading and providing that any person aggrieved may recover all damages sustained by its violation is merely declaratory of the common law, no question of the repugnancy of the statute to the Constitution is presented.[1]

[1] Arkansas Southern R. Co. *v.* German Nat. Bank, 207 U. S. 270 [1907].

Statute authorizing recovery of a penalty for delay in giving notice to a consignee of the arrival of freight at the termination of an interstate shipment is invalid,[1] as also a rule of a railroad commission authorizing recover of a penalty for failure to deliver freight at the depots and warehouses, or, in case of shipment for track delivery, to place loaded cars at an accessible place for unloading within 24 hours after arrival, since the requirement as to the delivery of cars within the short period fixed in the rule is absolute and makes no allowance for any justifiable and unavoidable cause for the failure to deliver.[2]

[1] St. Louis, I. M. & S. R. Co. *v.* Edwards, 227 U. S. 265 [1913].
[2] Yazoo & M. V. R. Co. *v.* Greenwood Grocery Co., 227 U. S. 1 [1913].

Municipal ordinance requiring an express company doing business in the city to give a bond for each and every vehicle licensed, to be conditioned for the safe and prompt delivery of all baggage, packages, etc., is invalid as applied to interstate transportation.[1]

[1] Barrett *v.* New York, 232 U. S. 14 [1914].

Switching and Terminal Facilities.

Compelling two railroads to provide at a place of intersection ample facilities by track connections for transferring cars used in regular business of the respective roads from one line to the other, and to provide at such intersection equal and reasonable facilities for the interchange of cars and traffic, would plainly afford facilities to interstate commerce, if there were any, and would in no wise regulate such commerce within the meaning of the Constitution.[1]

[1] Wisconsin, M. & P. R. Co. *v.* Jacobson, 179 U. S. 287, 295 [1900]. *See also* Michigan C. R. Co. *v.* Michigan Railroad Commission, 236 U. S. 615 [1915]; Grand Trunk R. Co. *v.* Michigan Railroad Commission, 231 U. S. 457 [1914]; Missouri, K. & T. R. Co. *v.* McCann, 174 U. S. 580 [1899]; Central Stockyards Co. *v.* Louisville & N. R. Co., 192 U. S. 568 [1904]. *Cf.* Illinois C. R. Co. *v.* De Fuentes, 236 U. S. 157 [1915].

Interstate freight retains its character as such until actual delivery to the consignee takes place, and an order of a State commission regulating the transfer and switching of cars upon private sidings or spur tracks is void.[1]

[1] Southern R. Co. *v.* Greensboro Ice and Coal Co., 134 Fed. 82 [1904], affirmed in McNeill *v.* Southern R. Co., 202 U. S. 543 [1906]. *See also* Iowa *v.* Chicago, M. & St. P. R. Co., 33 Fed. 391 [1887]; Chicago, M. & St. P. R. Co. *v.* Becker, 32 Fed. 849 [1887].

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State statute forbidding the switching of cars over public crossings in cities of the first and second class with a crew containing less than a specified number of employees is not violative of the commerce clause.[1]

[1] St. Louis, I. M. & S. R. Co. v. Arkansas, 240 U. S. 518 [1916].

A State can not be said, as a matter of law, to have imposed an unconstitutional burden upon interstate commerce by forbidding any change in location of the machine shops, roundhouses, and general offices of a railway company which has agreed to maintain them in a designated county in consideration of receiving county aid.[1]

[1] International & G. N. R. Co. v. Anderson County, 246 U. S. 424 [1918].

Sunday Laws.

Statute which declares that transportation of freight shall be suspended on Sunday, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of Federal jurisdiction nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation and not invalid by force alone of the Constitution.[1]

[1] Hennington v. Georgia, 163 U. S. 299, 318 [1896].

Attachment and Garnishment.

Railway cars are not exempt from attachment under State laws, though they may have been or are intended to be used in interstate commerce.[1] Proceeding to attach foreign railway company's bank deposit in aid of action on its notes, held not to interfere with or burden foreign commerce unnecessarily and unreasonably, so as to deprive State court of jurisdiction.[2]

[1] Davis v. Cleveland, C. C. & St. L. R. Co., 217 U. S. 157 [1910]. *See also* International Mill. Co. v. Columbia Transp. Co., 292 U. S. 511 [1934].

[2] Ferrocarriles Nacionales De Mexico v. Rutledge, 331 Mo. 1015 [1932], certiorari denied, 289 U. S. 746 [1933].

Interstate Street-Car Service.

Municipal ordinances which only incidentally affect interstate street-car service are valid, and therefore an ordinance which prohibits the company from allowing passengers to ride on the rear or front platforms without suitable barriers, and requiring it to keep the cars clean and ventilated and fumigated, is valid, but provisions of the ordinance that cars shall never be permitted to be below a certain temperature are unreasonable, and those provisions so regulating the number of passengers to be carried in the cars as to subject the com-

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pany to varying conditions and conflicting municipal regulations are a burden on interstate commerce.[1]

[1] South Covington & C. Street R. Co. v. Covington, 235 U. S. 537 [1915]. *Cf.* Covington v. Cincinnati, N. & C. R. Co., 71 F. (2d) 117 [1934], certiorari denied, 293 U. S. 612 [1935].

Removal of Tracks.

No unconstitutional interference with interstate commerce results from a municipal ordinance which directs a railway company to remove its tracks from a busy street intersection, where the ordinance makes no discrimination against interstate commerce.[1]

[1] Denver & R. G. R. Co. v. Denver, 250 U. S. 241 [1919].

TELEGRAPH AND TELEPHONE COMPANIES.*

A statute making it the duty of every telegraph company doing business in the State to receive and transmit messages as promptly as possible, as applied to messages received within the State though destined to persons beyond the State, and authorizing recovery of a penalty for negligent failure, is within the power of the State in absence of legislation by Congress. The standard of duty under the statute is precisely that imposed at common law upon such a common carrier.[1] So also a statute providing a penalty for failure to transmit with due diligence.[2]

[1] Western U. Teleg. Co. v. Crovo, 220 U. S. 364 [1911].

[2] Western U. Teleg. Co. v. James, 162 U. S. 650 [1896], distinguishing Western U. Teleg. Co. v. Pendleton, 122 U. S. 347 [1887].

A State statute which provides that telegraphic communication for or from officers of justice shall take precedence, and that arrangements may be made with publishers of newspapers for the transmission of intelligence of general and public interest out of its order, but that all other messages shall be transmitted in the order which they are received, is invalid as a regulation of commerce between the States.[1]

[1] Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 358 [1887].

Interstate transmission of stock quotations by telegraph may not be interfered with by States to remove alleged discrimination as between brokers.[1]

[1] Western U. Teleg. Co. v. Foster, 247 U. S. 105 [1918].

A State statute making mental anguish caused by the negligent nondelivery of a telegram a cause of action is, as applied to telegrams the negligent nondelivery of which occurred in the District of Columbia, an unconstitutional attempt to regulate conduct within territory wholly under the jurisdiction of the United States; such statute is also unconstitutional, as to messages sent from that State to be delivered in another State, as an attempt to regulate interstate commerce.[1]

[1] Western U. Teleg. Co. v. Brown, 234 U. S. 542 [1914].

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* *See also* pp. 141, 968, 992.

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A license fee upon telegraph poles and wires within the limits of a municipal corporation is not a tax on the property of the company on its transmission of messages or on its receipts from such transmission or on its occupation or business, but it is a charge in the enforcement of local government supervision, and as such, when not unreasonable, is not obnoxious to the commerce clause.[1]

[1] Western U. Teleg. Co. *v.* New Hope, 187 U. S. 419 [1903]. *See also* Postal Teleg. Cable Co. *v.* Charleston, 153 U. S. 692 [1894]; Mackay Teleg. & Cable Co. *v.* Little Rock, 250 U. S. 94 [1919]; Atlantic & P. Teleg. Co. *v.* Philadelphia, 190 U. S. 160, 164 [1903]; St. Louis *v.* Western U. Teleg. Co., 148 U. S. 92, 96 [1893]; Cooney *v.* Mountain States Teleph. & Teleg. Co., 294 U. S. 384 [1935].

Statute prohibiting a stipulation against liability for negligence in the delivery of an interstate message is valid.[1]

[1] Western U. Teleg. Co. *v.* Commercial Milling Co., 218 U. S. 406 [1910].

A State has no authority to interfere with the operation of the lines of telegraph companies constructed along postal routes within its borders under the authority of the Post Road Act of 1866,[1] nor to exclude altogether a company proposing to take advantage of the act;[2] but that act does not deprive the State or a municipality of the right to subject telegraph companies to reasonable regulations, and an ordinance regulating the erection and use of poles and wires in the streets does not interfere with the exercise of authority under that act.[3]

[1] Essex *v.* New England Teleg. Co., 239 U. S. 313 [1915].
[2] Pensacola Teleg. Co. *v.* Western U. Teleg. Co., 96 U. S. 1, 11 [1878].
[3] Western U. Teleg. Co. *v.* Richmond, 224 U. S. 160 [1912]. *See also* Postal Teleg. Cable Co. *v.* Richmond, 249 U. S. 252 [1919].

Telephone companies, like telegraph companies, are important agents in the transaction of interstate commerce, and no State can grant to one telephone company the exclusive right to operate telephone lines within its borders; what a State cannot do because it operates as an obstruction to the free flow of interstate commerce, an Indian nation cannot do.[1]

[1] Muskogee Nat. Teleph. Co. *v.* Hall, 118 Fed. 382 [1902].

MOTOR VEHICLES.*

A State statute prescribing a comprehensive scheme for licensing and regulating motor vehicles,[1] or regulating the use of motor vehicles and including the right to exact reasonable compensation for special facilities afforded as well as reasonable provisions to insure safety,[2] are not, as to vehicles coming into the State, invalid as regulations of interstate commerce. But an ordinance regulating interstate busses

* *See also* pp. 211, 790, 818, 851, 979, 994.

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exacting a license fee in excess of amount necessary to defray expenses of regulation is not sustainable as a police measure.[3]

[1] Hendrick v. Maryland, 235 U. S. 610 [1915].

[2] Kane v. New Jersey, 242 U. S. 160 [1916]. *See also* Packard v. Banton, 264 U. S. 140, 144 [1924]; Hodge Drive-It-Yourself Co. v. Cincinnati, 284 U. S. 335 [1932].

[3] Sprout v. South Bend, 277 U. S. 163 [1928].

A State statute which prohibits common carriers for hire from using the highways between fixed termini or over regular routes without having obtained from the director of public works a certificate of public convenience is primarily not a regulation to secure safety on the highways or to conserve them, but a prohibition of competition; and, as applied to one desirous of using the highways as a common carrier of passengers and express purely in interstate commerce, between a point in Oregon and one in Washington, it is a violation of the commerce clause, besides defeating the purpose expressed in acts of Congress giving Federal aid for construction of interstate highways.[1] So, a statute imposing a privilege tax graduated according to carrying capacity was held invalid as imposed for the privilege of doing interstate business and not as compensation for use of highways.[2] But a State commission's order denying an interstate motor carrier a certificate to operate over a designated route was held not violative of the commerce clause, where based upon a finding, supported by evidence, that the designated route was so congested that addition of applicant's proposed service would create excessive hazard to public safety.[3]

[1] Buck v. Kuykendall, 267 U. S. 307 [1925]. *See also* Bush & Sons Co. v. Maloy, 267 U. S. 317 [1925]; Interstate Busses Corp. v. Holyoke Street R. Co., 273 U. S. 45 [1927].

[2] Interstate Transit v. Lindsey, 283 U. S. 183 [1931]. *See also* Sprout v. South Bend, 277 U. S. 163 [1928].

[3] Bradley v. Public Utilities Commission, 289 U. S. 92 [1933].

A State statute limiting net loads of trucks operating over State highway, is not invalid as repugnant to the commerce clause.[1] That clause merely inhibits regulations of motor vehicles which result in discrimination against vehicles used in interstate commerce, and does not restrict a State from making police regulations in respect to weight and size of vehicles, so long as such regulations apply equally to all.[2]

[1] Sproles v. Binford, 286 U. S. 374 [1932]. *See also* Morris v. Duby 274 U. S. 135 [1927].

[2] Nutt Co. v. South Carolina ex rel. Daniel, 180 S. C. 19 [1936], certiorari denied, 297 U. S. 724 [1936].

A State law imposing upon all persons engaged in transportation for hire by motor vehicle over the public highways of the State the burdens and duties of common carriers, and requiring them to furnish indemnity bonds to secure payment of claims and liabilities resulting from injury to property carried, when applied to a private carrier

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without special franchise or power of eminent domain and engaged exclusively in hauling from a place within the State to another State the goods of particular factories under standing contracts with their owners, violates the commerce clause by taking from the carrier the use of instruments by means of which he carries on interstate commerce; and imposing on him unreasonable conditions precedent to his right to continue to carry on interstate commerce.[1]

[1] Michigan Pub. Utilities Commission *v.* Duke, 266 U. S. 570 [1925]. *See also* Smith *v.* Cahoon, 283 U. S. 553 [1931]; Continental Baking Co. *v.* Woodring, 286 U. S. 352 [1932].

SHIPS AND SHIPPING.*

When a Vessel Is Engaged in Interstate Commerce.

A steamboat enrolled and licensed for the coasting trade under an act of Congress was engaged in lightering goods from and to vessels anchored in the lower bay of Mobile and the wharves of the city, and in towing vessels anchored there to and from the city, and in some instances towing the same beyond the outer bar of the bay and into the Gulf for a distance of several miles. The port was frequented by vessels engaged in interstate and foreign commerce. It was held that the lighter was engaged in interstate and foreign commerce and not subject to State regulations.[1]

[1] Foster *v.* Davenport, 22 How. 244 [1859]. *See also* Lord *v.* Goodall, N. & P. S. S. Co., 102 U. S. 541 [1881].

State Registration and Inspection Laws.

Statute requiring vessels leaving a port within the State to file a statement in writing at the office of the probate judge of the county, setting forth the name of the vessel, name of the owners, etc., so far as it was made to apply to vessels engaged in the coasting trade between ports in different States, was held to be in conflict with the act of Congress providing for the enrollment and licensing of vessels engaged in the coasting trade.[1]

[1] Sinnot *v.* Davenport, 22 How. 227 [1859].

The enrollment and licensing of a vessel under the laws of the United States enacted under the power derived from this clause does not of itself exclude the right of a State to exact a license from her own citizens on account of their ownership and use of such property having its situs within the State.[1] When Congress has not occupied the entire field, a State may enforce its own inspection laws to determine the seaworthiness of vessels engaged in interstate or foreign commerce, e. g., motor-driven tugs.[2]

[1] Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365 [1883].
[2] Kelly *v.* Washington ex rel. Foss Co., 302 U. S. 1 [1937].

* *See also* pp. 161, 189, and art. III, sec. 2, Admiralty and Maritime Jurisdiction, and citations thereunder, p. 467.

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Rates for Water Transportation.

The interstate commerce act does not cover rates for water transportation unconnected with transportation by railroad, and a State may regulate the rates which may be charged by a vessel plying between two points within the State though in its journey it passes over the high seas.[1]

[1] Wilmington Transp. Co. *v.* Railroad Commission, 236 U. S. 151 [1915].

State Statutory Liens.

Liens under State statutes enforceable by attachment, in suits *in personam*, may even extend to liens on vessels, when the proceedings to enforce them do not amount to admiralty proceedings *in rem*, and such a proceeding is not such a regulation of commerce among the States as to be invalid.[1] The enforcement of a lien for material furnished for constructing vessel cannot be avoided because the vessel was engaged in interstate commerce.[2]

[1] Johnson *v.* Chicago & P. Elevator Co., 119 U. S. 388, 399 [1886]. *See also* Stewart & Co. *v.* Rivara, 274 U. S. 614 [1927]; Edwards *v.* Elliott 21 Wall. 532 [1874].

[2] Iroquois Transp. Co. *v.* Delaney Forge & Iron Co. (The "Winnebago"), 205 U. S. 354 [1907].

See Martin *v.* West, 222 U. S. 191 [1911], with respect to a statute giving a lien for a nonmaritime tort against a foreign vessel.

Surveys of Vessels.

A statute making it the duty of the masters and wardens of a port within a State to make a survey of the hatches of all seagoing vessels which should arrive at that port and imposing a fee therefor is void as a regulation of commerce.[1]

[1] Foster *v.* New Orleans, 94 U. S. 246 [1877].

NAVIGATION AND NAVIGABLE WATERS *

In General.

In Northern Transp. Co. *v.* Chicago, 99 U. S. 635, 643 [1879], the court said, in reference to the general authority of States over navigable waters: "Navigable waters wholly within a State are not outside of State jurisdiction so long as Congress does not interfere. An abridgment of the rights of those who have been accustomed to use them, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of the State and its citizens, of which this court can take no cognizance."[1]

[1] *See also* Illinois ex rel. Dunne *v.* Economy Light & Power Co., 234 U. S. 497 [1914]; Manigault *v.* Springs, 199 U. S. 473 [1905]; Economy Light & Power Co. *v.* United States, 256 U. S. 113 [1921]; Pollard *v.* Hagan, 3 How. 212 [1845].

* *See also* p. 163.

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A compact between States to keep open the navigation of a river, when sanctioned by Congress, becomes the law of the Union.[1]

[1] Pennsylvania *v.* Wheeling & B. Bridge Co., 13 How. 518, 566 [1852].

The act of Congress admitting California as a State of the Union, which declares "that all the navigable waters within the said State shall be common highways and forever free, as well to the inhabitants of the said State as to citizens of the United States, without any tax, impost, or duty therefor", did not deprive the State of any powers over navigable waters within her limits which the original States possessed over such waters.[1]

[1] Cardwell *v.* American River Bridge Co., 113 U. S. 205, 210 [1885]. *See also* Pollard *v.* Hagan, 3 How. 212 [1845].

Lands Under Navigable Water.

Lands underlying navigable waters within the several States belong to the respective States in virtue of their sovereignty and may be used and disposed of as they may direct, subject always to the rights of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations; and each new State, upon its admission to the Union, becomes endowed with the same rights and powers in this regard as the older ones.[1]

[1] Scott *v.* Lattig, 227 U. S. 229 [1913]. *See also* Illinois C. R. Co. *v.* Illinois, 146 U. S. 387, 435 [1892]; McCready *v.* Virginia, 94 U. S. 391 [1877]; Shively *v.* Bowlby, 152 U. S. 1 [1894]; Donnelly *v.* United States, 228 U. S. 243, 260 ff. [1913]; James *v.* Dravo Contracting Co., 302 U. S. 134 [1937]; Silas Mason Co. *v.* Tax Commission of Washington, 302 U. S. 186 [1937].

Power to Make Improvements and Exact Tolls.

Acts which do not necessarily interfere with the operation of legislation by Congress for the improvement of a navigable stream will not be interfered with by the courts. The improvement of harbors, bays, and navigable rivers within the States falls within the class of cases of a local nature or operation in which the States may adopt regulations in the absence of congressional action,[1] even though they necessarily more or less affect interstate and foreign commerce.[2]

[1] Mobile County *v.* Kimball, 102 U. S. 691, 699 [1881]. *See also* Sands *v.* Manistee River Improv. Co., 123 U. S. 288, 295 [1887]; Monongahela Nav.Co. *v.* United States, 148 U. S. 312, 334 [1893]; Clyde Mallory Lines *v.* Alabama, 296 U. S. 261 [1935].

[2] Ouachita & M. Packet Co. *v.* Aiken, 121 U. S. 447 [1887]. *See also* Green Bay & M. Canal Co. *v.* Patten Paper Co., 172 U. S. 58 [1898]; Huse *v.* Glover, 119 U. S. 543, 548 [1886]; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 214 [1885]; Lindsay & P. Co. *v.* Mullen, 176 U. S. 126, 148 [1900]; Jackson *v.* United States 230 U. S. 1 [1913].

Grant of Exclusive Navigation.

Statutes granting to certain persons for a term of years the exclusive right to navigate boats moved by fire or steam on all the waters

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within the jurisdiction of the State are repugnant to the commerce clause so far as those statutes prohibit vessels licensed under act of Congress for the coasting trade from navigating the said waters by similar means.[1] But a statute of Maine granting the exclusive navigation of the upper Penobscot River (said river being wholly within the State and not navigable for the last 8 miles of its course) for a certain time, on condition that the grantees would improve the navigation of the said upper part, is not unconstitutional.[2]

[1] Gibbons *v.* Ogden, 9 Wheat. 1 [1824].
[2] Veazie *v.* Moor, 14 How. 568 [1853].

Obstructions in Navigable Waters.

Waters navigable within a State and connecting with other navigable waters so as to form a waterway to other States or foreign nations cannot be obstructed or impeded so as to impair, defeat, or place any burden upon a right to their navigation granted by Congress.[1] There is no common law of the United States which prohibits obstructions and nuisances in navigable rivers unless it be by the maritime law, administered by the courts of admiralty and maritime jurisdiction; and in the absence of the exercise of such power by Congress the States may adopt regulations.[2]

[1] Harmon *v.* Chicago, 147 U. S. 396, 411 [1893]. *See also* Pound *v.* Turck, 95 U. S. 459 [1878]; Egan *v.* Hart, 165 U. S. 188 [1897].
[2] Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 8 [1888].

Liability for Marine Torts.

Until Congress makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, a State statute providing "that when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission," applies, and, as thus applied, it constitutes no encroachment upon the commerce power of Congress.[1]

[1] Sherlock *v.* Alling, 93 U. S. 99, 104 [1876]. *See also* Old Dominion S. S. Co. *v.* Gilmore (The "Hamilton"), 207 U. S. 398 [1907].

Rules of Navigation as to Displaying Lights.

In Steamboat "New York" *v.* Rea, 18 How. 223 [1856], the court said that a statute requiring a light to be suspended in the rigging at least 20 feet above deck as a rule of navigation is doubtless binding upon the State courts, but cannot regulate the decisions of the Federal courts administering the general admiralty law. They can be governed only by the principles peculiar to that system, as generally recognized in maritime countries, modified by acts of Congress independently of local legislation.

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Harbor Regulations.

Statute enacting that the master and warden of a port within the State should be entitled to demand and receive, in addition to other fees, the sum of $5 whether called on to perform any service or not, for every vessel arriving in that port is void as a restriction on commerce.[1]

[1] Southern S. S. Co. *v.* Port Wardens, 6 Wall. 31 [1867]. *See also* Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 214 [1885]; Cushing *v.* The "John Fraser," 21 How. 187 [1859].

A State may, by its legislature, or through a board of harbor commissioners, establish, for the protection and benefit of commerce and navigation, harbor lines in navigable waters not inconsistent with any legislation of Congress limiting the building of wharves and other structures.[1]

[1] Prosser *v.* Northern P. R. Co., 152 U. S. 59, 64 [1894]. *See also* Gring *v.* Ives, 222 U. S. 365 [1912]; Philadelphia Co. *v.* Stimson, 223 U. S. 605 [1912].

FOODS AND DRUGS.*

Regulating Net Weight of Retail Packages.

Statute providing that lard compound or substitute, unless sold in bulk, shall be put up in pails or other containers holding 1, 3, or 5 pounds net weight, or some multiple of these numbers, does not violate the commerce clause as to sales by retail. Nor is the statute repugnant to the Pure Food and Drugs Act of Congress.[1]

[1] Armour & Co. *v.* North Dakota, 240 U. S. 510 [1916].

Regulating Size of Food Containers.

Order of State administrative officer prescribing use of "hallocks" of stated dimensions as standard containers for raspberries and strawberries within State held not void as to nonresident manufacturer of different type of containers, as unduly burdening interstate commerce.[1]

[1] Pacific States Box & Basket Co. *v.* White, 296 U. S. 176 [1935].

Citrus fruits.

Statute which makes it unlawful for any one to sell, offer for sale, ship, or deliver for shipment any citrus fruits which are immature or otherwise unfit for consumption is valid.[1]

[1] Sligh *v.* Kirkwood, 237 U. S. 52 [1915].

Flour.

Virginia law requiring inspection before sale of all flour brought into State, but exempting from inspection flour manufactured within State, held unconstitutional as a direct burden upon commerce among the States.[1]

[1] Voight *v.* Wright 141 U. S. 62 [1891].

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* *See also* p. 167.

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Meat.

A Virginia meat-inspection law applicable only to meat products produced 100 miles from place of sale is unconstitutional as a regulation in restraint of interstate commerce.[1]

[1] Brimmer *v.* Rebman, 138 U. S. 78 [1891]. *See also* Hygrade Provision Co. *v.* Sherman, 266 U. S. 497 [1925]; Minnesota *v.* Barber, 136 U. S. 313 [1890].

Concentrated stock feed.

A State statute regulating the sale of concentrated commercial feeding stuff, and which makes reasonable provision for the disclosure of ingredients by certificate and label and for inspection and analysis, is not in conflict with the Pure Food and Drugs Act.[1]

[1] Savage *v.* Jones, 225 U. S. 501 [1912]. *See also* Standard Stock Food Co. *v.* Wright, 225 U. S. 540 [1912].

Cosmetics.

Maine statute providing for the registration of cosmetics as a condition to the sale of cosmetics within the State and the use thereof in beauty and barber shops is not unconstitutional as to a New York manufacturer of cosmetics which are sold in Maine but not by the manufacturer.[1]

[1] Bourjois, Inc., *v.* Chapman, 301 U. S. 183 [1937].

Requiring State brand only.

Statute relating to the sale of certain commodities which provides that they shall bear the label required by the State law and none other is in conflict with the Pure Food Act under which such articles which have moved in interstate commerce shall be and remain branded under the Federal regulations until they reach the consumers.[1]

[1] McDermott *v.* Wisconsin, 228 U. S. 115 [1913].

Oleomargarine.

State laws prohibiting the introduction of oleomargarine within the State condemned.[1]

[1] Schollenberger *v.* Pennsylvania, 171 U. S. 1, 15 [1898]; Plumley *v.* Massachusetts, 155 U. S. 461, 467 [1894]; Collins *v.* New Hampshire. 171 U. S. 30, 33 [1898]. *Cf.* Capital City Dairy Co. *v.* Ohio, 183 U. S. 238, 245 [1902].

Coffee.

State statute prohibiting the manufacture or sale of any adulterated food or drug, or the coloring or coating of food whereby it is made to appear better than it really is, is not, as applied to imported colored coffee, repugnant to the commerce clause, but is an exertion by the State of its reserved police power to legislate for the protection of the health and safety of the community and to provide against deception and fraud.[1]

[1] Crossman *v.* Lurman, 192 U. S. 189, 196 [1904]. *See also* Arbuckle *v.* Blackburn, 113 Fed. 616 [1902], appeal dismissed, 191 U. S. 405 [1903].

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Milk.

Provision of New York Milk Control Act prohibiting dealer from selling, within the State, milk produced without the State where such milk was purchased from producer at less than minimum price fixed for similar milk produced within the State held unconstitutional, as undue burden on interstate commerce, as applied to dealer bringing wholesome milk from Vermont into New York in cans and bottling it in New York for sale to customers.[1]

[1] Baldwin *v.* Seelig, 294 U. S. 511 [1935].

FOREIGN CORPORATIONS.*

The State may exclude a foreign corporation entirely; it may restrict its business to particular localities, or it may exact such security for the performance of its contracts with its citizens as in its judgment will best promote the public interest. The whole matter rests in the discretion of the State.[1] Whilst there are exceptions to this rule, they embrace only cases where a corporation created by one State rests its right to enter another and to engage in business therein upon the Federal nature of its business; as, for instance, where it is necessarily an instrumentality of interstate commerce, or its business constitutes such commerce, and is therefore solely within the paramount authority of Congress. In such case the exceptional business is protected against interference by State authority.[2] The business of insurance is not commerce, and a State may exclude foreign insurance companies or may prescribe the terms and conditions under which they may do business.[3]

[1] Paul *v.* Virginia, 8 Wall. 168, 181 [1869]. *See also* Bank of Augusta *v.* Earle, 13 Pet. 519 [1839]; Hamilton Mfg. Co. *v.* Massachusetts, 6 Wall. 632 [1868]; Ducat *v.* Chicago, 10 Wall 410 [1871]; Philadelphia & R. R. Co. *v.* Pennsylvania (State Tax on Railway Gross Receipts), 15 Wall. 284 [1873]; Union P. R. Co. *v.* Peniston, 18 Wall. 5 [1873]; Minot *v.* Philadelphia W. & B. R. Co. (Delaware Railroad Tax), 18 Wall. 206 [1874]; State Railroad Tax Cases, 92 U. S. 575 [1876]; Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727 [1885]; Philadelphia & S. Mail S. S. Co. *v.* Pennsylvania, 122 U. S. 326 [1887]; California *v.* Central P. R. Co., 127 U. S. 1 [1888]; Home Ins. Co. *v.* New York, 134 U. S. 594 [1890]; Maine *v.* Grand Trunk R. Co., 142 U. S. 217 [1891]; Ashley *v.* Ryan, 153 U. S. 436 [1894]; New York *v.* Roberts, 171 U. S. 658 [1898]; Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28 [1900]; Security Mut. L. Ins. Co. *v.* Prewitt, 202 U. S. 246 [1906].

[2] Hooper *v.* California, 155 U. S. 648, 652 [1895]. *See also* Lafayette Ins. Co. *v.* French, 18 How. 404 [1856]; Ducat *v.* Chicago, 10 Wall. 410 [1871]; Doyle *v.* Continental Ins. Co., 94 U. S. 535 [1877]; Pembina Con. Silver Min. & Mill. Co. *v.* Pennsylvania, 125 U. S. 181, 186 [1888]; Fritts *v.* Palmer, 132 U. S. 282, 288 [1889]; Furst *v.* Brewster, 282 U. S. 493 [1931].

[3] Paul *v.* Virginia, 8 Wall. 168 [1869]. *See also* Liverpool & L. Life F. Ins. Co. *v.* Oliver, 10 Wall. 566 [1871]; Fire Assn. of Philadelphia *v.* New York, 119 U. S. 110 [1886]; Hooper *v.* California, 155 U. S. 648, 655 [1895]; Noble *v.* Mitchell, 164 U. S. 367 [1896]; Allgeyer *v.* Louisiana, 165 U. S. 578 [1897]; New York L. Ins. Co. *v.* Cravens, 178 U. S. 389 [1900]; Nutting *v.* Massachusetts, 183 U. S. 553, 556 [1902]; Hartford F. Ins. Co. *v.*

* *See also* pp. 135, 959, 989.

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Perkins, 125 Fed. 502 [1903], appeal dismissed 196 U. S. 643 [1905]; Security Mut. L. Ins. Co. *v.* Prewitt, 202 U. S. 246 [1906]; National Union F. Ins. Co. *v.* Wanberg, 260 U. S. 71 [1922]; Bothwell *v.* Buckbee-Mears Co., 275 U. S. 274 [1927].

The imposition of a State tax as a condition of admitting an interstate corporation to do business within the State, based upon the amount of its authorized capital stock, and of a franchise tax based upon capital, surplus, and undivided profits, constitutes an unlawful burden on interstate commerce;[1] so also, a statute requiring the corporation to file a certificate or statement with State officer.[2]

[1] Western U. Teleg. Co. *v.* Kansas, 216 U. S. 1 [1910]. *See also* Looney *v.* Crane Co., 245 U. S. 178 [1917]; International Paper Co. *v.* Massachusetts, 246 U. S. 135 [1918].

[2] International Text-Book Co. *v.* Pigg, 217 U. S. 91 [1910]. *See also* Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727 [1885]; Buck's Stove & Range Co. *v.* Vickers, 226 U. S. 205 [1912]; Crutcher *v.* Kentucky, 141 U. S. 47, 57 [1891[. *Cf.* Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611 [1903].

A State may restrict the right of a foreign corporation to engage in business within its limits or to sue in its courts so long as interstate commerce be not thereby burdened.[1] A statute, e. g., which prohibits action in the State courts on any contract in the State unless the corporation shall have appointed a resident agent upon whom process may be served in any action to which it may be a party, is invalid as to the right of a foreign corporation to sue in the State courts on a cause of action arising out of an interstate transaction.[2] But service of process upon a local agent of the corporation does not burden interstate commerce.[3] There is nothing in the commerce clause conferring immunity from giving information appropriate to a legislative or judicial inquiry.[4]

[1] Interstate Amusement Co. *v.* Albert, 239 U. S. 560 [1916].

[2] Sioux Remedy Co. *v.* Cope, 235 U. S. 197 [1914].

[3] International Harvester Co. *v.* Kentucky, 234 U. S. 579 [1914]. *See also* York Mfg. Co. *v.* Colley, 247 U. S. 21 [1918].

[4] Natural Gas Pipeline Co. *v.* Slattery, 302 U. S. 300 [1937].

A foreign railroad corporation which is not authorized to do business within the State, and does not own or operate any of its lines within the State, although it owns some property there and employs agents who solicit traffic, held not subject to the jurisdiction of a court of that State in a suit in damages for personal injuries under the Federal Employers' Liability Act, brought by a resident upon a cause of action which arose in another State when he was residing there, as otherwise an undue burden upon interstate commerce would result.[1]

[1] Denver & R. G. W. R. Co. *v.* Terte, 284 U. S. 284 [1932]. *See also* Michigan C. R. Co. *v.* Mix, 278 U. S. 492 [1929]; Atchison, T. & S. F. R. Co. *v.* Wells, 265 U. S. 101 [1924]; Davis *v.* Farmers' Co-op. Equity Co., 262 U. S. 312 [1923].

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A State in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws may impose such conditions as it deems proper, and the charge of a fee, based on the percentage of the entire capital stock, does not constitute a tax upon interstate commerce or the right to carry on the same or the instruments thereof.[1]

[1] Ashley *v.* Ryan, 153 U. S. 436 443 [1894].

OTHER SUBJECTS OF REGULATION.

Manufacture, sale, and delivery of goods.*

The legislature of a State has the power in many cases to determine as a matter of State policy whether to permit the manufacture and sale of articles within the State or entirely to forbid such manufacture and sale, so long as the legislation is confined to the manufacture and sale within the State.[1] Thus, a statute (in the absence of Federal legislation) regulating consignment and sale of farm produce on commission and requiring commission merchants to furnish bond, was upheld as applied to a merchant located and operating within the State, although he sold produce forwarded to him from outside State.[2] An Ohio statute prohibiting sale on open market of convict-made goods from other States was held valid in view of the State prohibition against sale and the Federal act subjecting convict-made goods to the law of any State to which transported.[3]

[1] Schollenberger *v.* Pennsylvania, 171 U. S. 1 [1898].

[2] Hartford Acci. & Indemnity Co. *v.* Illinois, 298 U. S. 155 [1936]. *Cf.* Real Silk Hosiery Mills *v.* Portland, 268 U. S. 325 [1925].

[3] Whitfield *v.* Ohio, 297 U. S. 431 [1936]. *See also* Alabama *v.* Arizona, 291 U. S. 286 [1934].

Banks and banking.

A State statute which forbids individuals or partnerships to engage in the banking business without a license is not, as to one whose business chiefly consists in receiving deposits for periodic shipment to other States and to foreign countries, invalid as a regulation of interstate and foreign commerce.[1]

[1] Engel *v.* O'Malley, 219 U. S. 128 [1911].

Securities.

A statute which requires dealers in securities evidencing title or interest in property to obtain a license from a State officer, is not invalid as applied to dispositions within the State of securities transported from other States.[1]

[1] Merrick *v.* Halsey & Co., 242 U. S. 568 [1917]. *See also* Hall *v.* Geiger-Jones Co., 242 U. S. 539 [1917]; Caldwell *v.* Sioux Falls Stockyards Co., 242 U. S. 559 [1917].

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* *See also* p. 139.

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Usury.

The Federal courts, in dealing with the question of usury, must look to the laws of the State where the transaction took place and follow the construction put upon such laws by the State courts; but this rule is not applicable to cases arising out of interstate commerce where the policy to be enforced is Federal.[1]

[1] Missouri, K. & T. Trust Co. *v.* Krumseig, 172 U. S. 351 [1899].

Ferries.

The police power of the State includes the establishment of ferries as well as the construction of roads and bridges.[1] The right to establish and regulate ferries is part of that mass of legislation which embraces everything within the territory of a State not surrendered to the General Government.[2]

[1] Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 215 [1885]. *See also* Vidalia *v.* McNeely, 274 U. S. 676 [1927]; Helson *v.* Kentucky, 279 U. S. 245 [1929].

[2] Conway *v.* Taylor, 1 Black 603 [1862]. *See also* Fanning *v.* Gregoire, 16 How. 524 [1854]; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365 [1883]; Sault Ste. Marie *v.* International Transit Co., 234 U. S. 333 [1914].

Conceding, *arguendo*, that the police power extends to the establishment, regulation, and licensing of ferries on a navigable stream which is the boundary between two States, none of the cases justifies the proposition that the power embraces such transportation which does not constitute a ferry in a strict technical sense.[1] In the case of a ferry between two States, not operated in connection with railroads and not a part of continuous transportation, each State has the power to regulate the ferriage charges from its own shore.[2] But the inclusion of interstate railroad ferries in the Interstate Commerce Act prevents the operation of an ordinance regulating fares on such ferries even as applicable to persons other than railroad passengers.[3]

[1] St. Clair County *v.* Interstate Sand & Car Transfer Co., 192 U. S. 454 [1904].

[2] Port Richmond & B. P. Ferry *v.* Hudson County, 234 U. S. 317 [1914].

[3] New York C. & H. R. R. Co. *v.* Hudson County, 227 U. S. 248 [1913].

Wharves, Piers, and Docks.

A State has authority to construct piers, etc., on navigable rivers within the State in the absence of controlling legislation by Congress.[1]

[1] Pound *v.* Turck, 95 U. S. 459, 464 [1878]. *See also* Parkersburg & O. River Transp. Co. *v.* Parkersburg, 107 U. S. 691 [1883]; The "James Gray" (Cushing) *v.* The "John Fraser," 21 How. 184 [1859].

Ordinance regulating the use of wharves in a town and forbidding the landing of vessels, except by permission of a wharfmaster at any point within the town other than between certain designated streets, if it be a regulation of commerce is one which belongs to that class of rules which like pilotage can be most wisely exercised by local authority and is valid until Congress assumes to establish regulations.[1]

[1] Cincinnati, P. B. S. & P. Packet Co. *v.* Catlettsburg, 105 U. S. 559 [1882].

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In the absence of congressional legislation, wharfage is governed by the local State law. By the State law it is generally required to be reasonable, and by that law its reasonableness must be judged.[1] A municipal corporation having by the law of its organization an exclusive right to construct wharves, collect wharfage, and regulate wharfage rates, cannot consistently with the Constitution charge and collect wharfage proportionate to the tonnage of the vessel from the owners of enrolled and licensed steamboats mooring and landing at the wharves constructed on the banks of a navigable river.[2]

[1] Ouachita & M. River Packet Co. *v.* Aiken, 121 U. S. 444, 448 [1887]. *See also* Northwestern Union Packet Co. *v.* St. Louis, 100 U. S. 423, 427 [1880].

[2] Keokuk Northern Line Packet Co. *v.* Keokuk, 95 U. S. 80 [1877].

Bridges.

Bridges over navigable streams which are entirely within the limits of a State are of the class of subjects on which the power of the State may be exercised as local in their nature and operation.[1] International character does not of itself divest State of power over its part of structure in silence of Congress.[2] But ordering the raising of railroad bridges to specified heights and the removal of other bridges over navigable waters and across which interstate commerce passes is a direct interference with such commerce.[3] A State has not the power to regulate tolls upon a bridge connecting it with another State.[4]

[1] Escanaba & L. M. Transp. Co. *v.* Chicago, 107 U. S. 678, 687 [1883]. *See also* Cardwell *v.* American River Bridge Co., 113 U. S. 205 [1885].

[2] International Bridge Co. *v.* New York, 254 U. S. 126 [1920].

[3] Kansas City Southern R. Co. *v.* Kaw Valley, 233 U. S. 75 [1914].

[4] Covington & C. Bridge Co. *v.* Kentucky, 154 U. S. 204 [1894].

Pilots and Pilotage.*

The regulation of pilots and pilotage is not a subject which is national in its nature, admitting only of one uniform system or plan of regulation, and the States may act in the absence of congressional legislation.[1]

[1] Cooley *v.* Board of Port Wardens, 12 How. 299, 319 [1851]. *See also* Gibbons *v.* Ogden, 9 Wheat. 1 [1824]; Pacific Mail S. S. Co. *v.* Joliffe, 2 Wall. 450, 459 [1865]; Southern S. S. Co. *v.* Masters & Wardens of Port of New Orleans, 6 Wall. 31, 34 [1867]; Ex parte McNeil, 13 Wall. 236, 242 [1872]; Wilson *v.* McNamee, 102 U. S. 572 [1881]; Spraigue *v.* Thompson, 118 U. S. 90, 93 [1886]; Olsen *v.* Smith, 195 U. S. 332, 341 [1904]; Thompson *v.* Darden, 198 U. S. 310, 315 [1905]; Anderson *v.* Pacific Coast S. S. Co., 225 U. S. 187 [1912].

Dams and Booms.

Statute authorizing the erection of dams and booms held valid.[1]

[1] Pound *v.* Turck, 95 U. S. 459, 460 [1878]. *See also* Wilson *v.* Black Bird Creek Marsh Co., 2 Pet. 245, 250 [1829]; Lindsay & P. Co. *v.* Mullen, 176 U. S. 126, 145 [1900]. As to controlling authority of acts of Congress prohibiting obstructions to navigable streams, *see* North Shore Boom & D. Co. *v.* Nicomen Boom Co., 212 U. S. 406, 466 [1909]; United States *v.* Bellingham Bay Boom Co., 176 U. S. 211 [1900].

**See also* pp. 170, 470.

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Canals.

A license taken out under an act of Congress to prosecute the coasting trade conveys no privilege to use, free of tolls or of any conditions whatsoever, the canals constructed by a State and made practicable for navigation by the funds of the State.[1]

[1] Veazie v. Moor, 14 How. 568 [1853].

Riparian Water Rights.

Statute declaring that "it shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches, or canals, the waters of any fresh-water lake, pond, brook, creek, river, or stream of this State into any other State for use therein" does not impair any right of such owner to use such waters in interstate commerce as to one who has entered into a contract to carry such water into another State, as a person cannot acquire a right to property by his desire to use it in interstate commerce.[1]

[1] Hudson County Water Co. v. McCarter, 209 U. S. 349 [1908].

Warehouses and Elevators.

A State statute which fixes the maximum of charges for the storage of grain, at places in the State having not less than 100,000 inhabitants, in warehouses "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such manner that the identity of different lots or parcels cannot be accurately preserved", is not invalid as a regulation of commerce. The warehouses are situated and their business carried on exclusively within the limits of the State. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction.[1] Similarly, a general State statute regulating the business and charges of public warehousemen engaged in elevating and storing grain for profit does not amount to a regulation of commerce.[2]

[1] Munn v. Illinois, 94 U. S. 113, 135 [1877].

[2] Brass v. North Dakota ex rel. Stoeser, 153 U. S. 391, 405 [1894]. *See also* Budd v. New York, 143 U. S. 517 [1892]; Merchants Exchange v. Missouri ex rel. Barker, 248 U. S. 365 [1919].

Livestock.

A State law regulating the interstate and local business of stockyards companies was held not to constitute an interference with interstate commerce, in the absence of congressional action; but was held invalid on the ground that it denied to the company the equal protection guaranteed by the Fourteenth Amendment.[1]

[1] Cotting v. Godard, 183 U. S. 79, 110 [1901].

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To prevent the spread of an infectious disease, a State, if not prevented by action of Congress, may require that cattle shall not be imported for dairy or breeding purposes unless accompanied by the certificate of the proper sanitary official of the State of origin certifying that the animals to be brought in, and also the herds from which they come, are free from disease. The Federal Cattle Contagious Disease Act applying only to shipments from quarantined districts established by the Secretary of Agriculture, does not conflict with the State inspection measure here in question as applied to shipments not made from such district.[1]

[1] Mintz *v.* Baldwin, 289 U. S. 346 [1933]. *See also* Kimmish *v.* Ball, 129 U. S. 217 [1889]; Reid *v.* Colorado, 187 U. S. 137 [1902]; Asbell *v.* Kansas, 209 U. S. 251 [1908].

Fish and Game laws.

A State statute for the protection of fisheries [1] (including oyster fisheries [2]) within the territorial jurisdiction of the State is valid. A State has power to make it an offense to have in possession, for the purpose of transportation beyond the State, birds which have been lawfully killed within the State during the open season.[3]

[1] Manchester *v.* Massachusetts, 139 U. S. 240 [1891].

[2] Smith *v.* Maryland, 18 How. 71 [1855]. *See also* Lee *v.* New Jersey, 207 U. S. 67 [1907]; McCready *v.* Virginia, 94 U. S. 391 [1877]; Foster-Fountain Packing Co. *v.* Haydel, 278 U. S. 1 [1928]; Bayside Fish Flour Co. *v.* Gentry, 297 U. S. 422 [1936]; Leonard *v.* Earle, 279 U. S. 392 [1929].

[3] Geer *v.* Connecticut, 161 U. S. 519 [1896]. *See also* New York ex rel. Silz *v.* Hesterberg, 211 U. S. 31 [1908]; Lacoste *v.* Department of Conservation, 263 U. S. 545 [1924]. *Cf.* Missouri *v.* Holland, 252 U. S. 416 [1920].

Natural Gas.

The transmission and sale of natural gas, produced in one State and transported and furnished directly to consumers in a city of another State by means of pipe lines from the source of supply, is interstate commerce; but, in the absence of any contrary regulation by Congress, is subject to local regulation and rates.[1]

[1] Pennsylvania Gas Co. *v.* Public Service Commission, 252 U. S. 23 [1920]. *Cf.* Public Utilities Commission *v.* Landon, 249 U. S. 236 [1919]; Missouri ex rel. Barrett *v.* Kansas Natural Gas Co., 265 U. S. 298 [1924]. *See also* East Ohio Gas Co. *v.* Tax Commission, 283 U. S. 465 [1931]; State Tax Comm. (Mississippi) *v.* Interstate Natural Gas Co., 284 U. S. 41 [1931]; Western Distributing Co. *v.* (Kansas) Public Service Comm., 285 U. S. 119 [1932]; Southern Nat. Gas Co. *v.* Alabama, 301 U. S. 148 [1937].

A State wherein natural gas is produced and is a recognized subject of commercial dealings may not require of those producing and transporting it that, in its sale and disposal, consumers in that State shall be accorded a preferred right of purchase over consumers in other States, when the requirement necessarily will operate to

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withdraw a large volume of the gas from an established interstate current whereby it is supplied in other States, to consumers there.[1]

[1] Pennsylvania v. West Virginia, 262 U. S. 553 [1923]. *Cf.* Champlin Ref. Co. v. (Oklahoma) Corp. Comm., 286 U. S. 210 [1932].

Where a pipe line is used to distribute both gas that is brought in from without the State and gas that is produced and used within the State, and the two are commingled, but their proportionate quantities are known, an order by the State commission directing the gas company to continue supplying gas from the line to a certain community does not burden interstate commerce.[1] A State statute prohibiting transportation of natural gas by foreign corporations, held invalid as an interference with interstate commerce.[2]

[1] Peoples Natural Gas Co. v. Public Service Commission 270 U. S. 550 [1926].

[2] West v. Kansas Natural Gas Co., 221 U. S. 229 [1911]; Haskell v. Kansas Natural Gas Co., 224 U. S. 217 [1912]. *See also* State Corp. Comm. (Kansas) v. Wichita Gas Co., 290 U. S. 561 [1934].

Electricity.

An order by a State commission fixing rates on electric current generated within the States and sold to a distributor in another State, held invalid, as imposing a burden on interstate commerce, although the regulation of such rates would necessarily benefit local consumers of electricity furnished by the same company.[1]

[1] Public Utilities Commission v. Attleboro Steam and Electric Co., 273 U. S. 83 [1927].

Power to Exclude Certain Classes of Persons.

The police power of a State justifies the adoption of precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime, or pauperism, or disturbances of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics and persons likely to become a public charge, as well as persons afflicted with contagious or infectious diseases.[1]

[1] Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 471 [1878]. *See also* New York v. Miln, 11 Pet. 102 142, [1837]; Henderson v. New York, 92 U. S. 259 [1876]; Chy Lung v. Freeman, 92 U. S. 275, 277 [1876].

The power over slavery was considered by a majority of the court to belong to the States, though the point was not necessary to a decision of the case. The subject was local in its character and in its effect, and the transfer and sale of slaves interstate could not be separated from this power. The court said: "Each State has a right to protect itself against the avarice and intrusion of the slave dealer; to guard its citizens against the inconveniences and dangers of a slave population. The right to exercise this power, by a State, is higher and deeper than the Constitution. The evil involves the prosperity, and may endanger the existence of a State. Its power to

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guard against, or to remedy the evil, rests upon the law of self-preservation; a law vital to every community, and especially to a sovereign State." [1]

[1] Groves *v.* Slaughter, 15 Pet. 449, 508 [1841].

Forms of Commercial Contracts.

A State may prescribe the forms of all commercial contracts, as well as the terms and conditions upon which the internal trade of the State may be carried on.[1]

[1] Covington & C. Bridge Co. *v.* Kentucky, 154 U. S. 204 [1894].

While any restriction as to the evidence of a contract relating to interstate commerce may be said to be a limitation on the contract itself, yet this remote effect, resulting from the lawful exercise by a State of its power to determine the form in which contracts may be proved, does not amount to a regulation of interstate commerce.[1]

[1] Richmond & A. R. Co. *v.* Patterson Tob. Co., 169 U. S. 311 [1898].

Censorship of Motion-Picture Films.*

Statute creating a board of censors of motion-picture films and making it the duty of the board to examine and censor films to be publicly exhibited in the State, including those brought from other States, is valid.[1]

[1] Mutual Film Co. *v.* (Ohio) Industrial Comm., 236 U. S. 230 [1915].

Intoxicating Liquors.†

The respective States have plenary power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such regulations depends solely on the judgment of the law-making power of the States, provided always, they do not transcend the limits of State authority by invading rights which are secured by the Constitution of the United States, and provided further, that the regulations as adopted do not operate as discriminations against the rights of residents or citizens of other States in the Union.[1]

[1] Vance *v.* Vandercook, 170 U. S. 438, 444 [1898]. *See also* Bartmeyer *v.* Iowa, 18 Wall. 129 [1874]; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25 [1878]; Mugler *v.* Kansas, 123 U. S. 623 [1887]; Foster *v.* Kansas, ex rel. Johnston, 112 U. S. 201 [1884]; Bowman *v.* Chicago & N. W. R. Co., 125 U. S. 465 [1888]; Kidd *v.* Pearson, 128 U. S. 1 [1888]; Leisy *v.* Hardin, 135 U. S. 100 [1890]; Wilkerson *v.* Rahrer (In re Rahrer), 140 U. S. 545, 563 [1891]; American Exp. Co. *v.* Iowa, 196 U. S. 133 [1904]; Delamater *v.* South Dakota, 205 U. S. 93 [1907]; Adams Exp. Co. *v.* Kentucky, 206 U. S. 129 [1907]; Adams Exp. Co. *v.* Kentucky, 214 U. S. 218 [1909]; Adams Exp. Co. *v.* Kentucky, 238 U. S. 190 [1915].

Under section 2 of the Twenty-first Amendment which provides: "The transportation or importation into any State, Territory, or

* *See also* pp. 167, 851.

† *See also* pp. 168, 850, 976.

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possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited", a State may exact a license fee for the privilege of importing beer from other States. Such a tax does not violate the commerce clause by discriminating in favor of the wholesaler of beer locally brewed, both paying the same wholesaler's tax.[1]

[1] State Board of Equalization of California *v.* Young's Market Co., 299 U. S. 59 [1936].

Cigarettes.

A State statute making it a misdemeanor for any person, firm, or corporation to bring cigarettes into the State, for the purpose of selling same, is not an infringement upon the exclusive power of Congress to regulate interstate commerce, when it operates only on sales not by the owner in the original packages.[1]

[1] Austin *v.* Tennessee, 179 U. S. 343 [1900]. *See also* Packer Corp. *v.* Utah, 285 U. S. 105 [1932].

State Taxation.*

IN GENERAL.

No State has the right to lay a tax on interstate or foreign commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and demands a regulation of it, which belongs solely to Congress.[1]

[1] Leloup *v.* Mobile, 127 U. S. 640 [1888], overruling Osborne *v.* Mobile, 16 Wall. 479 [1873]. *See also* State Freight Tax Case (Philadelphia & R. R. Co. *v.* Penn.) 15 Wall 232 [1873]; Western U. Teleg. Co. *v.* Texas, 105 U. S. 460 [1882]; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196 [1885]; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34 [1886]; Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489 [1887]; Fargo *v.* Stevens (Michigan), 121 U. S. 230 [1887]; Philadelphia and S. Mail S. S. Co. *v.* Pennsylvania, 122 U. S. 326 [1887]; Asher *v.* Texas, 128 U. S. 129 [1888]; Lyng *v.* Michigan, 135 U. S. 161 [1890]; Crutcher *v.* Kentucky, 141 U. S. 47 [1891]; Adams Express Co. *v.* Ohio, 165 U. S. 194 [1897]; Adams Express Co. (Barrett) *v.* New York, 232 U. S. 14 [1914]; Union P. R. Co. *v.* Public Service Commission, 248 U. S. 67 [1918]; Bowman *v.* Continental Oil Co., 256 U. S. 642 [1921]; Pullman Co. *v.* Richardson, 261 U. S. 330 [1923]; Ozark Pipe Line Corp. *v.* Monier, 266 U. S. 555 [1925]; Sprout *v.* South Bend, 277 U. S. 163 [1928]; New Jersey Bell Teleph. Co. *v.* State Bd. of Taxes & Assessments, 280 U. S. 338 [1930]; Anglo-Chilean Nitrate Sales Corp. *v.* Alabama, 288 U. S. 218 [1933]; Cooney *v.* Mountain States Teleph. & Teleg. Co., 294 U. S. 384 [1935]; James *v.* Dravo Contracting Co., 302 U. S. 134 [1937].

But there is no question that a State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce, provided it is levied solely because of the former, that the

* *See also* pp. 342, 361, 366, 531, 854, 981.

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amount exacted is not increased because of the interstate business done, and that one engaged exclusively in interstate commerce would not be subject to the tax.[1]

[1] Cooney *v.* Mountain States Teleph. & Teleg. Co., 294 U. S. 384 [1935]. *See also* Ratterman *v.* Western U. Teleg. Co., 127 U. S. 411 [1888]; Pacific Express Co. *v.* Seibert, 142 U. S. 339 [1892]; Horn Silver Min. Co. *v.* New York, 143 U. S. 305 [1892]; Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192 [1892]; Postal Teleg. Cable Co. *v.* Charleston, 153 U. S. 692 [1894]; New York ex rel. Parke, D. & Co. *v.* Roberts, 171 U. S. 658 [1898]; Pullman Co. *v.* Adams, 189 U. S. 420 [1903]; Allen *v.* Pullman's Palace Car Co., 191 U. S. 171 [1903]; Kehrer *v.* Stewart, 197 U. S. 60 [1905]; Williams *v.* Talladega, 226 U. S. 404 [1912]; Ohio Tax Cases, 232 U. S. 576 [1914]; St. Louis S. W. R. Co. *v.* Arkansas ex rel. Norwood, 235 U. S. 350 [1914]; New York ex rel. Cornell S. B. Co. *v.* Sohmer, 235 U. S. 549 [1915]; Watters *v.* Michigan, 248 U. S. 65 [1918]; Postal Teleg. Cable Co. *v.* Richmond, 249 U. S. 252 [1919]; Postal Teleg. Cable Co. *v.* Fremont, 255 U. S. 124 [1921]; Raley & Bros. *v.* Richardson, 264 U. S. 157 [1924]; International Shoe Co. *v.* Shartel, 279 U. S. 429 [1929]; Western Cartridge Co. *v.* Emmerson, 281 U. S. 511 [1930]; East Ohio Gas Co. *v.* Tax Commission, 283 U. S. 465 [1931]; Pacific Teleph. & Teleg. Co. *v.* Tax Commission of Washington, 297 U. S. 403 [1936].

It has been held in some cases that a privilege tax on a carrier doing both an interstate and intrastate business is valid when it is shown that the one taxed was free to abandon the intrastate business.[1] In another line of cases, this power of the states thus to control intrastate commerce seemingly was qualified when taxes on foreign corporations for the privilege of doing local business were held invalid as burdens on their interstate business.[2] However, more recently, the court said, "No decision of this Court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable." [3]

[1] Osborne *v.* Florida, 164 U. S. 650 [1897]; Pullman Co. *v.* Adams, 189 U. S. 420 [1903]; Allen *v.* Pullman's Palace Car Co., 191 U. S. 171 [1903].

[2] Western Union Teleg. Co. *v.* Kansas ex rel. Coleman, 216 U. S. 1 [1910]; Pullman Co. *v.* Kansas ex rel. Coleman, 216 U. S. 56 [1910]; Sprout *v.* South Bend, 277 U. S. 163 [1928]; East Ohio Gas Co. *v.* Tax Comm., 283 U. S. 465 [1931]; Cooney *v.* Mountain States Teleph. & Teleg. Co., 294 U. S. 384 [1935].

[3] Pacific Teleph. & Teleg. Co. *v.* Tax Commission of Washington, 297 U. S. 403, 415 [1936].

Under the Twenty-first Amendment, a State may exact a license fee for the privilege of importing beer from other States, and such a tax does not violate the commerce clause. Prior to adoption of the amendment, it would have been clearly unconstitutional.[1]

[1] State Bd. of Equalization *v.* Young's Market Co., 299 U. S. 59 [1936]

DISTINCTION BETWEEN INTERSTATE AND INTRASTATE COMMERCE.

The distinction between an interference and noninterference with interstate commerce is sometimes close,[1] and the court has found it

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necessary to distinguish its holding in the case at bar from that in a prior case.[2]

[1] General Railway Signal Co. v. Virginia ex rel. State Corp. Comm., 246 U. S. 500 [1918].

[2] Utah Power & Light Co. v. Pfost, 286 U. S. 165 [1932].

There are set out below the brief facts in a number of cases which are classified according to the holding of the court. It should be noted, however, that the list is not complete. It does not include those discussed later under separate titles.

Commerce Clause Violated.

Under the following facts, the court found an unconstitutional interference with interstate commerce, and held the tax law void:

(1) Tax on maintenance of office in Pennsylvania for use of stockholders, officers, employees, and agents of railroad not operating in Pennsylvania but a link in a line operating therein.[1]

(2) License tax on sale of liquor as applied to a sale out of State by mail.[2]

(3) License tax on wagons and drivers of express company engaged in interstate commerce.[3]

(4) Privilege tax on delivery of oil by foreign corporation on orders obtained by traveling salesmen, delivery being made by filling barrels from tank car which had already made one stop in the State for a similar purpose.[4]

(5) Tax on pipe lines transporting oil or gas produced in State but which might pass out of State.[5]

(6) Tax on gas pipe line whose only activity in State was the use of a thermometer and reduction of pressure to permit a vendee to draw off gas.[6]

(7) Gross income tax on radio broadcasting company.[7]

(8) Franchise tax on foreign corporation landing, storing, and selling in original package goods imported from abroad.[8]

(9) Tax on stevedoring company measured by a percentage of gross receipts from business of loading and discharge of cargoes.[9]

[1] Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114 [1890].

[2] Heyman v. Hays, 236 U. S. 178 [1915].

[3] Barrett v. New York, 232 U. S. 14 [1914].

[4] Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346 [1917].

[5] Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265 [1921]; United Fuel Gas Co. v. Hallanan, 257 U. S. 277 [1921].

[6] State Tax Commission v. Interstate Natural Gas Co., 284 U. S. 41 [1931]. But *see* East Ohio Gas Co. v. Tax Commission, 283 U. S. 465 [1931].

[7] Fisher's Blend Station, Inc. v. State Tax Comm., 297 U. S. 650 [1936].

[8] Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218 [1933].

[9] Puget Sound Stevedoring Co. v. Tax Commission of Washington, 302 U. S. 90 [1937]

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Commerce Clause Not Violated.

Under the following facts, the court found no unconstitutional interference with interstate commerce, and held the tax law valid:

(1) Annual tax on money and exchange brokers whose sole business is buying and selling foreign bills of exchange.[1]

(2) License fee as applied to a Colorado copper company maintaining office in Pennsylvania for use of stockholders, officers, agents, and employees when no movement of goods in interstate commerce involved.[2]

(3) Property or other tax on interstate bridge companies including intangible elements going to make up value of the franchise.[3]

(4) Tax on business involving movement from one State through another and back to first.[4]

(5) License tax on elevator company handling grain destined for interstate commerce.[5]

(6) License tax on cab service maintained at terminal by interstate carrier.[6]

(7) Privilege tax on local agency handling goods shipped to it without previous orders.[7]

(8) Stock transfer tax on sale by nonresident of certificate of stock.[8]

(9) Property tax on cash on hand and accounts receivable derived from sale of imported goods.[9]

(10) License tax on dealers in cotton futures contracts which do not oblige interstate shipments, even where delivery is actually made through interstate transportation.[10]

(11) Tax on sales of futures.[11]

(12) Tax on sales by local agent for undisclosed out-of-State principal.[12]

(13) Tax on ownership of stock in foreign corporation.[13]

(14) License tax on commercial credit agency furnishing information on persons within and persons without the State.[14]

(15) Tax on insurance companies.[15]

(16) License tax for erecting lightning rods as applied to erection of rods brought in from another State.[16]

(17) Special license tax where trading stamps given.[17]

(18) License tax on dealers in securities, applicable even though securities come in from other States.[18]

(19) License tax on installing safety signal systems on railroads as applied to a foreign corporation.[19]

(20) License tax on manufacturer based on amount of sales.[20]

(21) Property tax by Ohio on seat on New York Stock Exchange.[21]

(22) Occupation tax for mining ore destined largely for interstate commerce.[22]

(23) Tax on hides of wild animals and alligators, intended for interstate shipment.[23]

(24) Tax on production of gas for shipment in interstate commerce.[24]

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(25) License tax on oyster packers, payment to be in money or oyster shells equal to 10 percent of total shucked, including those brought from other States.[25]

(26) Tax on production of electricity for transmission in interstate commerce.[26]

(27) Occupation tax on business of buying and selling cotton locally produced, processed, and warehoused, but which ultimately is shipped in interstate or foreign commerce.[27]

(28) Tax on foreign holding company with principal office in State but no property other than personalty.[28]

(29) Franchise tax as applied to foreign corporation transmitting gas from outside and through the State but also making delivery to purchasers within the State.[29]

(30) Occupation tax on business of hiring laborers to be employed beyond limits of the State.[30]

(31) Tax on stevedoring company measured by a percentage of gross receipts from business of supplying longshoremen to shipowners or masters without directing or controlling the work of loading or unloading.[31]

(32) An entrance fee for a foreign corporation measured solely by the amount of its authorized capital stock (amounting to $5,000 for corporations with a capitalization of $90,000,000).[32]

[1] Nathan v. Louisiana, 8 How. 73 [1850].

[2] Pembina Consol. Silver Min. and Mill. Co. v. Pennsylvania, 125 U. S. 181 [1888].

[3] Henderson Bridge Co. v. Henderson, 141 U. S. 679 [1891], 173 U. S. 592 [1899]; Henderson Bridge Co. v. Kentucky, 166 U. S. 150 [1897]; Keokuk and H. Bridge Co. v. Illinois, 175 U. S. 626 [1900]; Detroit International Bridge Co. v. Corp. Tax App. Bd., 294 U. S. 83 [1935].

[4] Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192 [1892]; Ewing v. Leavenworth, 226 U. S. 464 [1913]; New York ex rel. Cornell S. B. Co. v. Sohmer, 235 U. S. 549 [1915].

[5] Cargill Co. v. Minnesota ex rel. R. R. & W. Comm., 180 U. S. 452 [1901].

[6] New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21 [1904].

[7] Kehrer v. Stewart, 197 U. S. 60 [1905]; Armour Packing Co. v. Lacy, 200 U. S. 226 [1906].

[8] New York ex rel. Hatch v. Reardon, 204 U. S. 152 [1907].

[9] New York ex rel. Burke v. Wells, 208 U. S. 14 [1908].

[10] Ware v. Mobile County, 209 U. S. 405 [1908].

[11] Broadnax v. Missouri, 219 U. S. 285 [1911].

[12] Banker Bros. Co. v. Pennsylvania, 222 U. S. 210 [1911].

[13] Darnell v. Indiana, 226 U. S. 390 [1912].

[14] United States Fidelity & G. Co. v. Kentucky, 231 U. S. 394 [1913].

[15] New York L. Ins. Co. v. Deer Lodge County, 231 U. S. 495 [1914]; Northwestern Mut. L. Ins. Co. v. Wisconsin, 247 U. S. 132 [1918].

[16] Browning v. Waycross, 233 U. S. 16 [1914].

[17] Rast v. Van Deman & Lewis Co., 240 U. S. 342 [1916]; Tanner v. Little, 240 U. S. 369 [1916]; Pitney v. Washington, 240 U. S. 387 [1916].

[18] Hall v. Geiger-Jones Co., 242 U. S. 539 [1917].

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[19] General Railway Signal Co. v. Virginia ex rel. State Corp. Comm., 246 U. S. 500 [1918].
[20] American Mfg. Co. v. St. Louis, 250 U. S. 459 [1919].
[21] Citizens Nat. Bank v. Durr, 257 U. S. 99 [1921].
[22] Oliver Iron Min. Co. v. Lord, 262 U. S. 172 [1923].
[23] Lacoste v. Dept. of Conservation, 263 U. S. 545 [1924].
[24] Hope Natural Gas Co. v. Hall, 274 U. S. 284 [1927].
[25] Leonard v. Earle, 279 U. S. 392 [1929].
[26] Utah Power & Light Co. v. Pfost, 286 U. S. 165 [1932].
[27] Chassaniol v. Greenwood, 291 U. S. 584 [1934].
[28] Atlantic Lumber Co. v. Commissioner of Corporations & Taxation of Massachusetts, 298 U. S. 553 [1936].
[29] Southern Natural Gas Corp. v. Alabama, 301 U. S. 148 [1937].
[30] Williams v. Fears, 179 U. S. 270 [1900].
[31] Puget Sound Stevedoring Co. v. Tax Commission of Washington, 302 U. S. 90 [1937].
[32] Atlantic Refining Co. v. Virginia, 302 U. S. 22 [1937].

DISCRIMINATION.

A property tax on lumber which discriminates in favor of locally produced lumber is invalid.[1] It is also improper for a State to require a license applicable only to sale of goods manufactured outside the State even though they are to be sold in intrastate commerce,[2] or to allow a rebate under conditions which can be met only by a manufacturer within the State.[3] However, a tax has been upheld which was measured by purchases but from which manufacturing corporations taxed on their capital were exempt.[4]

[1] Darnell (I. M.) & Son Co. v. Memphis. 208 U. S. 113 [1908].
[2] Ward v. Maryland, 12 Wall. 418 [1871]; Cook v. Pennsylvania, 97 U. S. 566 [1878]; Tiernan v. Rinker, 102 U. S. 123 [1880]; Welton v. Missouri, 91 U. S. 275 [1876]; Webber v. Virginia, 103 U. S. 344 [1881]; Walling v. Michigan, 116 U. S. 446 [1886].
[3] Bethlehem Motors Corp. v. Flynt, 256 U. S. 421 [1921].
[4] Armour & Co. v. Virginia, 246 U. S. 1 [1918].

PRIVILEGE TAXES, ETC.

Peddlers, Soliciting Agents, etc.

It is not unlawful for a State to levy a nondiscriminatory license tax on one peddling, within the State, sewing machines manufactured outside the State, when he maintains a warehouse or store within the State,[1] or carries a machine with him for sale.[2] Neither is it unlawful to subject a representative of a manufacturer in another State, to a peddler's tax when he uses a vehicle in the taxing State for the purpose of selling his product from the vehicle.[3] It has also been held that a percentage tax on commissions earned by commercial agents (brokers) all or most of whose business was done with nonresidents, was not unconstitutional.[4]

[1] Howe Mach. Co. v. Gage, 100 U. S. 676 [1880]; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304 [1914].
[2] Emert v. Missouri, 156 U. S. 296 [1895].
[3] Reyman Brewing Co. v. Brister, 179 U. S. 445 [1900]; Wagner v. Covington, 251 U. S. 95 [1919].
[4] Ficklen v. Taxing Dist. of Shelby County, 145 U. S. 1 [1892].

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It is unlawful for a State to require a license for an agent soliciting orders for goods to be shipped from outside the State, when solicitation is with or without sample [1] and even though the goods ordered, pictures and frames in this case, were to be assembled in the State,[2] or sent subject to rejection if not satisfactory,[3] or delivered by express C. O. D.[4] or when the solicitor receives his compensation in form of down payment by the purchaser.[5]

[1] Robbins v. Taxing Dist. of Shelby County, 120 U. S. 489 [1888]; Corson v. Maryland, 120 U. S. 502 [1887]; Asher v. Texas, 128 U. S. 129 [1888]; Stoutenburgh v. Hennick, 129 U. S. 141 [1889]; Brennan v. Titusville, 153 U. S. 289 [1894]; Stockard v. Morgan, 185 U. S. 27 [1902]; Crenshaw v. Arkansas, 227 U. S. 389 [1913]; Stewart v. Michigan, 232 U. S. 665 [1914].

[2] Caldwell v. North Carolina, 187 U. S. 622 [1903].

[3] Rearick v. Pennsylvania, 203 U. S. 507 [1906]; Dozier v. Alabama, 218 U. S. 124 [1910]; Davis v. Virginia, 236 U. S. 697 [1915].

[4] Norfolk & W. R. Co. v. Sims, 191 U. S. 441 [1903].

[5] Real Silk Hosiery Mills v. Portland, 268 U. S. 325 [1925].

Sales in original package.*

A State license tax for sale of goods without regard to their origin is not unconstitutional when applied to sales within the State in an original package shipped from another State and stored by the dealer as part of his stock in trade.[1] However, where the goods are imported from a foreign country, a license tax for their sale is unconstitutional.[2]

[1] Thurlow v. Massachusetts (License Cases), 5 How. 504 [1847]; Woodruff v. Parham, 8 Wall. 123 [1869]; Hinson v. Lott, 8 Wall. 148 [1869]; American Steel & Wire Co. v. Speed, 192 U. S. 500 [1904]; Sonneborn Bros. v. Keeling, 262 U. S. 506 [1923], qualifying or overruling Standard Oil Co. v. Graves, 249 U. S. 389 [1919]; Askren v. Continental Oil Co., 252 U. S. 444 [1920]; Bowman v. Continental Oil Co., 256 U. S. 642 [1921]; Texas Co. v. Brown, 258 U. S. 466 [1922]; Wiloil Corp. v. Pennsylvania, 294 U. S. 169 [1935].

[2] Brown v. Maryland, 12 Wheat. 419 [1827]; Cook v. Pennsylvania, 97 U. S. 566 [1878]; Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218 [1933].

"Use" Tax.

A statute taxing the use of chattels within a State is not unconstitutional as a violation of the commerce clause as applied to chattels purchased in another State, the tax being a supplement to, and at the same rate as, a tax on the retail sale of similar chattels within the State (but exempting those chattels already taxed on their sale within the State or any other State). The tax was found to be not upon the operations of interstate commerce, but upon the privilege or use after the commerce was at an end, and not so measured or conditioned as to hamper interstate transactions.[1]

[1] Henneford v. Silas Mason Co., 300 U. S 577 [1937].

* *See also* pp. 146, 362.

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Sale, Use, or Storage of Gasoline.

When gasoline is brought into a State, and comes to rest therein, the State has authority to tax the product or its storage or sale.[1] Thus, it is lawful to apply a use tax to imported gasoline withdrawn from storage to fill tanks of airplanes in interstate commerce [2] or for moving interstate trains,[3] and a State may require an importing distributor to report his importations, account for the taxes, and pass on the burden to consumers.[4] But gasoline purchased in Illinois and used in an Illinois-Kentucky ferry, cannot be taxed by Kentucky.[5] Similarly, where the courts of a State have determined that a gasoline tax is an excise upon general use in the State, rather than use of the roads, it is unconstitutional to apply the tax to gasoline brought into the State in the tanks of an interstate motor carrier doing no intrastate business.[6]

[1] Gregg Dyeing Co. *v.* Query, 286 U. S. 472 [1932].

[2] Eastern Air Transport, Inc. *v.* South Carolina Tax Commission, 285 U. S. 147 [1932]; Edelman *v.* Boeing Air Transport, Inc., 289 U. S. 249 [1933].

[3] Nashville, C. & St. L. R. Co. *v.* Wallace, 288 U. S. 249 [1933].

[4] Monamotor Oil Co. *v.* Johnson, 292 U. S. 86 [1934].

[5] Helson *v.* Kentucky, 279 U. S. 245 [1929].

[6] Bingaman *v.* Golden Eagle Western Lines, Inc., 297 U. S. 626 [1936].

Motor Vehicles.*

Registration may be required by a State for out-of-State vehicles operated therein,[1] or passing through from one State to another.[2] And a special fee may be exacted for the privilege of transporting motor vehicles on their own wheels in caravans,[3] unless excessive.[4] Taxes may also be imposed on carriers based on capacity [5] or mileage,[6] or as a flat fee,[7] but a privilege tax on motor buses operated exclusively in interstate commerce cannot be sustained unless it appears affirmatively that it is levied only as compensation for use of the highways in the State or to defray the expense of regulating motor traffic.[8]

[1] Hendrick *v.* Maryland, 235 U. S. 610 [1915].

[2] Kane *v.* New Jersey, 242 U. S. 160 [1916].

[3] Morf *v.* Bingaman, 298 U. S. 407 [1936].

[4] Ingels *v* Morf, 300 U. S. 290 [1937].

[5] Clark *v.* Poor, 274 U. S. 554 [1927]; Hicklin *v.* Coney, 290 U. S. 169 [1933].

[6] Interstate Busses Corp. *v.* Blodgett, 276 U. S. 245 [1928]; Continental Baking Co. *v.* Woodring, 286 U. S. 352 [1932].

[7] Aero Mayflower Transit Co. *v.* Georgia Pub. Serv. Commission, 295 U. S. 285 [1935].

[8] Interstate Transit *v.* Lindsey, 283 U. S. 183 [1931]. Cf. Sprout *v.* South Bend, 277 U. S. 163 [1928].

Vessels.†

A city may not require a license for the privilege of exercising a license granted by the United States for the coasting trade,[1] nor for the operation of an interstate ferry,[2] nor an international ferry;[3] nor

* *See also* pp. 187, 790, 818, 851, 979, 994.

† *See also* pp. 161, 189.

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may a city exact, for the use of public wharves, a fee applicable only to vessels not carrying products of the taxing State.[4]

[1] Moran v. New Orleans, 112 U. S. 69 [1884]; Harmon v. Chicago, 147 U. S. 396 [1893].

[2] Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 [1885]; Vidalia v McNeely, 274 U. S. 676 [1927].

[3] Sault Ste. Marie v. International Transit Co., 234 U. S. 333 [1914].

[4] Guy v. Baltimore, 100 U. S. 434 [1880].

Railroad and Steamship Agencies.

A license imposed by California on an agent soliciting business—but not selling tickets—for a railroad operating between Chicago and New York, is unconstitutional.[1] It is also unlawful for a State to exact a license fee from a steamship agent who acts for owners of vessels engaged exclusively in interstate and foreign commerce,[2] or who sells only foreign tickets.[3]

[1] McCall v. California, 136 U. S. 104 [1890].

[2] Texas Transport. & Terminal Co. v. New Orleans, 264 U. S. 150 [1924].

[3] Di Santo v. Pennsylvania, 273 U. S. 34 [1927].

Passengers in Interstate or Foreign Commerce.*

A tax on each passenger coming on a vessel from a foreign country,[1] even though levied in aid of an inspection law,[2] is void. Likewise, a tax on steamship companies for each passenger brought into the country by them[3] or a tax on railroad and stage companies for passengers carried out of or through the State by them, is void.[4]

[1] Smith v. Turner (Passenger Cases), 7 How. 283 [1849].

[2] New York v. Compagnie Générale Transatlantique, 107 U. S. 59 [1883].

[3] Henderson v. New York, 92 U. S. 259 [1876]; Chy Lung v. Freeman, 92 U. S. 275 [1876].

[4] Crandall v. Nevada, 6 Wall. 35 [1868].

Inspection Charges.

Charges for inspection and regulation may be imposed on telegraph companies,[1] and likewise charges may be imposed for use of the street for poles and wires,[2] but the charges must be reasonable.[3] A State fee of one-tenth of 1 percent on the gross operating revenues of utilities, the proceeds to be used for inspection and regulation, is not unconstitutional on its face as to an interstate railroad, but the burden is on the State to prove that the sums exacted did not exceed what was reasonably needed for the service rendered.[4]

[1] Western U. Teleg. Co. v. New Hope, 187 U. S. 419 [1903]; Atlantic and P. Teleg. Co. v. Philadelphia, 190 U. S. 160 [1903].

**See also* pp. 164, 246.

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[2] St. Louis v. Western U. Teleg. Co., 148 U. S. 92 [1893]; Western U. Teleg. Co. v. Richmond, 224 U. S. 160 [1912]; Postal Teleg. Cable Co. v. Richmond, 249 U. S. 252 [1919].

[3] Postal Teleg. Cable Co. v. New Hope, 192 U. S. 55 [1904]; Postal Teleg. Cable Co. v. Taylor, 192 U. S. 64 [1904].

[4] Great Northern R. Co. v. Washington, 300 U. S. 154, 162 [1937].

An inspection fee as applied to oysters including those brought from other States, only one-third of the fee being used to pay the cost of inspection, is valid.[1] But an inspection fee applicable to petroleum products in interstate and intrastate commerce is void when it exceeds the legitimate cost of inspection if it is not so separable that the excess may properly be assigned to intrastate commerce alone.[2] It should be noted, however, that a fee similar to that last mentioned which exceeded the cost of inspection by 25 percent, without a charge for overhead was upheld.[3]

[1] Foote & Co. v. Stanley, 232 U. S. 494 [1914].

[2] Phipps v. Cleveland Ref. Co., 261 U. S. 449 [1923].

[3] Pure Oil Co. v. Minnesota, 248 U. S. 158 [1918].

An inspection fee with respect to persons entering the country by vessel is void.[1]

[1] New York v. Compagnie Générale Transatlantique, 107 U. S. 59 [1883].

TAXES MEASURED BY CAPITAL STOCK, GROSS RECEIPTS, OR NET INCOME.

Capital Stock.

States may tax a corporation or its property by reference to its capital stock.[1] And in the case of domestic corporations, the entire capital stock may be used as a basis even though it stands for property itself beyond the taxing power of the State, so long as it is not shown in fact to affect interstate commerce adversely.[2]

[1] Taylor v. Secor (State Railroad Tax Cases), 92 U. S. 575 [1876].

[2] Kansas City, F. S. & M. R. Co. v. Botkin, 240 U. S. 227 [1916]; Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111 [1916].

But the entire capital stock cannot be used as the basis for a tax on a foreign corporation whether a carrier[1] or mercantile corporation,[2] and the fact that the tax is small or restricted by a maximum limit does not relieve it of its unconstitutional character.[3] However where an apportionment of the total capital employed is made on the basis of business done within the State (or of the mileage or properte held, etc.), the tax may be upheld,[4] unless the corporation is engagey exclusively in interstate commerce,[5] or it appears that the valud allotted on a mileage basis, in case of a railroad, is indefensible because the cost of construction per mile was much less within than without the taxing State, and that the large and valuable terminals are elsewhere.[6] A privilege tax on foreign corporations based on a proportion of authorized non-par-value stock represented by business

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in the State, is unconstitutional as applied to a corporation doing an interstate business, all of whose authorized stock has not been issued.[7]

[1] Western U. Teleg. Co. *v.* Kansas ex rel. Coleman, 216 U. S. 1 [1910]; Pullman Co. *v.* Kansas ex rel. Coleman, 216 U. S. 56 [1910]; Ludwig *v.* Western U. Teleg. Co., 216 U. S. 146 [1910]; Atchison, T. & S. F. R. Co. *v.* O'Connor, 223 U. S. 280 [1912].

[2] Looney *v.* Crane Co., 245 U. S. 178 [1917]; International Paper Co. *v.* Massachusetts, 246 U. S. 135 [1918]; Union P. R. Co. *v.* Public Service Commission, 248 U. S. 67 [1918]; Air-way Electric Appliance Corp. *v.* Day, 266 U. S. 71 [1924].

[3] Cudahy Packing Co. *v.* Hinkle, 278 U. S. 460 [1929]. Cf. Baltic Min. Co. *v.* Massachusetts, 231 U. S. 68 [1914]; Cheney Bros. Co. *v.* Massachusetts, 246 U. S. 147 [1918]; General Railway Signal Co. *v.* Virginia, 246 U. S. 500 [1918], upholding a tax where the statute prescribed a maximum or the rate was found not arbitrary or unreasonable.

[4] Minot *v.* Philadelphia, W. & B. R. Co. (Delaware Railroad Tax), 18 Wall. 206 [1874]; Western U. Teleg. Co. *v.* Attorney General, 125 U. S. 530 [1888]; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18 [1891]; Attorney General *v.* Western U. Teleg. Co., 141 U. S. 40 [1891]; Western U. Teleg. Co. *v.* Taggart, 163 U. S. 1 [1896]; New York ex rel. Parke, D. & Co. *v.* Roberts, 171 U. S. 658 [1898]; St. Louis, S. W. R. Co. *v.* Arkansas ex rel. Norwood, 235 U. S. 350 [1914]; Lusk *v.* Botkin, 240 U. S. 236 [1916]; St. Louis-San Francisco R. Co. *v.* Middlekamp, 256 U. S. 226 [1921]; Hump Hairpin Mfg. Co. *v.* Emmerson, 258 U. S. 290 [1922]; Southern R. Co. *v.* Watts, 260 U. S. 519 [1923]; Schwab *v.* Richardson, 263 U. S. 88 [1923]; Southern Natural Gas Corp. *v.* Alabama, 301 U. S. 148 [1937].

[5] Ozark Pipe Line Corp. *v.* Monier, 266 U. S. 555 [1925].

[6] Wallace *v.* Hines, 253 U. S. 66 [1920].

[7] Air-way Electric Appliance Corp. *v.* Day, 266 U. S. 71 [1924].

Gross Receipts.

A direct tax on gross receipts derived from interstate commerce is void.[1] So, too, is a privilege tax on a wholesale business, domestic and foreign, measured by a percentage of the entire business transaction.[2] But a tax on the occupation or on the property and measured by intrastate receipts,[3] or by a proportional part of total receipts allocated after considering mileage within the State,[4] is valid. A tax on property measured by gross receipts, including receipts from intrastate commerce and that part from interstate commerce which took place in the State, is valid in absence of a showing that it is not in excess of what would be a fair tax on the property, valued as a going concern.[5] It is also proper for a State to impose taxes on tolls paid by one railroad to another for use of the latter's right-of-way, notwithstanding the fact that the former was engaged in interstate commerce.[6]

[1] Fargo *v.* Stevens, 121 U. S. 230 [1887]; Philadelphia & S. Mail S. S. Co. *v.* Pennsylvania, 122 U. S. 326 [1887], qualifying Philadelphia & R. R. Co. *v.* Pennsylvania (State Tax on Railway Gross Receipts), 15 Wall. 284 [1873]; Ratterman *v.* Western U. Teleg. Co., 127 U. S. 411 [1888]; Western U. Teleg. Co. *v.* Seay, 132 U. S. 472 [1889]; Galveston, H. & S. A. R. Co. *v.* Texas, 210 U. S. 217 [1908]; Meyer *v.* Wells, Fargo & Co., 223 U. S. 298 [1912]; New Jersey Bell Teleph. Co. *v.* State Bd. of Taxes and Assessments,

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280 U. S. 338 [1930]; Fisher's Blend Station, Inc. v. State Tax Commission, 297 U. S. 650 [1936]. *Cf.* Baltimore & O. R. Co. v. Maryland, 21 Wall. 456 [1875], under which the State authorized construction of a railroad between Baltimore and Washington, fixed the rate of fare, and exacted one-fifth thereof as a tax.

[2] Crew-Levick Co. v. Pennsylvania, 245 U. S. 292 [1917].

[3] Ratterman v. Western U. Teleg. Co., 127 U. S. 411 [1888]; Western U. Teleg. Co. v. Seay, 132 U. S. 472 [1889]; United States Exp. Co. v. Minnesota, 223 U. S. 335 [1912]; Ohio Tax Cases, 232 U. S. 576 [1914]; New York ex. rel. Cornell S. B. Co. v. Sohmer, 235 U. S. 549 [1915].

[4] Maine v. Grand Trunk R. Co., 142 U. S. 217 [1891]; Wisconsin & M. R. Co. v. Powers, 191 U. S. 379 [1903].

[5] Pullman Co. v. Richardson, 261 U. S. 330 [1923]; Great Northern R. Co. v. Minnesota, 278 U. S. 503 [1929].

[6] New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431 [1895].

Net Income.

A tax upon net income, or measured by net income is not to be deemed an interference with interstate commerce merely because the income is derived from a source in another State.[1] In fact, a State may impose such a tax on a domestic corporation where the income is derived from intrastate, interstate, and foreign business so long as there is no discrimination against the interstate or foreign income.[2]

[1] Colgate v. Harvey, 296 U. S. 404 [1935]; Shaffer v. Carter, 252 U. S. 37 [1920]; Matson Navigation Co. v. State Board, 297 U. S. 441 [1936].

[2] United States Glue Co. v. Oak Creek, 247 U. S. 321 [1918]; Atlantic Coast Line R. Co. v. Daughton, 262 U. S. 413 [1923]; Matson Navigation Co. v. State Board, 297 U. S. 441 [1936].

In the case of a foreign corporation the State may impose a tax computed on a portion of net income determined by the proportion of its property within the State,[1] but where a basis of allocation attributes to the State an amount of income out of all proportion to the business there transacted, it is void.[2]

[1] Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 [1920]; Bass, Ratcliff & Cretton v. State Tax Commission, 266 U. S. 271 [1924].

[2] Hans Rees' Sons v. North Carolina ex rel. Maxwell, 283 U. S. 123 [1931].

PROPERTY TAXES.

In General.

Property having its situs within the taxing State is not exempt from a nondiscriminatory property tax merely because it is used in interstate commerce.[1] The tax may apply to the entire rolling stock of a domestic corporation not shown to be permanently out of the State.[2] And the right of a State to tax such property applies to intangibles as well as tangibles.[3] The entire property both within and without the State may be valued as a whole and a proportion of the whole, fairly ascertained, may be taxed by the particular State,[4] and where the property continually changes, the tax may be fixed by an appraisement and valuation of the average amount of the property habitually used or employed.[5] But it is unlawful in computing the

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value of the physical assets of an interstate carrier to include those not used in business.[6] It is also improper to include the value of a franchise granted by the United States.[7]

[1] Marye *v.* Baltimore & O. R. Co., 127 U. S. 117, 123 [1888]; Postal Teleg. Cable Co. *v.* Adams, 155 U. S. 688 [1895]; Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194 [1897]; United States Exp. Co. *v.* Minnesota, 223 U. S. 335 [1912]; Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450 [1918]; Wells, Fargo & Co. *v.* Nevada, 248 U. S. 165 [1918]; General American Tank Car Corp. *v.* Day, 270 U. S. 367 [1926]; St. Louis & S. W. R. Co. *v.* Nattin, 277 U. S. 157 [1928].

[2] New York ex rel. New York C. & H. R. R. Co. *v.* Miller, 202 U. S. 584 [1906].

[3] Adams Exp. Co. *v.* Ohio State Auditor, 166 U. S. 185 [1897]; Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450 [1918]; Wells, Fargo & Co., *v.* Nevada, 248 U. S. 165 [1918]; St. Louis & E. St. L. Electric R. Co. *v.* Missouri ex rel. Hagerman, 256 U. S. 314 [1921]; Virginia *v.* Imperial Coal Sales Co., 293 U. S. 15 [1934].

[4] Cleveland, C. C. & St. L. R. Co. *v.* Backus, 154 U. S. 439 [1894]; Western U. Teleg. Co. *v.* Taggart, 163 U. S. 1 [1896]; Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194 [1897]; Adams Exp. Co. *v.* Kentucky, 166 U. S. 171 [1897]; Union Refrigerator Transit Co. *v.* Lynch, 177 U. S. 149 [1900].

[5] American Refrigerator Transit Co. *v.* Hall, 174 U. S. 70 [1899]; Union Refrigerator Transit Co. *v.* Lynch, 177 U. S. 149 [1900]; General American Tank Car Corp. *v.* Day, 270 U. S. 367 [1926].

[6] Fargo *v.* Hart, 193 U. S 490 [1904].

[7] California *v.* Central P. R. Co., 127 U. S. 1 [1888].

Goods in Transit.

The States may not tax property in transit in interstate commerce.[1] But a nondiscriminatory tax is permitted if the goods have not yet started in interstate commerce,[2] or have completed the interstate transit even though still in the original package,[3] unless they be foreign imports in the original package.[4] States may also impose a nondiscriminatory tax when there is a break in an interstate transit, and the goods have not been restored to the current of interstate commerce.[5]

[1] Coe *v.* Errol, 116 U. S. 517 [1886]; Kelley *v.* Rhoads, 188 U. S. 1 [1903]; Champlain Realty Co. *v.* Brattleboro, 260 U. S. 366 [1922]; Hughes Bros. Timber Co. *v.* Minnesota, 272 U. S. 469 [1926]; Carson Petroleum Co. *v.* Vial, 279 U. S. 95 [1929].

[2] Coe *v.* Errol, 116 U. S. 517 [1886]; Diamond Match Co. *v.* Ontonagon, 188 U. S. 82 [1903]; Heisler *v.* Thomas Colliery Co., 260 U. S. 245 [1922].

[3] Pittsburgh & S. Coal Co. *v.* Bates, 156 U. S. 577 [1895]; American Steel & Wire Co. *v.* Speed, 192 U. S. 500 [1904]; Texas Co. *v.* Brown, 258 U. S. 466 [1922]; Wiloil Corp. *v.* Pennsylvania, 294 U. S. 169 [1935].

[4] Low *v.* Austin, 13 Wall. 29 [1872]; May (F.) & Co. *v.* New Orleans, 178 U. S. 496 [1900].

[5] Brown *v.* Houston, 114 U. S. 622 [1885]; Coe *v.* Errol, 116 U. S. 517 [1886]; General Oil Co. *v.* Crain, 209 U. S. 211 [1908]; Bacon *v.* Illinois, 227 U. S. 504 [1913]; Susquehanna Coal Co. *v.* South Amboy, 228 U. S. 665 [1913]; Minnesota *v.* Blasius, 290 U. S. 1 [1933]; Federal Compress & Warehouse Co. *v.* McLean, 291 U. S. 17 [1934].

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Vessels.

The general rule as to vessels plying between ports of different States and engaged in the coastwise trade, is that the domicile of the owner is the situs of the vessel for the purposes of taxation.[1] A State may not tax merely because the vessel is enrolled therein,[2] or touches at its ports,[3] unless, even though engaged in interstate commerce, it has acquired an actual situs therein.[4]

[1] Ayer & L. Tie Co. *v.* Kentucky, 202 U. S. 409 [1906]—vessel enrolled in Kentucky, touching at its ports, but owned by an Illinois corporation held not taxable in Kentucky. Cf. Wheeling, P. & C. Transp. Co. *v.* Wheeling, 99 U. S. 273 [1879]—vessel enrolled in West Virginia at domicile of owner but operating between West Virginia and Ohio, held taxable in West Virginia; St. Louis *v.* Wiggins Ferry Co., 11 Wall. 423 [1871]—vessel enrolled in Missouri, but owned by an Illinois corporation, held not taxable in Missouri, notwithstanding the corporation had its office there and the vessel operated between Illinois and Missouri—length of stops in Missouri being limited to 10 minutes each.

[2] St. Louis *v.* Wiggins Ferry Co., 11 Wall. 423 [1871]; Ayer & L. Tie Co. *v.* Kentucky, 202 U. S. 409 [1906].

[3] Hays *v.* Pacific Mail S. S. Co., 17 How. 596 [1855]—vessel enrolled in New York at domicile of owner but operating between Panama and California held not taxable in California; Morgan *v.* Parham, 16 Wall. 471 [1873]—vessel enrolled in New York at domicile of owner, operating between Alabama and Louisiana, held not taxable by Alabama.

[4] Old Dominion S. S. Co. *v.* Virginia, 198 U. S. 299 [1905]—vessel enrolled in New York at domicile of owner, but operating wholly in Virginia, held taxable in Virginia.

Regulation of Commerce with the Indian Tribes.

This clause does not constitute a basis for the enactment of a system of criminal laws for Indians living in their reservations without reference to their relation to any kind of commerce.[1] Their relation to the United States resembles that of a ward to his guardian.[2]

[1] United States *v.* Kagama, 118 U. S. 375, 384 [1886]—wherein the Court said, referring to the Indian tribes: "From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognised by the Executive and by Congress, and by this Court, whenever the question has arisen. * * * The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

[2] Cherokee Nation *v.* Georgia, 5 Pet. 1 [1831]. *See also* Worcester *v.* Georgia, 6 Pet. 515 [1832]. It may be noted that in both of these cases the constitutional authority of the United States to deal with Indians had been found in the commerce and treaty-making powers.

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Commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments as individuals, and so commerce with the Indian tribes means commerce with the individuals composing those tribes.[1] The power of Congress over commerce between a State and the Indian Territory is not less than its power over commerce among the States.[2]

[1] United States *v.* Holliday, 3 Wall. 407, 417 [1866]. *See also* Cherokee Nation *v.* Georgia, 5 Pet. 1, 18 [1831].

[2] Hanley *v.* Kansas City Southern R. Co., 187 U. S. 617, 619 [1903].

The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situate, and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and whether within or without the limits of a State, does not admit of any doubt. It arises in part from this clause, and in part from the recognized relation of tribal Indians to the Federal Government.[1]

[1] Perrin *v.* United States, 232 U. S. 478 [1914]. *See also* Johnson *v.* Gearlds, 234 U. S. 422 [1914]; Dick *v.* United States, 208 U. S. 340 [1908]; United States *v.* Lariviere, 93 U. S. 188 [1876]; United States *v.* Lariviere, 103 U. S. 491, 496 [1883]; United States *v.* Holliday, 3 Wall. 407, 415 [1866].

Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection. Though an Indian may be a citizen, Congress may make it an offense to sell intoxicating liquors to him while he remains a member of a tribe and under the charge of an Indian agent, and while the United States still holds in trust the title to land which has been allotted to him.[1] Congress can prohibit the introduction of intoxicating liquors into land occupied by a tribe of uncivilized Indians notwithstanding they are within territory admitted to statehood.[2]

[1] United States *v.* Nice, 241 U. S. 591 [1916], overruling Re Heff 197 U. S. 488, 509 [1905].

[2] United States *v.* Sandoval, 231 U. S. 28 [1914].

No State can, either by its constitution or other legislation, withdraw the Indians within its limits from the operation of the laws of Congress regulating trade with them, notwithstanding any rights it may confer on them as electors or citizens.[1]

[1] United States *v.* Holliday, 3 Wall. 407, 419 [1866]. *Cf.* New York ex rel. Cutler *v.* Dibble, 21 How. 366 [1859].

When a new State is admitted into the Union, Congress may, in the enabling act, reserve authority to legislate in the future respecting the Indians residing within the new State, and may declare that an

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existing act of Congress relating to traffic and intercourse with the Indian tribes shall remain in force.[1]

[1] Ex parte Webb, 225 U. S. 663 [1912].

The Congress shall have Power * * * To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

Article I. Sec. 8. Powers of Congress. Cl. 4. Naturalization and Bankruptcies.

Naturalization.

DEFINITION.

Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen.[1]

[1] Boyd v. Nebraska ex rel. Thayer, 143 U. S. 135, 162 [1892].

PROOF OF NATURALIZATION.

The condition of alienage cannot be put off at the will of the alien without the action or assent of the United States; where an Indian had separated himself from his tribe and surrendered to the jurisdiction of the United States, he still was held not a citizen because he failed to show acceptance of such surrender by the United States.[1] In the absence of proof that an alien has become a citizen of the United States, his original status is presumed to continue.[2]

[1] Elk v. Wilkins, 112 U. S. 94 [1884].
[2] Hauenstein v. Lynham, 100 U. S. 483, 484 [1880].

EFFECT OF NATURALIZATION.

A person by naturalization "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native." These rights are not acquired by virtue of the act of Congress but are extended to him by the Constitution itself.[1] He is distinguishable from a native citizen only so far as the Constitution makes a distinction. Constitutional distinctions include article I, section 2 (requiring length of citizenship as qualification for members of Congress) and article II, section 1 (restricting the Presidency to native-born citizens).[2]

[1] Osborn v. Bank of United States, 9 Wheat. 738, 827 [1824].
[2] Elk v. Wilkins, 112 U. S. 94, 101 [1884]; Luria v. United States, 231 U. S. 9 [1914].

Naturalization has a retroactive effect and removes all liability to forfeiture of land held while an alien, and where an alien takes by grant or by location of public lands, his subsequent naturalization relates back and obviates every consequence of his alien disability.[1]

[1] Osterman v. Baldwin, 6 Wall. 116, 122 [1867]; Manuel v. Wulff, 152 U. S. 505, 511 [1894]; Doe ex dem. Governeur's Heirs v. Robertson, 11 Wheat. 332 350 [1826].

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POWER OF CONGRESS OVER NATURALIZATION.

The simple power of the National legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.[1] The power of Congress does not extend to enlarging or abridging the rights of naturalized citizens,[2] and *a fortiori* cannot affect citizenship acquired as a birthright.[3]

[1] Osborn *v.* Bank of United States, 9 Wheat, 738, 827 [1824].
[2] Osborn *v.* Bank of United States, 9 Wheat, 738, 827 [1824].
[3] United States *v.* Wong Kim Ark, 169 U. S. 649, 703 [1898].

The power of naturalization is exclusively in Congress and has always been held by the Supreme Court to be so. It is not in the power of a State to denationalize a foreign subject who has not complied with the Federal naturalization laws and constitute him a citizen of the United States, or of a State, so as to deprive the Federal courts of jurisdiction over a controversy between him and a citizen of a State, conferred upon them by article III, section 2, of the Constitution.[1] But a State may confer upon aliens privileges which it confers upon citizens.[2]

[1] Chirac *v.* Chirac, 2 Wheat 259, 269 [1817]; Scott *v.* Sandford, 19 How. 393, 405 [1857].
[2] Lanz *v.* Randall, 4 Dill. (U. S.) 425 [1876]. For further cases on the subject of State power in the matter of naturalization, *see* Minneapolis *v.* Reum, 56 Fed. 576 [1893]; United States *v.* Rhodes, 27 Fed. Cas. No. 16151 [1866]; United States *v.* Villato, 2 Dall. 370 [1797]; Lynch *v.* Clarke, 1 Sandf. Ch. 646 [1844]; Mayer *v.* United States, 38 Ct. Cl. 553 [1903]; Matthew *v.* Rae, 16 Fed. Cas. No. 9284 [1829].

UNIFORMITY.

When a naturalization law is made by its terms applicable alike to all the States of the Union, without distinction or discrimination, it cannot be successfully questioned on the ground that it is not uniform, in the sense of the Constitution, merely because its operation or working may be wholly different in the various States.[1]

[1] Darling *v.* Berry, 13 Fed. 659 [1882].

COLLECTIVE NATURALIZATION.

While Congress has, under this clause, enacted general laws under which individuals may be naturalized, there are numerous instances of collective naturalization by treaty or statute.[1] While the transfer of territory involves a change of allegiance of its inhabitants, they may,[2] but do not necessarily,[3] become citizens of their new country.

[1] Boyd *v.* Nebraska ex rel. Thayer, 143 U. S. 135, 162 [1892] (where are cited several examples of Indian treaties—e. g.: 5 Stat. 349, ch. 83; 5 Stat. 647, ch. 101; 7 Stat. 335; 7 Stat. 483; 24 Stat. 388); Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99 [1830] (treaty with England of 1783); Gonzales *v.* Williams, 192 U. S. 1 [1904] (treaty with Mexico of 1842).
[2] Osterman *v.* Baldwin, 6 Wall. 116 [1867] (Texas).
[3] Contzen *v.* United States, 179 U. S. 191 [1900] (Puerto Rico).

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WHO MAY BE NATURALIZED.

Naturalization is a privilege to be given, qualified, or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms which Congress imposes.[1] It is not to be supposed that acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy.[2]

[1] United States v. Macintosh, 283 U. S. 605, 615 [1931].
[2] Terrace v. Thompson, 263 U. S. 197, 220 [1923].

The Constitution does not limit the power of Congress in this respect to white persons. It may, if it thinks proper, authorize the naturalization of any one, of any color, who was born under allegiance to another Government; but the power to establish rules of naturalization is, "by the well-understood meaning of the word, confined to persons born in a foreign country, under a foreign government."[1] In substantial conformity to this principle has been the practice above noted with respect to the Indians, who were considered as not subject to the jurisdiction of the United States and therefore capable of being naturalized like the subjects of a foreign government.*

[1] Scott v. Sandford, 19 How. 393, 417, 419 [1857].

The very first naturalization act of March 26, 1790 (1 Stat. 103), limited the right "to aliens being free white persons." This restriction was carried in successive acts (adding, in 1870, persons of African nativity and descent) and was construed as limiting the naturalization act of 1906; the expression "free white person" was held to refer to persons belonging to what is popularly known as the Caucasian race, and therefore that a Japanese cannot be naturalized—being clearly not a Caucasian.[1] But a high-caste Hindu, although a Caucasian, was held ineligible.[2]

[1] Ozawa v. United States, 260 U. S. 178 [1922]; Yamashita v. Hinkle, 260 U. S. 199 [1922]; Toyota v. United States, 268 U. S. 402 [1925].
[2] United States v. Bhagat Singh Thind, 261 U. S. 204 [1923].

So, the requirement of an oath of allegiance by the applicant has been upheld, and naturalization refused to a Socialist,[1] a pacifist,[2] and one who qualified his support by asserting his right to judge of the morality and necessity of war.[3]

[1] Ex parte Sauer, 81 Fed. 355 [1891].
[2] United States v. Schwimmer, 279 U. S. 644 [1929].
[3] United States v. Macintosh, 283 U. S. 605 [1931].

NATURALIZATION PROCEDURE.

The function of admitting to citizenship has from the beginning been conferred exclusively upon courts.[1] Congress having by virtue of the present clause enacted a naturalization law, there is a statutory right in the alien to submit his petition, and the act of passing upon that application is an exercise of judicial judgment. The pro-

* Not until 1924 were Indians as a race declared citizens (43 Stat. 253).

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ceeding is a "case" within article III, section 2, and subject to review by a Circuit Court of Appeals.[2]

[1] Campbell *v.* Gordon, 6 Cr. 176, 182 [1810]; Stark *v.* Chesapeake Ins. Co., 7 Cr. 420 [1813]; Spratt *v.* Spratt, 4 Pet. 393 [1830].

[2] Tutun *v.* United States, 270 U. S. 568 [1926]; United States *v.* Macintosh, 283 U. S. 605, 615 [1931].

The certificate of naturalization, while conclusive as a judgment of citizenship, cannot, in a distinct proceeding, be introduced as evidence of residence, age, or good character of the person naturalized.[1]

[1] Mutual Ben. L. Ins. Co. *v.* Tisdale, 91 U. S. 238 [1876].

This judicial function may be vested in courts of the States having common-law jurisdiction.[1] This does not mean that Congress may compel them to entertain jurisdiction,[2] but that they may act when State legislation has so provided.[3]

[1] Levin *v.* United States, 128 Fed. 826, 832 [1904]. *See also* Holmgren *v.* United States, 217 U. S. 509 [1910].

[2] Morgan *v* Dudley, 57 Ky. 693 [1857].

[3] Ex parte Knowles, 5 Cal. 301 [1855]; Stephens, Petitioner, 70 Mass. 559 [1855]; Rushworth *v.* Judges, 58 N. J. Law 97 [1895]; Beavins' Petition, 33 N. H. 89 [1856].

RIGHT OF EXPATRIATION.

The Constitution is silent on this subject, but from the very first there was recognized the right of a citizen to expatriate himself, under certain conditions and subject to proof. In Talbot *v.* Janson [1] a decision on the exact point was avoided by the facts of the case (where the act of leaving the country was in pursuance of a criminal purpose and not to be construed into an act of emigration), but it was indicated that in absence of a statute governing the subject, an expatriation must be bona fide, the cause of removal be lawful, the departure be entire, with intent to leave the country and settle in another. The absence of a Federal statute—there being no constitutional prohibition in the way—was commented upon, Justice Iredell stating (p. 164) "it not only is a proper instance in which [the legislative power] may be exercised, but it is the duty of the Legislature to make such provision * * *." It was, however, 1868, before Congress expressly recognized the right of expatriation and declared that any restrictions thereon were inconsistent with the fundamental principles of the Republic (R. S. 1999; U. S. C. 8: 15).

[1] 3 Dall. 133 [1795]. *See also* Murray *v.* The "Charming Betsey", 2 Cr. 64 [1804]; The "Venus", 8 Cr. 253 [1814]; The "Santissima Trinidad", 7 Wheat. 283 [1822]; Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99 [1830]; Shanks *v.* Dupont, 3 Pet. 242 [1830]; Comitis *v.* Parkerson, 56 Fed. 556 [1893]; M'Ilvaine *v.* Coxe, 4 Cr. 209 [1808].

Bankruptcies.*

SCOPE OF GRANT TO CONGRESS.

While attempts have been made to formulate a distinction between bankruptcy and insolvency, it long has been settled that,

* *See also* pp. 357, 661, 696.

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within the meaning of the constitutional provision, the terms are convertible.[1]

[1] Sturges v. Crowninshield, 4 Wheat. 122, 195 [1819]; Hanover Nat. Bank v. Moyses, 186 U. S. 181 [1902]; Continental Illinois Nat. Bank & T. Co. v. Chicago, R. I. & P. R. Co., 294 U. S. 648, 667 [1935].

The power conferred on Congress does not carry with it the restrictions of the English bankruptcy system[1]—Congress may include others than traders within the term "bankrupt", and provide for voluntary as well as involuntary proceedings.[2] Congress may embrace within its legislation whatever may be deemed important to a complete and effective bankruptcy system. The object of such a system is to secure a ratable distribution of the bankrupt's estate among his creditors, when he is unable to discharge his obligations in full, and at the same time to relieve the honest debtor from legal proceedings for his debts upon a surrender of his property. The distribution of the property is the principal object to be attained.[3] But the discharge of the debtor has come to be an object of no less concern than the distribution of his property.[4]

[1] Re Klein, 1 How. 277, 278 [1843].
[2] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 187 [1902].
[3] United States v. Fox, 95 U. S. 670, 672 [1878]; Pirie v. Chicago Title & T. Co., 182 U. S. 438, 449 [1901].
[4] Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 588 [1935].

This clause authorizes Congress to enact legislation short of final adjudication in bankruptcy, e. g., a "bankruptcy" law may provide for the reorganization of railroads when insolvent or unable to pay their debts as they mature.[1] And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress.[2] Nor is the scope of the bankruptcy power necessarily limited to that which has been heretofore exercised.[3]

[1] Continental Illinois Nat. Bank & T. Co. v. Chicago, R. I. & P. R. Co., 294 U. S. 648 [1935].
[2] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 186 [1902].
[3] Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 587 [1935].

From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power. The nature and extent of this power can best be fixed by the gradual process of historical and judicial inclusion and exclusion.[1]

[1] Continental Illinois Nat. Bank & T. Co. v. Chicago, R. I. & P. R. Co., 294 U. S. 648, 668, 670 [1935].

In the exercise of its bankruptcy powers, Congress can impair the obligation of contract and extend the provisions of the bankruptcy

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laws to contracts already entered into at time of their passage.[1] Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with the fundamental law. Personal notice to creditors of the filing of a petition in bankruptcy is not essential to the binding force of the resulting decree. Notice by publication does not violate the due process clause.[2]

[1] Re Klein, 1 How. 277 [1843]; Hanover Nat. Bank v. Moyses, 186 U. S. 181 [1902].

[2] Hanover Nat. Bank v. Moyses, 186 U. S. 181 [1902].

Congress by virtue of its constitutional authority over bankruptcies has the power to permit suits by trustees in bankruptcy in the Federal courts against adverse claimants regardless of diversity of citizenship.[1]

[1] Schumacher v. Beeler, 293 U. S. 367 [1934].

While the power of Congress under the bankruptcy clause is not to be limited by the English or colonial law in force when the Constitution was adopted, it does not follow that the power has no limitations.[1] The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment.[2] Congress cannot take from a creditor specific property previously acquired from the debtor. The Fifth Amendment commands that, however great the Nation's need, private property shall not be taken for a wholly public use without just compensation. If the public interest requires the taking of property of individual mortgagees in order to relieve the individual necessities of mortgagors, resort must be had to eminent domain, not to "bankruptcy" legislation. The provisions of the first Frazier-Lemke Act,[3] which deprived the mortgagee of his right (*a*) to retain a lien until the indebtedness thereby secured is paid; (*b*) to realize upon the security by a judicial public sale; (*c*) to determine when such sale should be held; (*d*) to protect his interests by bidding at foreclosure sales; and (*e*) to control the property during a period of default, took valuable rights in specific property from the creditor and gave them to his debtor in violation of the Fifth Amendment.[4] But the amended act [5] which reserves these rights to the creditor pending a 3-year stay of foreclosure proceedings and debt readjustment is a valid exercise of the bankruptcy power, and its provisions are not so unreasonable as to infringe the provisions of the Fifth Amendment.[6]

[1] Continental Illinois Nat. Bank & T. Co. v. Chicago, R. I. & P. R. Co. 294 U. S. 648, 669 [1935].

[2] Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 589, 602 [1935].

[3] Act of June 28, 1934, ch. 869, 48 Stat. 1289.

[4] Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555 [1935].

[5] Act of August 28, 1935, ch. 792, 49 Stat. 943.

[6] Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, 300 U. S. 440 [1937].

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The bankruptcy power of Congress is also subject to the requirement that the sovereignty of a State, so essential to its proper functioning under the Federal Constitution, shall not be impaired or surrendered.[1] Hence, an act of Congress [2] which would subject the fiscal affairs of a political subdivision of a State to a Federal bankruptcy court is an infringement of rights reserved to the States by the Tenth Amendment. It is also an attempt on the part of the State, by availing itself of such legislation, to evade the clause of the Constitution which prevents States from impairing the obligations of contracts.[3]

[1] Ashton v. Cameron County Water Improvement District, 298 U. S. 513 [1936].

[2] Act of May 24, 1934, ch. 345, 48 Stat. 798.

[3] Ashton v. Cameron County Water Improvement District, 298 U. S. 513 [1936].

Similarly, the bankruptcy power of Congress does not supersede the power of a State to determine how a corporation shall be formed, supervised, and dissolved. "How long and upon what terms a State-created corporation may continue to exist is a matter exclusively of State power." Hence, an Illinois law extending the corporate capacity of dissolved corporations for 2 years for the sole purpose of liquidation, does not authorize the corporation, after the expiration of said period, to petition for reorganization under section 77B of the Bankruptcy Act. "There is nothing in the Federal Constitution which operates to restrain a State from terminating absolutely and unconditionally the existence of a State-created corporation, if that be authorized by the statute under which the corporation has been organized." [1]

[1] Chicago Title & Trust Co. v. 4136 Wilcox Bldg. Corp., 302 U. S. 120 [1937].

UNIFORM LAWS.

Bankruptcy legislation must be uniform, but that uniformity is geographical and not personal. The provision in the bankruptcy act that the statute shall not affect the allowance to bankrupts of their exemptions which are prescribed by the State laws in force at the time of the filing of the petition is not in derogation of the limitation of uniformity. The system is, in the constitutional sense, uniform throughout the United States when the trustee takes in each State whatever would have been available to the creditors if the bankruptcy law had not been passed. The general operation of the law is uniform, although it may result in certain particulars differently in different States.[1]

[1] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 190 [1902].

Notwithstanding the requirement as to uniformity, the bankruptcy acts of Congress may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States. For example, a bankruptcy act may recognize and enforce the laws of the State affecting dower, exemptions, the validity

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of mortgages, priorities of payment and the like.[1] Nor does said recognition of local legislation constitute an unlawful delegation by Congress of its legislative power.[2] Likewise Congress may reserve to the United States certain priorities in the settlement of a bankrupt's estate.[3]

[1] Stellwagen *v.* Clum, 245 U. S. 605, 613 [1918].
[2] Hanover Nat. Bank *v.* Moyses, 186 U. S. 181, 190 [1902]
[3] United States *v.* Fisher, 2 Cr. 358 [1805].

EXCLUSIVENESS OF POWER.

In the absence of congressional action the States may enact insolvency laws. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. A State law which discharges the debtor from contracts entered into prior to its passage impairs the obligation of contract and is invalid, while a State insolvency law which discharges the debtor and his future acquisition of property so far as it relates to debts contracted subsequent to the passage of the law is not an impairment of the contract, such law being read into each contract as a clause thereof.[1] But a State cannot by such a law discharge one of its own citizens from his contracts with citizens of other States,[2] though made after the passage of the law, unless they voluntarily become parties to the proceedings in insolvency and accept dividends.[3] A discharge under a foreign bankruptcy law is no bar to an action on a contract made in this country.[4] But a Canadian statute granting to an embarrassed railway corporation within the Dominion power to enforce upon its mortgage creditors a settlement by which they are to receive other securities of the corporation in place of their mortgage bonds, when consented to by a large majority, is binding on bondholders who are citizens of the United States. Anything done which discharges the corporation from liability in place where it is chartered and doing business discharges it everywhere.[5]

[1] Sturges *v.* Crowninshield, 4 Wheat. 122 [1819]; Ogden *v.* Saunders, 12 Wheat. 213 [1827]; Planters' Bank *v.* Sharp, 6 How. 301 [1848]. *Cf.* McMillan *v.* M'Neill, 4 Wheat. 209 [1819]; Farmers' & M. Bank *v.* Smith, 6 Wheat., 131 [1821].
[2] Boyle *v.* Zacharie, 6 Pet. 635 [1832]; Suydam *v.* Broadnax, 14 Pet. 67 [1840]; Cook *v.* Moffat, 5 How. 295 [1847]; Baldwin *v.* Hale, 1 Wall. 223 [1864]; Baldwin *v.* Bank of Newberry, 1 Wall. 234 [1864]; Gilman *v.* Lockwood, 4 Wall. 409 [1867].
[3] Clay *v.* Smith, 3 Pet. 411 [1799].
[4] McMillan *v.* M'Neill, 4 Wheat. 209 [1819].
[5] Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527 [1883].

A State may not pass an insolvency law which provides for a discharge of the debtor from his obligations, which shall have the effect of a bankruptcy discharge as to creditors in other States, and this although no general Federal bankruptcy law is in effect.[1] The authority to deal with the property of the debtor within the State, so far as it does not impair the obligation of contracts, is conceded,

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but the power to release him, which is one of the usual elements of all bankruptcy laws, does not belong to the State legislature where the creditor is not within the control of the State court.[3]

[1] Brown v. Smart, 145 U. S. 454 [1892]; Stellwagen v. Clum, 245 U. S. 605, 615 [1918].

[2] Denny v. Bennett, 128 U. S. 489, 498 [1888]; International Shoe Co. v. Pinkus, 278 U. S. 261, 263 [1929].

But Congress having established uniform laws upon the subject of bankruptcy in pursuance of the Constitution, the jurisdiction conferred becomes exclusive throughout the United States,[1] and State laws in conflict therewith are suspended.[2] The power of Congress to establish uniform laws on the subject of bankruptcy does not exclude the rights of the States to legislate on the same subject, except when the power has been actually exercised and the State laws conflict with those of Congress.[3] The Federal bankruptcy laws, e. g., do not suspend consistent provisions of a State law governing fraudulent transfers. It is only State laws which conflict with the bankruptcy laws of Congress that are suspended; those which are in aid of the bankruptcy act can stand.[4]

[1] New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S. 656, 661 [1876]; Re Watts, 190 U. S. 1, 27 [1903].

[2] Re Klein, 1 How. 277, 281 [1843]; Smith v. Turner (The Passenger Cases), 7 How. 283, 397 [1849], per McLean, J.; Globe Bank & T. Co. v. Martin, 236 U. S. 288, 298 [1915].

[3] Ogden v. Saunders, 12 Wheat. 213 [1827].

[4] Stellwagen v. Clum, 245 U. S. 605, 615 [1918], citing Miller v. New Orleans Acid & Fertilizer Co., 211 U. S. 496 [1909]. *See also* Chicago Title & Trust Co. v. 4136 Wilcox Bldg. Corp., 302 U. S. 120 [1937].

The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount; the States may not pass or enforce laws to interfere with or complement the Bankruptcy Act of 1898 or to provide additional or auxiliary regulations in the field covered by it.[1] Since the Federal Government possesses supreme power in respect of banpkrutcies, a State desiring to participate in the assets of a bankrupt must, like other creditors, submit to appropriate limitations on the time for presenting claims.[2]

[1] Tua v. Carriere, 117 U. S. 201 [1886]; International Shoe Co. v. Pinkus, 278 U. S. 261, 265 [1929].

[2] New York v. Irving Trust Co., 288 U. S. 329, 333 [1933].

The repeal of a bankruptcy act of the United States removes an obstacle to the operation of the insolvency laws of a State, and does not render necessary their reenactment.[1] The exercise by Congress of the power under this clause does not so extinguish the power of the States that that power cannot be revived by repealing the Federal law.[2]

[1] Butler v. Goreley, 146 U. S. 303, 314 [1892].

[2] Sturges v. Crowninshield, 4 Wheat. 122, 196 [1819].

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The Congress shall have Power * * * To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

Article I. Sec. 8. Powers of Congress. Cl. 5. Coinage, weights and measures.

Coinage.

DEFINITION OF COINAGE.

Coinage is the conversion of metal into money by governmental direction and authority. It means to mold into form a metallic substance of intrinsic value and stamp on it its legal value.[1]

[1] Griswold *v.* Hepburn, 63 Ky. 20 [1865].

PURPOSE OF CLAUSE—EXCLUSIVE POWER OF CONGRESS.

The power to coin money and regular its value was withdrawn from the States (art. I, sec. 10) and by this clause conferred exclusively on the Federal Government for the purpose of providing a currency which should have a uniform legal value in all the States.[1] To this end, Congress has legislated from a very early date—the first act being April 2, 1792 (1 Stat. 246), establishing a mint and providing for coinage in general.

[1] Legal Tender Cases, 12 Wall. 457, 545 [1871]; United States *v.* Marigold, 9 How. 560, 568 [1850]; Briscoe *v.* Bank of Kentucky, 11 Pet. 257 [1837]; Houston *v.* Moore, 5 Wheat. 1, 49 [1820]; Sturges *v.* Crowninshield, 4 Wheat. 122, 193 [1819].

EXTENT OF POWER OF CONGRESS OVER CURRENCY.

What power there is over the currency is vested in Congress.[1] The power extends to laws regulating the subject in every detail, and the conduct and transactions of individuals in respect thereof.[2] Thus, Congress may penalize the conscious and willful possession, without legal authority, of dies in the likeness of those used for making coins of the United States;[3] or the mutilation, melting, and export of coins.[4] A joint resolution of June 5, 1933, abrogating the "gold clause" stipulations in money contract obligations (purporting to give obligee a right to require payment in gold or a particular kind of coin or currency) was upheld in the case of preexisting private contracts. Private contracts must be understood as having been made subject to possible exercise of the authority of the Government. The Court may inquire whether measures taken by Congress in furtherance of its monetary policy are capricious or arbitrary, but if they have a reasonable relation to a legitimate end, their impairment of private contracts is not to be considered a taking of property for public use without just compensation nor a deprivation of it without due process of law.[5] As applied to bonds of the United States, the same clause was held unconstitutional by eight of the nine Justices as a repudiation of the substance of its own engagement, entered into upon its plighted

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faith. Recovery was, however, denied on the ground plaintiff showed no actual damages.[6]

[1] Legal Tender Cases, 12 Wall. 457, 545 [1871]; Nortz v. United States, 294 U. S. 317, 328 [1935].
[2] Civil Rights Cases, 109 U. S. 3, 18 [1883].
[3] Baender v. Barnett, 255 U. S. 224 [1921].
[4] Ling Su Fan v. United States, 218 U. S. 302 [1910].
[5] Norman v. Baltimore & O. R. Co., 294 U. S. 240 [1935].
[6] Perry v. United States, 294 U. S. 330 [1935]. *Cf.* Smyth v. United States, 302 U. S. 329 [1937].

The power to emit bills of credit is deduced as incidental to the aggregate of the express powers of Congress in relation to money and finances.[1]

[1] McCulloch v. Maryland, 4 Wheat. 316, 404 [1819]; Juilliard v. Greenman, 110 U. S. 421, 438, 449 [1884].

In exercise of this entire power, Congress may restrain the circulation of notes not issued under its own authority [1] and may tax municipal notes paid out by banks.[2] Congress may require the surrender of gold coin and of gold certificates—which are currency, not warehouse receipts or contracts for a certain amount of gold as a commodity—and substitute therefor other currency not redeemable in gold (J. Res. of June 5, 1933, 48 Stat. 112); and a plaintiff who seeks payment in an amount measured by the higher market value of gold, does not show any actual loss simply because he is compelled to accept an equivalent amount of other currency, since by legislative enactments in force at the time (Act of March 9, 1933, 48 Stat. 1), he would have been required to surrender the gold coin, and could neither have dealt in it nor exported it.[3]

[1] Veazie Bank v. Fenno, 8 Wall. 533, 548 [1869].
[2] Merchants Nat. Bank v. United States, 101 U. S. 1 [1880].
[3] Nortz v. United States, 294 U. S. 317 [1935].

Standard of Weights and Measures.

The power to fix a standard of weights and measures, granted to Congress by this clause, was not expressly denied to the States. Accordingly, on the principle that it is not the mere grant of power to Congress but its actual exercise of that power which makes its action exclusive,[1] the States may exercise this power in the absence of congressional legislation.[2] Early opinion questioning such authority [3] seems clearly discounted. State law establishing State daylight-saving time was upheld, even assuming that Congress has power under this clause to establish standard time.[4]

[1] Sturges v Crowninshield, 4 Wheat. 122, 193 [1819]; Houston v. Moore, 5 Wheat. 1, 49 [1820]; Ogden v. Saunders, 12 Wheat. 213, 275 [1827].
[2] Weaver v. Fegely, 29 Pa. St. 27 [1857]; Williams v. Sandles, 93 Ohio St. 92 [1915], writ of error dismissed, 245 U. S. 680 [1918]; Dwight and

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Lloyd Sintering Co. v. American Ore Reclamation Co., 263 Fed. 315 [1920], certiorari denied 252 U. S. 582 [1920].

[3] The "Miantinomi", 17 Fed. Cas. No. 9521 [1855].

[4] Massachusetts State Grange v. Benton, 10 F. (2d) 515 [1925], affirmed in 272 U. S. 525 [1926].

The first general exercise of the power of Congress under this clause was the act of March 3, 1893 (27 Stat. 746; U. S. C. 15: 206) establishing the standard gauge for sheet and plate iron and steel. This was followed in 1894 by act of July 12 (28 Stat. 101; U. S. C. 15: 221) establishing the units of electrical measure; and in 1918 by the act establishing standard time zones (40 Stat. 450; U. S. C. 15: 261).

The Congress shall have Power * * * To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

Article I. Sec. 8. Powers of Congress. Cl. 6. Counterfeiting.

Powers of Congress.

This clause is not a limitation on the power of Congress to maintain the coin in its purity, and section 169 of the Criminal Code penalizing a willing and conscious possession of dies in the likeness of those used for making coins of the United States is to be upheld as an appropriate measure to that end.[1]

[1] Baender v. Barnett, 255 U. S. 224 [1921].

The clause does not in terms embrace the offense of uttering or circulating counterfeit coin, but a statute penalizing not only the importing but the passing or uttering of such counterfeits was upheld as a protective measure authorized by the power to coin money.[1]

[1] United States v. Marigold, 9 How. 560 [1850].

An act of 1806 (2 Stat. 404) for punishment of counterfeiting the current coin of the United States, made equally punishable the counterfeiting of foreign gold or silver coins current by law or in actual circulation as money; a subsequent act of 1825 (4 Stat. 121, sec. 20) restricted this to coins made current by law. The validity of this law was impliedly assumed in United States v. Gardner, 10 Pet. 618 [1836], where the question decided was whether the foreign coin involved had been made current by law.

Powers of the States.

The power of Congress to punish counterfeiting is not necessarily exclusive. Congress having in its legislation on the subject left the States free to punish counterfeiting of United States coin as an offense

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under State law, numerous statutes were upheld accordingly.[1] Such jurisdiction was questioned in Georgia.[2]

[1] *See* Dashing *v.* State, 78 Ind. 358 [1881]; Martin *v.* State (Texas), 18 Texas Crim. App. 224 [1885]; Commonwealth (Mass.) *v.* Fuller, 49 Mass. 313 [1844]; (Iowa) State *v.* McPherson, 9 Iowa 53 [1859]; Harlan *v.* People, 1 Dougl. (Mich.) 207 [1842]; In re Truman, 44 Mo. 181 [1869].

[2] Rouse *v.* Georgia, 4 Ga. 139 [1848].

Similarly, the power of Congress (drawn from this and the preceding clause) to punish the circulation of counterfeit coins, is not exclusive of State authority to reach such dealings as a fraud upon individuals.[1]

[1] Fox *v.* Ohio, 5 How. 410 [1847]. *See also* United States *v.* Yates, 6 Fed. 861 [1881] and Ex parte Houghton, 8 Fed. 897 [1881]; United States *v.* Cruikshank, 92 U. S. 542, 550 [1876].

Concurrent Powers.

The same act of counterfeiting may be punishable under the laws of the States as well as of the United States.[1]

[1] Sexton *v.* California, 189 U. S. 319 [1903].

The Congress shall have Power * * * To establish Post Offices and post Roads;

Article I. Sec. 8. Powers of Congress. Cl. 7. Post offices, etc.

In General.

The power vested in Congress has been practically construed, since the foundation of the Government, to authorize not merely the designation of the routes over which the mail shall be carried and the offices where letters and other documents shall be received to be distributed or forwarded but the carriage of the mail and all measures necessary to secure its safe and speedy transit and its prompt delivery.[1]

[1] Re Jackson, 96 U. S. 727, 732 [1878]. *See also* Hoover *v.* McChesney, 81 Fed. 472 [1897]; United States *v.* Loring, 91 Fed. 881 [1884].

The rule that in the enforcement of provisions guaranteeing civil rights Congress is limited to the enactment of legislation corrective of a wrong committed by the States and not by individuals does not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such powers to the States, as in the regulation of commerce, the coining of money, the establishment of post offices and post roads, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof.[1]

[1] Civil Rights Cases, 109 U. S. 3, 18 [1883].

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Post Offices.

The power to establish post offices includes authority to obtain sites therefor by condemnation proceedings.[1]

[1] Kohl *v.* United States, 91 U. S. 367 [1876].

A statute (R. S. 5478) penalizing forcible entry into a post office "with intent to commit therein larceny or other depredation" is designed to protect the Postal Service by securing buildings used for postal purposes from felonious entry, and is to be upheld on this ground.[1]

[1] Considine *v.* United States, 112 Fed. 342, 352 [1901]. *See also* Legal Tender Cases, 12 Wall. 457, 537 [1871].

Post Roads.

The power of Congress in respect to post roads was held in an early State case (Dickey *v.* Maysville, W. P. & L. Turnpike R. Co., 37 Kentucky, 113, 138 [1838]) to be given for the purpose of construction, repair, and improvement "whenever the exercise of any such independent national power shall be deemed proper for effectuating the satisfactory transportation of the mails."

The opposite view was held in Cleveland, P. & A. R. Co. *v.* Franklin Canal Co., 5 Fed. Cas. No. 2890 [1853]—where it was held that Congress was limited to establishing, i. e., declaring as post roads those already laid out under State authority.

And in United States *v.* Railroad Bridge Co., 6 McLean 517, 525 [1855], Justice McLean stated that the power "has generally been considered as exhausted in the designation of roads on which the mails are to be transported"—that neither under the commercial power nor under the power to establish post roads could Congress construct a bridge over a navigable water. However, in Pennsylvania *v.* Wheeling and B. Bridge Co., 18 How. 421 [1856], an act of Congress legalizing a bridge over the Ohio and establishing it as a post road, was upheld. But the Court did not ground its decision on the postal power, but on the commerce clause.

In Searight *v.* Stokes, 3 How. 151 [1845], involving the proper construction of the compact between the United States and Pennsylvania regarding the use and upkeep within that State of the Cumberland road—which had been constructed wholly by the Federal Government—the power of Congress to construct the road originally or to make such a compact was not questioned. Being charged, by the present clause, with the transportation of the mails, "it would hardly have performed its duty to the country" had it suffered the road to fall into ruin. (It may be noted that the act of 1806 originally authorizing the construction of the National Road, so called—2 Stat. 357—did not place it on the basis of a post road

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at all. Its use for postal services was therefore a natural result but not the constitutional justification.)

The power (at least in conjunction with the power under the commerce clause) has been construed to authorize Congress to grant franchises authorizing corporations to construct national highways and interstate bridges.[1]

[1] California *v.* Central P. R. Co., 127 U. S. 1, 39 [1888], construed in Luxton *v.* North River Bridge Co., 153 U. S. 525, 533 [1894], as based upon the commerce power.

The powers here granted are "not confined to the instrumentalities of commerce, or the Postal Service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. * * * As they were intrusted to the general government for the good of the Nation, it is not only the right, but the duty, of Congress to see to it that * * * the transmission of intelligence (is) not obstructed or unnecessarily encumbered by State legislation." Accordingly a Federal law granting the use of the post roads to telegraph companies upon equal terms was upheld—under the commerce and postal powers combined.[1]

[1] Pensacola Teleg. Co. *v.* Western U. Teleg. Co., 96 U. S. 1, 9 [1878].

Postal Service Generally.

"The power possessed by Congress embraces the regulation of the entire postal system of the country."* Accordingly, it was held that an act of 1872 (R. S. 3894) prohibiting the carriage of letters concerning lotteries, was constitutional. Such prohibition is not intended as an interference with freedom of the press (*see* Horner *v.* United States, 143 U. S. 207, 213 [1892]); and transportation of matter excluded from the mails, by other agencies not within Government control, is not thereby forbidden. An indicated distinction in the matter of enforcement between sealed and unsealed matter was not involved in the actual decision.[1]

[1] Re Jackson, 96 U. S. 727, 732 [1878], affirmed in Re Rapier, 143 U. S. 110 [1892]. *See also* Lewis Pub. Co. *v.* Morgan, 229 U. S. 288, 301 [1913].

The right of the Postmaster General to exclude letters, or to refuse to permit their delivery to addressees, must depend upon some law of Congress; but the action of the Postmaster in seizing and

* A statute of 1876, requiring the consent of the Senate to removals of postmasters, was argued and decided as a question of the extent of the executive power of removal. Myers *v.* United States, 272 U. S. 52 [1926].

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returning letters is subject to review by the courts where the Postmaster General has exceeded his authority under the statute.[1]

[1] American School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94 [1902]—wherein it was assumed that the law authorizing the fraud order was constitutional. *See also* Bates & G. Co. *v.* Payne, 194 U. S. 106 [1904]; Public Clearing House *v.* Coyne, 194 U. S. 497 [1904].

The extremely low rate charged for second-class mail "is a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes is derived from the newspaper and other periodical press." [1]

[1] United States ex rel. Milwaukee Social Democratic Pub. Co. *v.* Burleson, 255 U. S. 407, 410 [1921], citing Lewis Pub. Co. *v.* Morgan, 229 U. S. 288 [1913].

The Espionage Act, title XII of which dealt with use of the mails and declared nonmailable any newspaper published in violation of the provisions of the act in general, was held constitutional in Schenck *v.* United States, 249 U. S. 47 [1919]; Frohwerk *v.* United States, 249 U. S. 204 [1919]; Debs *v.* United States, 249 U. S. 211 [1919]; Abrams *v.* United States, 250 U. S. 616, 619 [1919].

The relations of the general Government to the transportation of the mails is such as to authorize a direct interference to prevent a forcible obstruction, and while it may be competent for the Government through the executive branch forcibly to remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions.[1]

[1] Re Debs, 158 U. S. 564, 599 [1895].

It is within the power of Congress to make it a criminal offense for anyone to open a letter after it has passed from the actual control of the post-office officials and agents and before manual delivery to the person to whom it was directed.[1]

[1] United States *v.* McCready, 11 Fed. 225 [1882].

Delegation of Power.*

The ordinary rule of construction of Government powers would have led to the conclusion that Congress, being charged with the duty of establishing post offices and post roads, could not delegate such duty to a branch of the executive department of the Government, but the policy of the Government from the time the general post office was established has been to delegate the power, to designate the places where the mails shall be received and delivered, to the Postmaster General.[1]

[1] Ware *v.* United States, 4 Wall. 617, 632 [1867]; United States *v.* Barlow, 132 U. S. 271 [1889].

* *See also* pp. 95, 155, 252, 258, 549.

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Power of the States.

Under the principle that where the United States cannot assume, or has not assumed exclusive jurisdiction, the States may exercise a concurrent power of punishing the crime of mail robbery "is unquestionably cognizable as highway robbery under the State laws, although made punishable under those of the United States." [1] And in United States *v.* Kirby, 7 Wall. 482, 486 [1869], it was "doubted whether it is competent for Congress to exempt the employees of the United States from arrest on criminal process from the State courts, when the crimes charged against them are not merely *mala prohibita*, but are *mala in se*." It was held that a law of Maryland requiring a license of all persons operating motor trucks on the highways, could not constitutionally be applied in case of a driver of a mail truck.[2]

[1] Houston *v.* Moore, 5 Wheat. 1, 34 [1820].
[2] Johnson *v.* Maryland, 254 U. S. 51 [1920].

A statute of Pennsylvania making the liability of railroads for injuries to persons other than passengers lawfully employed in any car, etc., the same as in case of employees, was construed as classifying postal employees with employees of the railroads, i. e., as not passengers; and as so construed was held not to conflict with the postal power of Congress.[1]

[1] Price *v.* Pennsylvania R. Co., 113 U. S. 218, 221 [1885]; Martin *v.* Pittsburg & L. E. R., 203 U. S. 284 [1906].

A statute of Illinois requiring all regular passenger trains to stop at each advertised station and at county seats a sufficient time to take on and let off passengers was construed by the State courts to require a fast mail train from Chicago to the South to make a detour of 7 miles in order to stop at Cairo; and as so construed (there being adequate accommodations for passengers to and from Cairo provided otherwise) was held to be an unconstitutional interference with the power of Congress under this clause.[1] But this case was distinguished, and a Minnesota statute requiring intrastate passenger trains, without question of detour, to stop at all county seats in their course, was upheld.[2]

[1] Illinois C. R. Co. *v.* Illinois ex rel. Butler, 163 U. S. 142 [1896].
[2] Gladson *v.* Minnesota, 166 U. S. 427 [1897].

The fact that in an act of Congress, legalizing an international bridge over the Niagara River (which had been built as a railroad bridge under a charter from the State—in connection with a Canadian act) Congress established the bridge as a post route, was not argued, nor held, an assumption of power by Congress under the postal clause.[1]

[1] International Bridge Co. *v.* New York, 254 U. S. 126 [1920].

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The Congress shall have Power * * * 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;

Article I. Sec. 8. Powers of Congress. Cl. 8. Copyrights and patents.

Extent of Power in General.

The power granted to Congress by this clause "is domestic in its character and necessarily confined within the limits of the United States." [1]

[1] Brown *v.* Duchesne, 19 How. 183, 195 [1857].

By the term "securing" an exclusive right is here intended, not the protection of an acknowledged legal right, but a future right.[1]

[1] Wheaton *v.* Peters, 8 Pet. 591, 660 [1834].

This clause contemplates that the exclusive right of authors and inventors to their respective writings and discoveries shall exist for a limited period, and that the period shall be subject to the discretion of Congress.[1] It is for Congress to determine for what time and under what circumstances protection shall be granted. While rights are to be secured for but a limited time, Congress may extend the term upon the expiration of the time originally specified and in doing so protect the rights of purchasers and assignees, and this may be done by special act.[2]

[1] Pennock *v.* Dialogue, 2 Pet. 1, 16 [1829]; Evans *v.* Eaton, 3 Wheat. 454 [1818].

[2] Higgins *v.* Keuffel, 140 U. S. 428, 431 [1891]; Evans *v.* Jordan, 9 Cr. 199 [1815]; Bloomer *v.* McQuewan, 14 How. 539, 549 [1852]; Bloomer *v.* Millinger, 1 Wall. 340, 350 [1864]; Eunson *v.* Dodge, 18 Wall. 414, 416, [1873].

This power is given not generally but only as a means to this particular end; hence it expressly appears that Congress is not empowered by the Constitution to pass laws for the protection or benefit of authors and inventors except as a means to "promote science and useful arts." [1]

[1] Martinetti *v.* Maguire, 1 Deady, 216 [1867]. *See also* Kendall *v.* Winsor, 21 How. 322, 328 [1859]; Higgins *v.* Keuffel, 140 U. S. 428, 431]1891]; Bleistein *v.* Donaldson Lithographing Co., 188 U. S. 239, 249 [1903].

Trade-Marks Not Included.

The power to protect writings and inventions refers to fruits of intellectual labor and does not extend to the protection of trade-marks. The ordinary trade-mark has no necessary relation to invention or discovery, nor can it be classed under the head of writings. A trade-mark is generally the adoption of something already in existence as the distinctive symbol of the party using it. At common law the exclusive right to it grows out of its use and not its mere adoption. The Trade Mark Act of 1870 was accordingly held unconstitutional

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as neither warranted by article I, section 8, clause 8 nor (since it was in terms applicable to all commerce, whether interstate or intrastate) by the commerce clause.[1] The present law, however, is frankly based upon the commerce power.[2]

[1] Trade-Mark Cases, 100 U. S. 82 [1879].
[2] *See* Warner *v.* Searle & H. Co., 191 U. S. 195 [1903].

Copyrights.

SOURCE AND EXTENT OF THE RIGHT.

No authority exists for obtaining a copyright beyond the extent to which Congress has authorized it. A copyright cannot be sustained as a right existing at common law; but, as it exists in the United States, it depends wholly on the legislation of Congress.[1]

[1] Banks *v.* Manchester, 128 U. S. 244, 252 [1888]. *See also* Wheaton *v.* Peters, 8 Pet. 591 [1834]; Stevens *v.* Gladding, 17 How. 447, 451 [1855]; Holmes *v.* Hurst, 174 U. S. 82, 85 [1899]; American Tobacco Co. *v.* Werckmeister, 207 U. S. 284 [1907]; Bobbs-Merrill Co. *v.* Straus, 210 U. S. 339 [1908].

Copyright is a species of property distinct from ownership of property used in making copies of the matter copyrighted. So, held, that sale of a copperplate under execution did not pass any right to print and publish the map for which the copperplate was designed.[1]

[1] Stevens *v.* Gladding, 17 How. 447 [1855].

The copyright act of Congress (R. S., sec. 4952, as amended), giving to authors the exclusive right to dramatize any of their works, is valid as applied to pantomime dramatization by means of moving-picture films.[1] The public presentation of a dramatic composition, not printed and published, does not deprive the owner of his common-law right, except by the operation of statute. At common law, the public performance of the play is not an abandonment of it to the public use.[2]

[1] Kalem Co. *v.* Harper Bros., 222 U. S. 55 [1911].
[2] Ferris *v.* Frohman, 223 U. S. 424 [1912].

POWERS OF STATES.

The States are not foreclosed from taxing income from copyrights—the mere fact that a copyright is property derived from a grant by the United States does not create immunity from taxation, such immunity being limited to the protection of the operations of government.[1]

[1] Fox Film Corp. *v.* Doyal, 286 U. S. 123 [1932]—overruling Long *v.* Rockwood, 277 U. S. 142 [1928] (holding otherwise as to patents).

COPYRIGHT AND PATENT RIGHT DISTINGUISHED.

The description of an art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters patent.[1]

[1] Baker *v.* Selden, 101 U. S. 99, 105 [1880].

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Patents.

SOURCE AND EXTENT OF THE RIGHT.

The right to patent is purely statutory, with full power in Congress to prescribe to whom and on what terms a patent shall issue,[1] including the period for which it shall exist.[2] Such conditions were prescribed in the Patent Act of 1793; while one object of such legislation was to stimulate the efforts of genius,[3] the main object was "to promote the progress of science and useful arts", by giving the public a right to the use of the invention as early as possible with due regard to the rights of the inventor.[4] The legislation based on this provision regards the right of property in the inventor as the medium of the public advantage derived from his invention, so that in every grant of the limited monopoly two interests are involved—that of the public, who are the grantors, and that of the patentee. There are thus two parties to every application for a patent, and more, when as in the case of interfering claims or patents, other private interests compete for preference.[5]

[1] Owen *v.* Helmann, 12 F. (2d) 173 [1926], certiorari denied 271 U. S. 685 [1926].

[2] Pennock *v.* Dialogue, 2 Pet. 1, 16 [1829]; Evans *v.* Eaton, 3 Wheat. 454 [1818].

[3] *Cf.* Webster Electric Co. *v.* Splitdorf Electrical Co., 264 U. S. 463, 466 [1924].

[4] *See also* Kendall *v.* Winsor, 21 How. 322, 328 [1859].

[5] Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53 [1884]; Butterworth *v.* United States ex rel. Hoe, 112 U. S. 50 [1884].

While it has been intimated that the power here in question might have been fully exercised by Congress in making special grants,[1] it is settled that a patent is not the exercise of any prerogative power or discretion by any officer of the Government, but is the result of a course of proceeding, according to modes regulated by act of Congress, *quasi* judicial in its character, and not subject to be revoked by the President or the Commissioner of Patents. The United States may however maintain a suit in equity to impeach a patent for fraud—the essence of the right to interfere in such case is the obligation of the United States to protect the public from the monopoly of the fraudulent patent.[2] An act granting the right of appeal from the Commissioner of Patents to the Court of Appeals of the District of Columbia is not unconstitutional as conferring executive power upon a judicial body.[3]

[1] Bloomer *v.* Stolley, 5 McLean 158 [1850].

[2] United States v. American Bell Teleph. Co., 128 U. S. 315 [1888].

[3] United States ex rel. Bernardin *v.* Duell, 172 U. S. 576 [1899].

Congress may modify rights under an existing patent, provided vested property rights are not thereby impaired.[1] But from this grant of power it does not follow that Congress may, from time to time, as

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often as they think proper, authorize an inventor to recall rights which he had granted to others or reinvest in him rights of property which he had before conveyed for a valuable and fair consideration.[2]

[1] McClurg v. Kingsland, 1 How. 202, 206 [1843].
[2] Bloomer v. McQuewan, 14 How. 539, 549 [1852].

Letters patent for a new invention or discovery in the arts confer upon the patentee an exclusive property in the patented invention which can not be appropriated or used by the Government itself without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser.[1]

[1] James v. Campbell, 104 U. S. 356, 358 [1882]. *See also* United States v. Burns, 12 Wall. 246, 252 [1871]; Cammeyer v. Newton, 94 U. S. 225, 234 [1877]; Hollister v. Benedict & B. Mfg. Co., 113 U. S. 59, 67 [1885]; United States v. Palmer, 128 U. S. 262, 271 [1888]; Belknap v. Schild, 161 U. S. 10, 16 [1896].

Any person may lawfully accomplish the same end as produced by a patented process, without infringing the patent, if he uses means substantially different from those described by the patent.[1]

[1] O'Reilly v. Morse, 15 How. 62, 119 [1854]. *See also* Wicke v. Ostrum, 103 U. S. 461 [1881].

One who is employed and paid by another to develop a process and machinery for manufacturing a specified product, and who patents an invention made by him in the course of the employment, holds the patent for his employer.[1] The same rule applies in the case of employees of the United States—where the terms of employment do not call expressly or by implication for invention, the right of the United States in any invention made during course of employment is limited to "shop right." [2]

[1] Standard Parts Co. v. Peck, 264 U. S. 52 [1924].
[2] United States v. Dubilier Condenser Corp., 289 U. S. 178 [1933].

PATENTABILITY.*

The protection afforded by the acts of Congress under this clause is limited to new and useful inventions.[1] While a patentable invention is a mental result,[2] an idea of itself is not patentable.[3] A conception of the mind is not patentable until represented in some physical form.[4] It is not necessary that an improvement be of such general utility as to supersede all other inventions in practice to accomplish the same object;[4] a machine may be imperfect in operation, but if it embodies the generic principle and works, though only in a crude way, it is enough.[5]

[1] Seymour v. Osborne, 11 Wall. 516, 549 [1871]. As to the distinction between merely a new article of commerce and a patentable manufacture, *see*

* Litigation on this point turns largely on the construction of the patent laws, without involving the constitutional grant of powers.

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Union Paper Collar Co. *v.* Van Dusen, 23 Wall. 530, 563 [1875]; Reckendorfer *v.* Faber, 92 U. S. 347, 356 [1876].

[2] Smith *v.* Nichols, 21 Wall. 112, 118 [1875].

[3] Rubber-tip Pencil Co. *v.* Howard, 20 Wall. 498, 507 [1874].

[4] Clark Thread Co. *v.* Willimantic Linen Co., 140 U. S. 481, 489 [1891].

[5] Hildreth *v.* Mastores, 257 U. S. 27, 34 [1921].

As to the difference between improvement and invention, *see* Packing Co. Cases, 105 U. S. 566, 571 [1882]; King *v.* Gallun, 109 U. S. 99 [1883]; Phillips *v.* Detroit, 111 U. S. 604 [1884], and cases cited; Weir *v.* Morden, 125 U. S. 98 [1888]; Aron *v.* Manhattan R. Co., 132 U. S. 84 [1889]; Busell Trimmer Co. *v.* Stevens, 137 U. S. 423, 435 [1890]; Magin *v.* Karle, 150 U. S. 387, 392 [1893]; Potts & Co. *v.* Creager, 155 U. S. 597, 606 [1895].

Specifications are to be construed liberally, in accordance with the design of the Constitution and the patent laws of the United States, to promote the progress of the useful arts and allow inventors to retain to their own use not anything which is matter of common right but what they themselves have created.[1]

[1] Winans *v.* Denmead, 15 How. 330, 341 [1854]; Grant *v.* Raymond 6 Pet. 218, 240 [1832].

POWERS OF STATES.

No State can limit, control, or exercise the power given by this clause.[1] But a State may prescribe reasonable regulations for the transfer of patent rights so as to protect its citizens from fraud, in the absence of congressional legislation. So, held that State laws regulating the execution and transfer of notes given for a patent right and requiring that the words "given for a patent right" shall be written or printed on the face of such note, are not unconstitutional.[2]

[1] Woollen *v.* Banker, 2 Flipp. (U. S.) 33 [1877].

[2] Allen *v.* Riley, 203 U. S. 347 [1906]; Woods (John) & Sons *v.* Carl, 203 U. S. 358 [1906]; Ozan Lumber Co. *v.* Union County Nat. Bank, 207 U. S. 251 [1907].

The use of a patent is subject to the police regulations of the States. A statute of Kentucky requiring inspection of illuminating oils, and the condemnation of oils inflammable at less than 130° Fahrenheit does not conflict with the authority of Congress under this clause, nor interfere with any right secured by the patent laws, although the oil for which patent has issued cannot be made to comply with State specifications.[1]

[1] Patterson *v.* Kentucky, 97 U. S. 501 [1879].

A patent right was held liable to be subjected, by bill in equity, to payment of a judgment debt of patentee.[1]

[1] Ager *v.* Murray, 105 U. S. 126 [1882].

It was held in Long *v.* Rockwood, 277 U. S. 142 [1928], that a State may not tax the income received by one of her citizens as royalties for the use of patents issued to him by the United States. This

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decision was apparently overruled by Fox Film Corp. *v.* Doyal, 286 U. S. 123 [1932], involving taxation of the income from copyrights.

DESIGN PATENTS.

The law of 1842 authorizing the grant of patents for designs was intended to encourage the decorative arts and contemplated appearance rather than utility; but utility is an element for consideration in determining the validity of such a patent. Patents for designs, like other patents, must show originality and inventive faculty.[1]

[1] Gorham Mfg. Co. *v.* White, 14 Wall. 511, 524 [1872]; Smith *v.* Whitman Saddle Co., 148 U. S. 674, 678 [1893]; Eclipse Mfg. Co. *v.* Holland, 62 Fed. 465 [1894].

The Congress shall have Power * * * To constitute Tribunals inferior to the supreme Court;

Article I. Sec. 8. Powers of Congress. Cl. 9. Inferior courts.

Duty of Congress to Create Inferior Courts.*

Congress is bound to create some inferior courts in which to vest all that jurisdiction which, under the Constitution, is exclusively vested in the United States and of which the Supreme Court cannot take original cognizance. It might establish one or more inferior courts, and might parcel out the jurisdiction among such courts from time to time at their own pleasure. But the whole judicial power of the United States should be at all times vested either in an original or appellate form in some courts created under its authority.[1]

[1] Martin *v.* Hunter, 1 Wheat. 304, 331 [1816].

Power of Congress over Inferior Courts.

State courts are not inferior courts within the meaning of this clause. They emanate from a different authority, and are the creatures of a distinct government.[1] Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States.[2]

[1] Re Bollman, 4 Cr. 75, 97 [1807].
[2] Houston *v.* Moore, 5 Wheat. 1, 27 [1820].

The Congress shall have Power * * * To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

Article I. Sec. 8. Powers of Congress. Cl. 10. Piracies and felonies.

Effect of Grant to Congress.

The specific grant of power to define and punish piracies and felonies on the high seas cannot be deemed to be a limitation on the

* *See also* pp. 259, 268.

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powers, either legislative or judicial, conferred on the National Government by the clause extending the judicial power "to all cases of admiralty and maritime jurisdiction." The history of these two clauses requires each to be construed as supplementing rather than limiting the other.[1]

[1] United States v. Flores, 289 U. S. 137 [1933].

Piracies and Felonies.

To define piracies, in the sense of the Constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done either by a reference to crimes having a technical name, and determinate extent, or by enumerating the acts in detail, upon which the punishment is inflicted. Congress need not define, in terms, the offense of piracy; it may punish persons committing the crime of piracy, "as defined by the law of nations," [1] leaving to the courts by judicial interpretation to ascertain the exact scope of the offense.[2] Under the power to "define" piracies, Congress can, however, denominate as piracies acts which are not so denominated by the general principles of international law, e. g. the slave trade.[3]

[1] United States v. Smith, 5 Wheat. 153, 158, 160 [1818].
[2] *Cf.* United States v. Kelly, 11 Wheat. 417 [1826].
[3] Charge to Grand Jury 24 Fed. Cas. No. 14544; 30 Fed. Cas. No. 18269a [1859].

The general rule that criminal statutes of the United States are not to be given extraterritorial effect is inapplicable to a merchant vessel. Such a ship, "for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, is deemed to be a part of the territory of that sovereignty." [1] Congress may, therefore, give to the Federal courts power to punish murder or robbery committed on board a United States vessel by a foreigner.[2] Congress may also punish United States citizens for crimes committed on foreign vessels,[3] and punish either citizens or foreigners who perpetrate felonies on piratical vessels.[4]

[1] United States v. Flores, 289 U. S. 137, 155 [1933].
[2] United States v. Holmes, 5 Wheat. 412 [1820].
[3] United States v. Holmes, 5 Wheat. 412 [1820].
[4] United States v. Klintock, 5 Wheat. 144 [1820]; United States v. Furlong, 5 Wheat. 184 [1820]; United States v. Holmes, 5 Wheat. 412 [1820].

On the High Seas.

The term "high seas," for purposes of this clause, includes waters within bays and roadsteads, even though within the territorial jurisdiction of another power.[1] It is applicable to the open, unenclosed waters of the Great Lakes.[2]

[1] United States v. Furlong, 5 Wheat. 184, 200 [1820].
[2] United States v. Rodgers, 150 U. S. 249 [1893].

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Offenses Against the Law of Nations.

The laws of nations require every national government to use "due diligence" to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who within its own jurisdiction counterfeit the money of another nation has long been recognized.[1]

[1] United States *v.* Arjona, 120 U. S. 479, 484 [1887].

The power of the United States to pass and enforce a statute protecting rights secured by the law of nations does not prevent a State from providing punishment for the same thing.[1]

[1] United States *v.* Arjona, 120 U. S. 479, 487 [1887].

Article I. Sec. 8. Powers of Congress. Cl. 11. To declare war, etc.

The Congress shall have power * * * To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

War.

WHAT CONSTITUTES WAR.

Justice Washington stated in Bas *v.* Tingy (The "Eliza"), 4 Dall. 37, 40 [1800]: "It may, I believe, be safely laid down, that every contention by force, between two nations, in external matters, under the authority of their respective governments, is not only war, but public war." And he distinguished war waged upon a formal declaration from a state of hostilities more confined in its nature and extent, which nevertheless constituted public war. The relations between the United States and France in 1800 were held to amount to a state of war of this latter sort. *See also* Talbot *v.* Seeman, 1 Cr. 1, 33 [1801].

It is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights against the other. Accordingly, the hostilities of 1861–1865 were held to be war, *de facto*, on practically the same footing as though against foreign enemies. Important belligerent rights were accorded the insurgents by the Government; and foreign countries recognized their status by declarations of neutrality.[1]

[1] Prize Cases, 2 Black 635 [1863]; United States *v.* Alexander (Mrs. Alexander's Cotton), 2 Wall. 404, 417 [1865]; The "William Bagaley" *v.* United States, 5 Wall. 377, 406 [1867]; Mauran *v.* Insurance Cos., 6 Wall. 1 [1868]; Hall *v.* Coppell, 7 Wall. 542, 554 [1869]; Ford *v.* Surget, 97 U. S. 594, 604 [1878].

While the President has no power to initiate or declare a war either against a foreign nation or a domestic State, he has power

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nevertheless to recognize the existence of a state of war, and to resist force by force. So, the act of May 13, 1846, recognizing a state of war with Mexico, constituted a ratification of the act of the President in accepting the challenge and engaging in the battles of Palo Alto and Resaca de la Palma. And it was accordingly held that the President had a right, *jure belli*, to institute a blockade of ports in possession of States in rebellion, which neutrals were bound to regard.[1] His proclamations to this effect (there were two, dated April 19, and April 27, 1861, applicable to different States) mark the beginning of the Civil War.[2] The mere existence of civil war did not, however, *ipso facto* make unlawful all commercial intercourse; the President's proclamations, by cogent implication, permitted intercourse (except as expressly prohibited) until August 16, 1861.[3]

[1] Prize Cases, 2 Black 635 [1863].
[2] Freeborn *v.* The "Protector" (The "Protector"), 12 Wall. 700 [1872].
[3] Matthews *v.* McStea, 91 U. S. 7 [1875].

Without deciding on the power of the President acting alone, it was held that the concurrence of Congress afforded ample foundation for any regulations on the subject of partial intercourse with the Confederate States.[1]

[1] Hamilton *v.* Dillin, 21 Wall. 73, 87 [1875].

POWERS OF CONGRESS.

In General.

The term "to declare war" necessarily connotes "the plenary power to wage war with all the force necessary to make it effective." [1]

[1] United States *v.* Macintosh, 283 U. S. 605, 622 [1931]. *See also* American Ins. Co. *v.* Canter, 1 Pet. 511, 542 [1828].

The authority conferred by this clause extends to all legislation necessary to the prosecution of the war with vigor and success. It is not limited to operations in the field and the dispersion of the enemy, but carries with it the power to prosecute war to a termination and to guard against its renewal. It includes the authority to use other means besides those indicated by the terms of the grant and contemplates all means and any manner in which war may be legitimately prosecuted. All acts tending to lessen an adversary's strength are lawful.[1]

[1] Ex parte Milligan, 4 Wall. 2, 139 [1866]. *See also* Stewart *v.* Bloom, 11 Wall. 493, 507 [1871]; Legal Tender Cases, 12 Wall. 457 [1871]; White *v.* Hart, 13 Wall. 646 [1872]; Raymond *v.* Thomas, 91 U. S. 712, 715 [1876]; Young *v.* United States, 97 U. S. 39, 60 [1878]; Ford *v.* Surget, 97 U. S. 594, 605 [1878]; Civil Rights Cases, 109 U. S. 3, 18 [1883].

The power carries with it the power to acquire territory by conquest.[1] But a war declared by Congress is not to be presumed to be waged for the purpose of conquest; and territory is to be considered

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as added to the United States only by action of the treaty-making power or the legislative authority. Conquered territory while in possession of the military forces, is a part of the United States as against any foreign nation, but is not a part of the Union within the meaning of the customs laws.[2]

[1] *See* Serré *v.* Pitot, 6 Cr. 332 [1810].

[2] Fleming *v.* Page, 9 How. 603 [1850]. *See also* Castillero *v.* United States, 2 Black 17, 355 [1863].

Congress cannot under this clause declare war against a State of the Union or any number of such States.[1] But it is not deprived of its war powers when the necessity for their exercise is called out by insurrection and civil war.[2]

[1] Prize Cases, 2 Black 635, 668 [1863]. *See also* Norris *v.* Doniphan, 61 Kentucky 385, 391 [1863].

[2] Tyler *v.* Defrees, 11 Wall, 331, 345 [1871].

Specific Legislation Upheld Under the War Power.

Power exercised by Congress for the prosecution of war has been upheld under this clause in specific cases as follows:

(1) Draft laws: Civil War—*See* Kneedler *v.* Lane, 45 Pa. 238 [1863]. World War—Arver *v.* United States, (Selective Draft Law Cases), 245 U. S. 366 [1918]; Cox *v.* Wood, 247 U. S. 3 [1918].

(2) The confiscation acts of 1861 and 1862 (12 Stat. 319, 589), (Miller *v.* United States, 11 Wall. 268 [1871]; *see also* Kirk *v.* Lynd, 106 U. S. 315 [1883]). A mere declaration of war does not *ipso facto* work a confiscation of enemy property; a positive law passed by Congress is necessary (Brown *v.* United States, 8 Cr. 110, 123 [1814]; Conrad *v.* Waples, 96 U. S. 279, 284 [1878]).

(3) The act emancipating the slaves of persons aiding in the rebellion (12 Stat. 591, sec. 9) (*see* Buie *v.* Parker, 63 N. C. 131 [1869].)

(4) Act of 1864 (13 Stat. 123), suspending the statutes of limitation of actions (Stewart *v.* Bloom, 11 Wall. 493 [1871]. *See also* Mayfield *v.* Richards, 115 U. S. 137 [1885]).

(5) Acts of Congress authorizing condemnation of land for monuments, etc., on the battlefield of Gettysburg were upheld as germane and appropriate to the exercise of the war-making power, especially in view of the fact that they plainly tended to enhance the love of the citizen for his country and quicken his motives to defend it (United States *v.* Gettysburg Electric R. Co., 160 U. S. 668, 681 [1896]).

(6) The provisions of the Volstead Act (41 Stat. 305) extending the scope of the war-time prohibition act to include malt liquors of one-half of 1 percent alcoholic content, whether in fact intoxicating or not (Hamilton *v.* Kentucky Distilleries & W. Co., 251 U. S. 146 [1919]; Ruppert (Jacob) *v.* Caffey, 251 U. S. 264 [1920]).

(7) In taking over and operating the railroad systems of the country the United States did so in a sovereign capacity, as a war measure, "under a right in the nature of eminent domain" (Dupont de Nemours Powder Co. *v.* Davis, 264 U. S. 456, 462 [1924]).

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Constitutional Restrictions.

The mere existence of a state of war did not suspend the guaranties of the Fifth and Sixth Amendments nor relieve Congress from their limitations in connection with the Food Control Act of August 10, 1917.[1]

[1] United States *v.* Cohen Grocery Co., 255 U. S. 81 [1921]. *See also* United States *v.* Standard Brewery, 251 U. S. 210 [1920], as to use of grains, fruits, and other food products in connection with beverages.

For an interpretation and application of the Espionage Act of June 15, 1917 (40 Stat. 217), and its relation to the guaranties of the First Amendment, *see*—

Debs *v.* United States, 249 U. S. 211 [1919]; Schenck *v.* United States, 249 U. S. 47 [1919]; Sugarman *v.* United States, 249 U. S. 182 [1919]; Frohwerk *v.* United States, 249 U. S. 204 [1919]; Abrams *v.* United States, 250 U. S. 616 [1919].

Effect of Existing Federal Legislation.

The Director General of Railroads was not barred by the Federal Statutes of limitations (applicable to carriers generally) from pursuing an action on behalf of the United States to recover on a liability arising out of Federal control.[1]

[1] Dupont de Nemours Powder Co. *v.* Davis, 264 U. S. 456 [1924].

Effect on State Law, etc.*

A State tax on passengers leaving the State was held invalid as an interference with the power of Congress to transport troops (necessarily incident to its right to declare war).[1] State statutes of limitation were held not to apply during period of hostilities.[2]

[1] Crandall *v.* Nevada, 6 Wall. 35 [1868].

[2] Hanger *v.* Abbott, 6 Wall. 532 [1868]; Freeborn *v.* The "Protector" (The "Protector") 9 Wall. 687 [1870]; Levy *v.* Stewart, 11 Wall. 244 [1871]; Davis *v.* Corona Coal Co., 265 U. S. 219 [1924].

State law making it a misdemeanor to advocate that citizens should not assist in the prosecution of war is not in conflict with the war power of Congress.[1]

[1] Gilbert *v.* Minnesota, 254 U. S. 325 [1920].

Letters of Marque and Reprisal.†

By the act declaring war in 1812 (2 Stat. 759), the President was authorized to issue commissions to privateers. It was held that a privateer took his commission subject to the power of the President to prescribe instructions.[1] Letters obtained by fraudulent misrepresentations will not vest the interests of prize.[2]

[1] The "Thomas Gibbons," 8 Cr. 421 [1814]. *See also* The "Joseph," 8 Cr. 451 [1814].

[2] The "Experiment," 8 Wheat. 261 [1823].

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* *See also* pp. 164, 212.

† *See also* p. 296.

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Rules Concerning Captures.

The power to make these rules is not limited to captures on the high seas or on foreign territory; it extends to captures within the United States. "Property is captured on land when seized or taken from hostile possession by the military forces under orders from a commanding officer." What shall be the subject of capture is always within the control of every belligerent.[1] In the absence of rules respecting prize, the courts of the United States will administer the law of nations. So held, that fishing boats unarmed and honestly engaged in catching and bringing in fresh fish are exempt from capture.[2]

[1] Brown *v.* United States, 8 Cr. 110 [1814]. *See also* United States *v.* Padelford, 9 Wall. 531, 540 [1870]; Lamar *v.* Browne, 92 U. S. 187 [1876]; The "Pedro," 175 U. S. 354 [1899]; The "Panama," 176 U. S. 535 [1900]; Mauran *v.* Insurance Cos., 6 Wall. 1 [1868].

[2] The "Paquete Habana," 175 U. S. 677 [1900].

The Captured and Abandoned Property Act of March 12, 1863 (12 Stat. 820), was held within the power to "make regulations concerning captures on land and water."[1] The act was a surrender by the United States of its right as a belligerent to appropriate property of a particular kind taken in the enemy's country, and belonging to a loyal citizen.[2]

[1] Haycraft *v.* United States, 22 Wall. 81 [1875].

[2] Briggs *v.* United States, 143 U. S. 346 [1892].

The Trading With the Enemy Act of 1917 (40 Stat. 411), was held to be strictly a war measure and within the power of Congress.[1] Congress may provide for immediate seizure, *in pais*, or through a court, of enemy property, leaving the question of enemy ownership *vel non* to be settled later at suit of claimant.[2]

[1] Stoehr *v.* Wallace, 255 U. S. 239 [1921].

[2] Central Union Trust Co. *v.* Garvan, 254 U. S. 554 [1921]. *See also* Commercial Trust Co. *v.* Miller, 262 U. S. 51 [1923]; United States Trust Co. *v.* Miller, 262 U. S. 58 [1923]; Ahrenfeldt *v.* Miller, 262 U. S. 60 [1923].

Neither the Confiscation Act of 1861 (12 Stat. 256) nor the supplementary act of 1863 (12 Stat. 762), modified the law of prize; and consequently a capture prosecuted as prize under international law cannot claim the protection of the acts mentioned, although equally subject to confiscation thereunder.[1]

[1] The "Hampton" *v.* United States, 5 Wall. 372 [1867].

The power of Congress in respect to prizes is plenary, and no one can have any interest in prizes captured except by permission of Congress.[1]

[1] The "Siren," 13 Wall. 389 [1871]; United States *v.* Steever, 113 U. S 747, 753 [1895].

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The Congress shall have Power * * * To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

Article I. Sec. 8. Powers of Congress. Cl. 12. Raising and support of armies.

In General.

In was stated in United States *v.* Macintosh, 283 U. S. 605, 622 [1931], that the power to raise armies "necessarily connotes the like power to say who shall serve in them and in what way", and that "whether any citizen shall be exempt from serving in the armed forces of the Nation in time of war is dependent upon the will of Congress and not upon the scruples of the individual, except as Congress provides." The privilege of a conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress, and cannot be greater in the case of a foreign-born than a native-born citizen. So, held that an applicant for naturalization who offered to take the oath of allegiance with the qualification that his support of any future war would depend upon his opinion as to its moral justification, was properly refused admission to citizenship.

Drawing support from this clause together with the other clauses relating to national defense, it was stated in United States *v.* Schwimmer, 279 U. S. 644, 650 [1929], that the duty of citizens by force of arms to defend our Government against all enemies whenever necessity arises "is a fundamental principle of the Constitution"; and one who applies for citizenship is bound to show that any lack of nationalistic sense does not oppose this principle nor prevent the true faith and allegiance required.

The power of Congress (under this clause and the clause for regulating the land and naval forces) to determine how armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed and the service to which he shall be assigned, is plenary and exclusive. "In virtue of its power to raise and support armies, to provide and maintain a Navy and to make rules for the government of land and naval forces, the Congress may require military service of adults and minors alike. The power of the United States may be exerted to supersede parents' control and their right to have the services of minor sons who are wanted and fit for military service. And the Congress may confer upon minors the privilege of serving in land or naval forces, authorize them to enlist, or draft them upon such terms as it may deem expedient and just." [1] Hence, the parents' consent to the enlistment of their minor son in the Navy on condition that he carry war-risk

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insurance in the sum of $10,000 in behalf of his mother is not binding on the Government.

[1] United States v. Williams, 302 U. S. 46 [1937], citing the following cases among others: In re Grimley, 137 U. S. 147, 153 [1890]; Arver v. United States (Selective Draft Law Cases), 245 U. S. 366, 377–378, 386 [1918]; Hamilton v. University of California, 293 U. S. 245, 262–264 [1934].

A writ of habeas corpus cannot issue from a State court for the discharge of a minor who enlisted in the military forces without the consent of his parents.[1]

[1] United States v. Tarble (Tarble's Case), 13 Wall. 397 [1872]. *See also* cases under clause 11, p. 243.

The draft law of 1917 was upheld against the following objections: (1) That by some of its administrative features it delegates Federal power to State officials; (2) that it vests both legislative and judicial power in administrative officers; (3) that, by exempting ministers of religion and theological students under certain conditions and by relieving from strictly military service members of certain religious sects whose tenets deny the moral right to engage in war, it is repugnant to the first Amendment, as establishing or interfering with religion; and (4) that it creates involuntary servitude in violation of the Thirteenth Amendment.[1]

[1] Arver v. United States (Selective Draft Law Cases) 245 U. S. 366; [1918]; Jones v. Perkins, 245 U. S. 390 [1918].

The Congress shall have Power * * * To provide and maintain a Navy;

Article I.
Sec. 8. Powers of Congress.
Cl. 13. Provisions for a Navy.

In General.

It was early stated by Chief Justice Marshall that it was "never to be questioned in this Court" that a Government which possesses the broad powers of war, which "may provide and maintain a Navy" and make rules for the government of its land and naval forces, has power to punish an offense committed by a marine on board a ship of war. The question in that case was not as to the power, but as to the extent to which that power had been exercised; and it was held that an act limited to the punishment of offenses within forts or other places under the exclusive jurisdiction of the United States, did not apply to war vessels.[1]

[1] United States v. Bevans, 3 Wheat. 336, 390 [1818].

This clause constitutes a more direct authority for the building of war vessels than the clause granting power to declare war.[1] It has been held that it includes all powers necessary to the object intended;

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and specifically that Congress has power under it to enlist minors in the naval service.[2]

[1] United States v. Burlington & H. C. Ferry Co., 21 Fed. 331, 340 [1884].
[2] United States v. Williams, 302 U. S. 46 [1937], (Pennsylvania) Commonwealth v. Murray, 4 Bin. 487 [1812] (opinion by Chief Justice Tilghman of Pa.); United States v. Stewart, 27 Fed. Cas. No. 16400 [1839].

The Congress shall have Power * * * To make Rules for the Government and Regulation of the land and naval Forces;

Article I. Sec. 8. Powers of Congress. Cl. 14. Land and naval forces.

In General.

In pursuance of this authority, Congress by act of March 2, 1799 (1 Stat. 709), established rules for the government of the Navy which were repealed in 1800. In 1862 (12 Stat. 565) Congress recognized the regulations theretofore issued by the Secretary of the Navy, subject to alteration with approval of the President. Referring to regulations issued under this authority the Court stated (Ex parte Reed, 100 U. S. 13, 22 [1879]) "such regulations have the force of law", citing Gratiot v. United States.[1]

[1] In Gratiot v. United States, 4 How. 80, 117 [1846] the Court, speaking of Army regulations stated, "this Court has too repeatedly said, that they have the force of law, to make it proper to discuss that point anew."

Congress has under this clause power to provide for the trial and punishment of military and naval offenses, in the manner practiced by civilized nations, and this power is independent of the judicial power of the United States under article III. So, held that a naval court-martial called in pursuance of an act of 1800, establishing rules for the government of the Navy, and providing in article 32 that offenses not specified should be punished "according to the laws and customs in such cases at sea," had jurisdiction of the offense (not specified) of attempted desertion, and the civil courts had no jurisdiction of an action of false imprisonment against the officer who executed the judgment of the court-martial.[1] Similarly, the civil courts on habeas corpus can consider only whether the military court had jurisdiction.[2] And where a navy court-martial has jurisdiction of one, at least, of the charges against the accused, the civil courts of the United States have no jurisdiction to issue a writ of prohibition to the court-martial.[3] Whether a civil court could in any case issue such a writ was not decided.

[1] Dynes v. Hoover, 20 How. 65 [1857].
[2] Swaim v. United States, 165 U. S. 553 [1897]; Carter v. Roberts, 177 U. S. 496 [1900].
[3] Smith v. Whitney, 116 U. S. 167 [1886].

The general rule has been repeatedly recognized that the acts of a court-martial, within the scope of its jurisdiction and duty, cannot

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be controlled or reviewed in the civil courts, by writ of prohibition or otherwise.[1]

[1] Mullan *v.* United States 212 U. S. 516 [1909]; Smith *v.* Whitney, 116 U. S. 167, 177 [1886], citing Dynes *v.* Hoover, 20 How. 65 [1858]; Ex parte Reed, 100 U. S. 13 [1879]; Ex parte Mason, 105 U. S. 696 [1882]; Keyes *v.* United States, 109 U. S. 336 [1883]; Wales *v.* Whitney, 114 U. S. 564, 570 [1885]; Kurtz *v.* Moffitt, 115 U. S. 487, 500 [1885]. *See also* United States *v.* Tarble (Tarble's Case), 13 Wall. 397, 408 [1872]; United States *v.* Grimley (Re Grimley), 137 U. S. 147, 150 [1890]; Johnson *v.* Sayre, 158 U. S. 109, 115 [1895]; Re Vidal, 179 U. S. 126 [1900]; Carter ex rel. Carter, *v.* McClaughry, 183 U. S. 365, 401 [1902]; McClaughry *v.* Deming, 186 U. S. 49, 69 [1902].

It was stated by Chief Justice Marshall that under this clause and the power to maintain a navy, Congress could enact a statute for punishment of offenses committed by marines on board a ship of war wherever that ship might lie.[1]

[1] United States *v.* Bevans, 3 Wheat. 336, 390 [1818].

Under this and other clauses of the Constitution Congress may prescribe rules governing enlistment, pay, and the carrying of war-risk insurance, etc.[1]

[1] United States *v.* Williams, 302 U. S. 46 [1937].

Article I. Sec. 8. Powers of Congress. Cl. 15. Calling out the militia.

The Congress shall have Power * * * To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

Power of Congress.

Congress is not deprived of its power under this clause where the necessity for its exercise is called out by civil war. Authority to suppress rebellion is found in the power to suppress insurrection and carry on war.[1] The power to suppress insurrection carries with it inherently rightful authority to guard against an immediate renewal of the conflict, and to remedy the evils growing out of its rise and progress.[2]

[1] Texas *v.* White, 7 Wall. 700 [1869]; Tyler *v.* Defrees, 11 Wall. 331 [1871].

[2] Stewart *v.* Bloom, 11 Wall. 493, 506 [1871]; Raymond *v.* Thomas, 91 U S. 712, 714 [1876].

The power of Congress to compel military service and the duty of the citizen to render it when called for is derived from the authority to declare war and to raise armies; this power is not qualified or restricted by the provisions of the militia clause, and the limitations, if any, as to the use of the militia.[1]

[1] Arver *v.* United States (Selective Draft Law Cases), 245 U. S. 366 [1918]; Cox *v.* Wood, 247 U. S. 3 [1918].

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Delegation of Power to President.

Act of Congress of February 28, 1795 (1 Stat. 424), delegating to the President power to call forth the militia, held constitutional. Under this act the power to determine when the exigency requiring the calling forth of the militia had arisen was exclusively in the President, and his determination upon this point was conclusive.[1]

[1] Martin *v.* Mott, 12 Wheat. 19, 32 [1827]; Luther *v.* Borden, 7 How. 1, 43 [1849].

Concurrent State Power.

Congress may make laws to enforce a call; in this the States have concurrent power, and may prescribe penalties for failure to obey the President's call. They possess also a concurrent power to aid the National Government by calls under their own authority, and in emergencies may use the militia to put down armed insurrection.[1]

[1] Moore *v.* Houston, 3 S. & R. (Pa.) 169 [1817], affirmed in Houston *v.* Moore, 5 Wheat. 1 [1820].

Status of Militia in Service.

A militiaman who refused to obey a call of the President under the act of 1795 was not "employed in the service of the United States so as to be subject to the articles of war", but was liable to be tried for the offense under that act.[1]

[1] Houston *v.* Moore, 5 Wheat. 1 [1820]; Martin *v.* Mott, 12 Wheat. 19 [1827].

The legislation on the subject was reviewed and the conclusion reached that a distinction had always existed and did still (1902) exist between the militia or volunteer forces and the Regular Army of the United States; and held, that a volunteer officer could not be tried by a court-martial composed entirely of Regular Army officers.[1]

[1] McClaughry *v.* Deming, 186 U. S. 49 [1902].

Article I. Sec. 8. Powers of Congress. Cl. 16. Power over the militia.

The Congress shall have Power * * * 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;

In General.

In Houston *v.* Moore, 5 Wheat. 1, 16 [1820], the court said: "Congress has power to provide for organizing, arming, and disciplining them, and this power being unlimited, except in the two partic-

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ulars of officering and training them, according to the discipline to be prescribed by Congress, it may be exercised to any extent that may be deemed necessary by Congress. * * * The power of the State governments to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, it remains with the States, subordinate nevertheless to the paramount law of the General Government, operating upon the same subject." But after a detachment of the militia has been called forth, and has entered the Federal service, the authority of Congress over such detachment is exclusive.

Article I. Sec. 8. Powers of Congress. Cl. 17. Seat of government, etc.

The Congress shall have power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

Seat of Government.*

ESTABLISHMENT.

In pursuance of this clause Maryland, by act of 1788, authorized her delegation in the House of Representatives in Congress to cede to Congress a tract not exceeding 10 miles square as Congress should fix upon and accept for the seat of government; and similarly Virginia by act of December 3, 1789, ceded to the United States that part of her territory subsequently known as Alexandria County. On July 16, 1790, Congress passed an act for the establishment of the seat of government (1 Stat. 130), accepting the cession of a district not exceeding 10 miles square, to be located on the Potomac River, "between the mouths of the Eastern Branch and Connagocheque," and further providing for the survey and location of the said district.

* The designation "District of Columbia" appears not to have originated in an act of Congress; the district was referred to in the Maryland act of 1791 as a "territory, since called the Territory of Columbia." Congress, in the act of 1801 relating to judicial organization, used the term district, or District of Columbia, but no specific act was passed establishing that as the official name until 1871 (16 Stat. 419). The name "Washington" similarly was not fixed in the beginning by act of Congress. The agreement between the proprietors, executed on March 13, 1791, referred merely to a Federal City; the Maryland act of December 19, 1791, refers to "a city, which has been called the city of Washington." The designation was used officially by the commissioners in 1794, but was first recognized in an act of Congress in 1802 (2 Stat. 175).

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An amendatory act of Mar. 3, 1791 (1 Stat. 214), authorized selection of land below Eastern Branch and above Hunting Creek, thus providing for inclusion of Alexandria—and President Washington on March 30, 1791, proclaimed the boundaries of the district selected—beginning at Hunting Creek accordingly, and covering 10 miles square in Virginia and Maryland.[1]

[1] See Morris v. United States, 174 U. S. 196 [1899]; Phillips v. Payne, 92 U. S. 130 [1876].

By the act of 1790 (1 Stat. 139), the seat of government was to be removed to the new location on the first Monday of December, 1800; and it was held, in United States v. Hammond (1 Cr. (C. C.) 15 [1801]) that the jurisdiction of the United States vested accordingly.

The original district thus established was of the maximum area permitted by the Constitution. "Thereafter, on the 9th of July, 1846, Congress, in violation of the Constitution, passed an act purporting to authorize a vote to be taken by the people of Alexandria County to determine whether the county should be retroceded to the State of Virginia, and declaring, that, in the case that a majority of the votes should be cast in favor of retrocession, the county should be retroceded and forever relinquished in full and absolute right and jurisdiction." A majority of the votes were cast for retrocession; whereupon, without further action by Congress, Virginia accordingly declared the county reannexed and has since assumed full jurisdiction. And Congress has by more than one act recognized the transfer as a settled fact. So held, that a resident of that county is estopped from raising the question as to the validity of the retrocession.[1]

[1] Phillips v. Payne, 92 U. S. 130, 131 [1876]. Cf. James v. United States, 38 Ct. Cl. 615, 627 [1923] as to the intended permanency of the cession for the seat of government.

Maryland passed an additional act in 1791, ratifying her former act of cession; and both this and the Virginia act provided that the United States should not acquire any right of property in the soil so as to affect the rights of individuals except as the same should be transferred to the United States by the individuals concerned. Under the agreement between the original proprietors of the lands on which the City of Washington was laid out and the President's Commissioners, and upon the enactment of the Maryland Act, ratifying the cession, the United States became the owner in fee of the streets of the city, although no conveyance thereof by the trustees was ever in fact made as provided in such agreement.[1]

[1] Morris v. United States, 174 U. S. 196 [1899].

The boundary of the District resulting from this retrocession has been a source of controversy. It is settled that the original title of Maryland extended at least to low-water mark on the Virginia side.[1] This state of things was not changed by the original grant of Virginia and the regrant by the United States to Virginia in 1846; nor by the

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Virginia-Maryland compact of 1785. That compact, in respect of the free navigation of the Potomac, possibly never was in force in the District of Columbia.[2] An arbitration award accepted by the two States in 1878 (fixing low-water mark on the Virginia side as the boundary) although assented to by the United States (20 Stat. 481) did not affect the boundary of the District. On the other hand, the Revised Statutes relating to the District, in section 1, import an assertion by Congress that the title of the United States embraces the whole river bed.[3]

[1] Maryland v. West Virginia, 217 U. S. 1, 45, 46 [1910]; s. c. ibid., 577, 578; Morris v. United States, 174 U. S. 196 [1899].

[2] Marine R. & Coal Co. v. United States, 257 U. S. 47 [1921]. *Cf.* Georgetown v. Alexandria Canal Co., 12 Pet. 91 [1838], where it was stated that the compact of 1785 was a compact between the two States as such, the citizens of each being entitled individually to the benefit of it, but individually in no just sense parties to it. That compact could be modified or annulled at the will of the two States, and when they ceded the District of Columbia to the United States whatever the Legislatures of Virginia and Maryland could have before done could be done by Congress after the cession in respect to that portion of the river within the District subject only to the limitations imposed by the act of cession.

Without deciding whether, under this compact, landowners in the absence of legislative grant, either by Maryland before the cession or by the United States after the cession, acquired a right to build wharves on land of the United States lying in the bed of the river, it was held that mandamus would not issue to the Secretary of War to permit building of a wharf where by reason of intended public improvements the apparent consequence of such action would be only to increase the expense to the Government of constructing the intended parkway.[1]

[1] United States ex rel. Greathouse v. Dern, 289 U. S. 352 [1933].

The matter thus remained in dispute. In 1934 Congress provided for a commission to establish the boundary line between the District of Columbia and Virginia—their findings and recommendations to be reported to Congress and Virginia for final ratification (49 Stat. 453). A final report was made to the second session of the Seventy-fourth Congress, and a bill introduced to ratify the findings, but no action was taken thereon.

CONTINUANCE OF EXISTING LAW.

By the act of July 16, 1790 (1 Stat. 139), providing for the establishment of the seat of government, State laws were not to be affected until Congress provided for the government of the District. This was "perhaps only declaratory of a principle which would have been in full operation without such declaration" (United States *v.* Simms, 1 Cr. 252, 256 [1803]). As provision for the District government was not made until February 27, 1801 (2 Stat. 103), the States' right to legislate continued until that time, and where the acts of Congress made no changes in the existing laws, the laws of Virginia[1] and Mary-

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land [2] remained in force in the parts of the District ceded by them respectively, but the effect of statutes within the District can not be controlled by decision of the State courts rendered since the cession.[3]

[1] Young *v.* Bank of Alexandria, 4 Cr. 384 [1808]; Deneale *v.* Archer, 8 Pet. 528, 530 [1834]; Rhodes *v.* Bell, 2 How. 397, 404 [1844].

[2] Tayloe *v.* Thomson, 5 Pet. 358, 368 [1831]; Ex parte Watkins, 7 Pet. 568 [1833]; Stelle *v.* Carroll, 12 Pet. 201, 205 [1838]; Van Ness *v.* Bank of United States, 13 Pet. 17 [1839]; United States *v.* Eliason, 16 Pet. 291, 301 [1842]; Russell *v.* Allen, 107 U. S. 163, 171 [1883]. *See also* United States *v.* Williams, 4 Cr. (C. C.) 372 [1833], where it was said that the State laws operate in the District solely by virtue of the act of Congress which adopted them in mass, and only so far as applicable to the circumstances of the District.

[3] Russell *v.* Allen, 107 U. S. 163, 171 [1883].

As to the operation of the cession upon individuals, its only effect was to terminate the State citizenship of residents; contract obligations were not affected, and liens on property for debt were continued.[1]

[1] Reily *v.* Lamar, 2 Cr. 344, 356 [1805]; Korn *v.* Mutual Assur. Soc., 6 Cr. 192, 199 [1810]; Mutual Assur. Soc. *v.* Watts, 1 Wheat. 279 [1816].

STATUS OF THE DISTRICT OF COLUMBIA.

The District of Columbia is a separate political community in a certain sense, and in that sense may be called a State whose sovereign power is lodged in the Government of the United States; but it is not strictly a State within the meaning of that term as used in the Constitution [1]—a citizen of the District cannot be a party to a suit in the Federal courts, where the jurisdiction depends on diversity of citizenship.[2] It was held to be a "State" within the terms of a treaty with France regulating the rights of Frenchmen to inherit property within the "States of the Union." [3]

[1] Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 19 [1889]. *See also* Bank of Alexandria *v.* Dyer, 14 Pet. 141, 146 [1840].

[2] Hepburn *v.* Ellzey, 2 Cr. 445, 452 [1805]; Barney *v.* Baltimore, 6 Wall. 280 [1868]; Hooe *v.* Jamieson, 166 U. S. 395, 397 [1897].

[3] De Geofroy *v.* Riggs, 133 U. S. 258 [1890]. *See also* Talbott *v.* Silver Bow County, 139 U. S. 438, 444 [1891]; Downes *v.* Bidwell, 182 U. S. 244, 270 [1901].

The District of Columbia is a municipal corporation, with the right to sue and be sued, although its organization is peculiar, there being no general organic law covering all of the ordinary powers usually conferred in the creation of a municipal corporation, e. g., no formal charter.[1]

[1] Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 9 [1889]; District of Columbia *v.* Tyrrell, 41 App. D. C. 463 [1914].

The District Commissioners are merely administrative officers with ministerial powers only. The sum of the municipal powers of the District of Columbia is neither vested in nor exercised by the District Commissioners. They are on the contrary, vested in the Congress

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of the United States. So held, that the Commissioners have no power to agree to a common law submission of a claim against the District.[1]

[1] District of Columbia v. Bailey, 171 U. S. 161 [1898].

POWER OF CONGRESS OVER THE DISTRICT OF COLUMBIA.

In General.

The District of Columbia, unlike the Territories, is a permanent part of the United States—the very heart of the Union, over which Congress has permanent and exclusive power of legislation—the combined powers of National and State governments where legislation is possible.[1]

[1] Kendall v. United States ex rel. Stokes, 12 Pet. 524, 619 [1838]; Shoemaker v. United States, 147 U. S. 282, 300 [1893]; Parsons v. District of Columbia, 170 U. S. 45, 52 [1898]; O'Donoghue v. United States, 289 U. S. 516, 518 [1933].

Congress legislates for the District with the same power as the legislative assemblies of the States, and in doing so it acts as the legislature of the Union. The failure of Congress to exercise its power in no way impairs the grant, but it must be exercised subject to the limitations contained in the Constitution.[1]

[1] Cohens v. Virginia, 6 Wheat. 264 [1821]; Mattingly v. District of Columbia, 97 U. S. 687, 690 [1878]. *See also* United States v. More, 3 Cr. 159, 161 [1805] (report of case in circuit court).

The power of Congress to exercise exclusive jurisdiction in all cases whatever within the District of Columbia includes the power of taxation;[1] and this power is irrespective of the fact that the persons taxed lack the suffrage and have politically no voice in the expenditure of the money.[2] In the exercise of this power Congress may, at its discretion, wholly exempt certain classes of property from taxation, or it may tax them at a lower rate than other property.[3] An act providing for condemnation of land for streets and assessing the damages against adjacent land was held valid against objection that it contravened the Fifth Amendment.[4] Similarly the act of September 27, 1890, establishing Rock Creek Park "for the benefit and enjoyment of the people of the United States" and assessing expenses against adjacent property owners, was upheld.[5]

[1] Loughborough v. Blake, 5 Wheat. 317 [1820]; Parsons v. District of Columbia, 170 U. S. 45, 56 [1898].
[2] Heald v. District of Columbia, 259 U. S. 114 [1922].
[3] Gibbons v. District of Columbia, 116 U. S. 404, 407 [1886].
[4] Wight v. Davidson, 181 U. S. 371 [1901].
[5] Wilson v. Lambert, 168 U. S. 611 [1898].

Constitutional Restrictions.

The power of Congress in the District of Columbia as elsewhere throughout the Federal Union, is distinctly limited by all express guaranties of individual right contained in the Federal Constitution.

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No more in the District of Columbia than anywhere else within the United States, could the Legislature of the Union pass a bill of attainder or an *ex post facto* law, or dispense with trial by jury, or establish a religion, or authorize unreasonable searches. All the general limitations imposed by the Constitution upon its authority are as applicable in the District of Columbia as in any other part of the United States.[1] The exclusive power of legislation over the District which is vested in Congress by the Constitution, must be assumed to extend only to all lawful subjects of legislation; and invasions of those fundamental individual rights, which lie at the foundation of the social compact, and for the maintenance of which free governments exist, are not lawful subjects of legislation.[2]

[1] Curry *v.* District of Columbia, 14 App. D. C. 423 [1899], holding that a joint resolution of Congress authorizing the D. C. Commissioners to grant exclusive hacking privileges, was obnoxious to the principle of equality and invalid.

[2] Citizens' Sav. & L. Asso. *v.* Topeka, 20 Wall. 655 [1875].

The provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases [1] and of presentment by a grand jury [2] are applicable in the District of Columbia.

[1] Callan *v.* Wilson, 127 U. S. 540 [1888]; Capital Traction Co. *v.* Hof, 174 U. S. 1 [1899].

[2] United States *v.* Moreland, 258 U. S. 433 [1922].

The Employers' Liability Act of June 11, 1906 (34 Stat. 232), although unconstitutional as relating to interstate commerce, was constitutional as to commerce wholly in the District of Columbia, under the plenary powers of Congress over the District.[1] Similarly, the power exercised by Congress in the enactment of the provision of section 3 of the Sherman Act (26 Stat. 209) relating to restraint of trade or commerce exclusively within the District of Columbia, was its plenary power, under article I, section 8, clause 17 of the Constitution, to legislate for the District, and therefore the meaning of this provision, unlike section 1 of the act, is not limited by the scope of the power to regulate commerce.[2]

[1] El Paso & N. E. R. Co. *v.* Gutierrez, 215 U. S. 87 [1909].

[2] Atlantic Cleaners & Dyers *v.* United States, 286 U. S. 427, 428 [1932].

Delegation of Power to District of Columbia Government.

The District of Columbia is a municipal corporation, and as such it may be invested with legislative authority; but it can exercise only those powers which are expressly conferred by statute, which must be of a strictly municipal nature.[1]

[1] Thompson *v.* Roe ex dem. Carroll, 22 How. 422, 435 [1860].

Congress may delegate the power to improve or repair streets and to assess adjacent property therefor,[1] and to regulate public markets.[2]

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It has power to confer upon the city of Washington authority to assess upon the adjacent proprietors of lots the expenses of repairing streets,[2] and it may confirm assessments previously made by the District of Columbia without authority of law.[4]

[1] Willard *v.* Presbury, 14 Wall. 676, 680 [1870].
[2] Washington Market Co. *v.* District of Columbia, 172 U. S. 361, 367 [1899].
[3] Briscoe *v.* Rudolph, 221 U. S. 547 [1911].
[4] Mattingly *v.* District of Columbia, 97 U. S. 687, 690 [1878].

The District government may be invested with legislative authority by Congress, and an act of the legislative assembly * exempting certain property from taxation under prescribed conditions was within that authority; but such exemptions are in the nature of a bounty, subject to repeal by inconsistent acts of Congress.[1] An act of the legislative assembly which imposes "a license on trades, business, and professions practiced or carried on in the District of Columbia" is invalid as being a regulation of interstate commerce.[2]

[1] Welch *v.* Cook, 97 U. S. 541 [1879]; Gibbons *v.* District of Columbia, 116 U. S. 404, 407 [1886].
[2] Stoutenburgh *v.* Hennick, 129 U S. 141, 147 [1889].

Courts of the District of Columbia.

It was stated in Kendall *v.* United States ex rel. Stokes, 12 Pet. 524, 619 [1838], that in view of the entire control vested in Congress over the District, "it is reasonable to suppose that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice." And in Moss *v.* United States, 23 App. D. C. 475 [1904]: "though the courts of the District are created and established by the act of Congress, the power for such creation and establishment is no less derived from the Constitution than the power under article III, section 1, of the Constitution, and are therefore courts of the United States for the administration of the laws of the United States."

In Embry *v.* Palmer, 107 U. S. 3 [1883], it was stated that by reason of the exclusive authority of Congress over the District of Columbia, the District of Columbia Supreme Court † was a court of the United States, and the effect to be given to its judgments was to be prescribed by Congress accordingly, without necessary reference to its express powers granted by article IV, section 1. Without deciding whether the Supreme Court of the District is or is not an inferior court

* By an act of Congress of February 21, 1871 (16 Stat. 419), the District of Columbia was constituted a municipal government, with an appointed governor and a legislative assembly consisting of a council appointed by the President, and a house of delegates elected from 22 districts. This organization was abolished by the act of June 20,1874 (18 Stat. 116), setting up a commission form of government.

† In 1936 the Supreme Court was designated United States District Court for the District of Columbia; and in 1934 the Court of Appeals was designated United States Court of Appeals for the District of Columbia.

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of the United States within the meaning of article III, it is a "court of the United States" for the purposes of Revised Statutes 714, authorizing retirement pay to judges of any court of the United States, after 10 years' service and reaching the age of 70.[1]

[1] James v. United States, 202 U. S 401 [1906].

In a proceeding brought by a public utility against the Public Utilities Commission of the District of Columbia, in the Supreme Court of the District, under paragraph 64 of section 8 of the act of March 4, 1913 (37 Stat. 974), the court is empowered, not merely to decide legal questions of fact as incident thereto, but also to amend and, if need be, enlarge valuations, rates, and regulations established by the Commission, which the court finds upon the record and evidence to be inadequate, and to make such order as in its judgment the Commission should have made. This is legislative, as distinguished from judicial power. And under the power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia, Congress may vest this jurisdiction in the courts of the District. But such power cannot be conferred upon the United States Supreme Court; and the provision made by the above act (par. 64) for appeals to that court from the Court of Appeals of the District, is, therefore, void.[1]

[1] Keller v. Potomac Electric Power Co., 261 U. S. 428 [1923].

The Supreme Court and the Court of Appeals of the District of Columbia are constitutional courts of the United States, ordained and established under article III of the Constitution, and vested generally with the same jurisdiction as that possessed by the inferior Federal courts located elsewhere, in respect of the cases enumerated in section 2 of article III. The judicial power thus conferred is not, and cannot be, affected by the additional congressional legislation enacted under article I, section 8, clause 17, imposing upon such courts other duties which, because that special power is limited to the District, Congress cannot impose upon Federal courts elsewhere.[1]

[1] O'Donoghue v. United States, 289 U. S. 516 [1933], distinguishing the dictum in Ex parte Bakelite Corp., 279 U. S. 438 [1929], to the effect that these courts were legislative rather than constitutional courts as made by way of illustration merely and not necessary to the decision.

Authority over Places Purchased.

MEANING OF "LIKE AUTHORITY."

The necessary result of the grant of like authority, is that when title is acquired by purchase with the consent of a State legislature, the land so purchased, by the very terms of the Constitution, *ipso facto* falls within the exclusive legislation of Congress; and State jurisdiction is completely ousted, for exclusive jurisdiction is the attendant upon exclusive legislation.[1] Within the District of Columbia, and the places thus purchased and used for the purposes set out

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in this clause, the national and municipal powers of government of every description are united in the Government of the Union.[3]

[1] Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525, 532 [1885]. *See also* United States v. Bevans, 3 Wheat. 336, 388 [1818]; Surplus Trading Co. v. Cook, 281 U. S. 647, 652, 654 [1930].

[2] Pollard v. Hagen, 3 How. 212, 223 [1845].

SCOPE OF TERM "PLACES."

The broadest construction has been put upon this clause—one which makes it cover all structures and all places necessary for carrying on the business of the National Government.[1] It includes post offices;[2] and is applicable to a hotel located upon the Hot Springs reservation in Arkansas.[3] There is contemplated, however, a permanent use of property purchased; and land leased to the United States for 1 month, with an option of occupying same for 6 months at a stipulated rental, is not a "place" within the meaning of the clause.[4]

[1] James v. Dravo Contracting Co., 302 U. S. 134 [1937]; Silas Mason Co. v. Tax Commission of Washington, 302 U. S. 186 [1937]; United States v. Tucker, 122 Fed. 518, 522 [1903].

[2] Battle v. United States, 209 U. S. 36 [1908].

[3] Arlington Hotel Co. v. Fant, 278 U. S. 439 [1929].

[4] United States v. Tierney, 28 Fed. Cas. No. 16517 [1864].

EXCLUSIVE JURISDICTION.

When the United States acquires title to lands by purchase with the consent of the legislature of the State, the Federal jurisdiction is exclusive of all State authority.[1] When a place is under the control of the United States and is used as a fort or magazine, or for other purpose mentioned in the Constitution, the laws of the United States framed for such places become the law of these places upon the consent of the State lawfully given for that purpose, and an act of Congress assuming jurisdiction is not necessary.[2]

[1] United States v. Unzeuta, 281 U. S. 138 [1930].

[2] Ex parte Hebard, 4 Dill. (U. S.) 380 [1877].

Buildings constructed within the States under this clause are exempt, as instrumentalities for the execution of the powers of the general Government, from such control of the States as would defeat or impair their use for that purpose; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the State would be desirable, there would seem to be no objection to its grant by the legislature of the State. Such cession is really as much for the benefit of the State as it is for the benefit of the United States. It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purpose for which the property was acquired or reserved from sale. When they cease to be thus used the jurisdiction reverts to the State.[1]

[1] Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525, 541 [1885].

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The cession by the State includes judicial as well as legislative jurisdiction.[1] The power of State courts over the property ceases, and no process can issue out of any State court to disturb the title or affect the property.[2] A State is without jurisdiction to try and punish offenses committed within the ceded territory.[3] Congress has power to punish murder committed within ceded territory, as e. g. in a post office.[4] The jurisdiction carries with it, as an incident, the right to make the Federal power effectual; so, a criminal committing an offense within Federal jurisdiction may be apprehended within a State by the United States marshal. Congress exercises its power not as a local legislature but in its high character as the legislature of the Union.[5]

[1] Steele *v.* Halligan, 229 Fed. 1011 [1916].
[2] Martin *v.* House, 39 Fed. 694 [1888].
[3] Commonwealth *v.* Clary, 8 Mass. 72 [1811]; United States *v.* Travers, 28 Fed. Cases 16537 [1814].
[4] Battle *v.* United States, 209 U. S. 36 [1908].
[5] Cohens *v.* Virginia, 6 Wheat. 264, 428 [1821].

The reservation which has usually accompanied the consent of the States, that civil and criminal process of the State courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them, but is admitted to prevent them from becoming an asylum for fugitives from justice.[1]

[1] Fort Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 533 [1885]. *See also* United States *v.* Cornell, 2 Mason (U. S.) 60 [1819].

Federal jurisdiction being exclusive, private personal property thereon can not be taxed by the State.[1] A State has not the power to legislate so as to control the governor of a national soldiers' home, acting under the direction of the board of managers and by the authority of Congress, in regard to the internal administration of the affairs of the home.[2] A State statute providing for the recovery of a penalty for default in the delivery of a telegram does not apply to a telegram to be delivered within a United States navy yard.[3]

[1] Surplus Trading Co. *v.* Cook, 281 U. S. 647 [1930]. *Cf.* Nikis *v.* Commonwealth, 144 Va. 618 [1926].
[2] Ohio *v.* Thomas, 173 U. S. 276 [1899].
[3] Western U. Teleg. Co. *v.* Chiles, 214 U. S. 274 [1909].

ACQUISITION WITHOUT CESSION OF FULL JURISDICTION.

This clause contains no express stipulation that the consent of the State to the purchase of places for "needful buildings" shall be without reservations.[1]

[1] James *v.* Dravo Contracting Co, 302 U. S. 134 [1937]; Silas Mason Co. *v.* Tax Commission of Washington, 302 U. S. 186 [1937].

It is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such owner-

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ship and use without more do not withdraw the lands from the jurisdiction of the State.[1]

[1] Surplus Trading Co. *v.* Cook, 281 U. S. 647, 650 [1930]. *See also* In re O'Connor, 37 Wis. 379 [1875].

The phrase "places purchased" limits the National Government to one mode of acquiring exclusive legislative authority over land within a State, namely, by purchase with the State's consent; when land is acquired in any other way, as by cession, any conditions may be annexed to it not inconsistent with the public use contemplated. So a State may impose the condition that jurisdiction shall be retained by the United States only so long as the place is used for the purposes specified; may continue its laws in force there so far as they do not conflict with necessary acts of Congress; or may provide that civil and criminal process of State courts may be executed therein; but where a cession has been made subject to certain conditions, the United States takes entire political jurisdiction, save as expressed in the conditions, and it cannot be limited without the consent of Congress.[1]

[1] Chicago, R. I. & P. R. Co. *v.* McGlinn, 114 U. S. 545 [1885]; Palmer *v.* Barrett, 162 U. S. 399 [1896].

Consent or ratification by the State is necessary to the acquisition of exclusive jurisdiction, but it is necessary for no other purpose, and cannot be required in order to permit the United States to exercise its right of eminent domain.[1]

[1] Chappell *v.* United States, 160 U. S. 499, 510 [1896].

The United States purchased the Arlington estate during the War of the Rebellion at a tax sale, but jurisdiction thereof was never ceded by the State of Virginia. A United States circuit court has no jurisdiction of a petty larceny committed in the national cemetery in that State.[1]

[1] United States *v.* Pennsylvania, 48 Fed. 669 [1880].

Article I.
Sec. 8. Powers of Congress.
Cl. 18. Incidental powers.

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.

Powers of Either House Separately.

The two Houses of Congress in their separate relations have not only such powers as are expressly granted them by the Constitution, but also such auxiliary powers as are necessary and appropriate to make the express powers effective. A Senate resolution directing a committee to investigate the administration of the Department of Justice concerned a subject on which legislation could be had which would

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be materially aided by the information which the investigation was calculated to elicit.[1]

[1] McGrain v. Daugherty, 273 U. S. 135 [1927].

A Grant of Power.

"We are accustomed to speak for mere convenience of the express and implied powers conferred upon Congress. But in fact the auxiliary powers, those necessary and appropriate to the execution of other powers singly described, are as expressly given as is the power to declare war, or to establish uniform laws on the subject of bankruptcy. They are not catalogued, no list of them is made, but they are grouped in the last clause of section 8 of the first article, and granted in the same words in which all other powers are granted to Congress."[1]

[1] Legal Tender Cases, 12 Wall. 457, 550 [1871].

The test of congressional power to regulate the relation of master and servant, in connection with carriers is not merely the matter regulated, but whether the regulation is directly one of interstate commerce or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce.[1]

[1] Howard v. Illinois C. R. Co. (Employers' Liability Cases), 207 U. S. 463, 495 [1908].

An implied power arising from this "general coefficient clause" is not to be confined to, nor interpreted by, the English law on the subject at the time of the adoption of the Constitution.[1]

[1] Continental Illinois Nat. Bank & T. Co. v. Chicago, R. I. & P. R. Co., 294 U. S. 648, 668 [1935].

To Make Laws.

In defining the term "statute of a state" as used in section 237 (a) of the Judicial Code, the Court referred to instances in the Constitution where the term "law" is used (including the present clause) and said "the Constitution of the United States does not use the term statute, but it does employ the term law, often regarded as an equivalent, to describe an exertion of legislative power."[1]

[1] King Mfg. Co. v. Augusta, 277 U. S. 100, 103 [1928].

Necessary and Proper.

IN GENERAL.

"It is impossible to know what those nonenumerated powers are, and what is their nature and extent, without considering the purposes they were intended to subserve. Those purposes, it must be noted, reach beyond the mere execution of all powers definitely intrusted to Congress and mentioned in detail. They embrace the execution of

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all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. * * *."[1]

[1] Legal Tender Cases, 12 Wall. 457, 533 [1871]. *See also* Logan *v.* United States, 144 U. S. 263, 282 [1892].

"By the settled construction and the only reasonable interpretation of this clause, the words 'necessary and proper' are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it."[1]

[1] Legal Tender Case, 110 U. S. 421, 440 [1884].

This clause is not a limitation or restriction upon the powers of Congress, but an enlargement of them. Many powers are necessarily implied under the express grants of power in the Constitution; "it would be utopian to suppose that a government can exist without leaving the exercise of discretion somewhere."[1]

[1] United States *v.* Fisher, 2 Cr. 358, 396 [1805]; McCulloch *v.* Maryland, 4 Wheat. 316, 411 [1819]; United States *v.* Marigold, 9 How. 560 [1850]; Legal Tender Cases, 12 Wall. 457, 532 [1871]; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 472 [1894]; In re Quarles, 158 U. S. 532, 537 [1895]; In re Debs, 158 U. S. 564, 578 [1895].

The broad statement that the Federal Government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the States such portions as it was thought desirable to vest in the Federal Government, leaving those not included in the enumeration still in the States. The States severally never possessed international powers and the investment of the Federal Government with the powers of external sovereignty does not depend upon the affirmative grants of the Constitution.[1]

[1] United States *v.* Curtiss-Wright Export Corp. 299 U. S. 304 [1936].

Congress has a large discretion as to the means to be employed in the exercise of any power granted it.[1] Every right created by, arising under, or dependent upon the Constitution may be protected or enforced by such means as Congress may deem best; if the Constitution guarantees a right, the National Government is clothed with authority to enforce it—the powers given to the National Government are not ineffective because the means of enforcing them are not expressly given. Congress has a large discretion as to the means to be employed, and may employ those means which, in its judgment, are most advantageous, taking care only that they are not inconsistent

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with the limitations placed upon the general power by the Constitution.[2] The Constitution does not profess to enumerate the means by which the powers it confers shall be executed, and where an end is required and a duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is intrusted.[3]

[1] Fairbank *v.* United States, 181 U. S. 283, 287 [1901]; Northern Securities Co. *v.* United States, 193 U. S. 197, 343 [1904]; Story *v.* Perkins, 243 Fed. 997 [1917], affirmed in Jones *v.* Perkins, 245 U. S. 390 [1918].

[2] McCulloch *v.* Maryland, 4 Wheat. 316, 419 [1819]; Prigg *v.* Pennsylvania, 16 Pet. 539, 619 [1842]; In re Quarles, 158 U. S. 532, 535 [1895].

[3] McCulloch *v.* Maryland, 4 Wheat. 316, 407 [1819]; Prigg *v.* Pennsylvania, 16 Pet. 539, 614 [1842]; Thomson *v.* Union P. R. Co., 9 Wall. 579 [1870]; United States *v.* Cruikshank, 92 U. S. 542 [1876].

The courts will determine whether the means employed by Congress to accomplish the ends sought have any relation to the powers granted by the Constitution, and if the measures adopted as the most eligible and appropriate are adapted to the end to be accomplished, and are not inconsistent in letter or spirit with the limitations of the Constitution, the courts cannot declare them inexpedient or unwise.[1] Every act of Congress, to be valid, must find in the Constitution some warrant for its passage; but while construction, for the purpose of conferring a power, should be resorted to with great caution, yet resort must be had to every reasonable construction to save a statute from unconstitutionality, and a choice of means by Congress is not to be adjudged invalid unless the conflict between the Constitution and the statute is clear and strong.[2]

[1] Wilkes *v.* Dinsman, 7 How. 89, 127 [1849]; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 657 [1890]; Logan *v.* United States, 144 U. S. 263, 283 [1892]; Motes *v.* United States, 178 U. S. 458, 462 [1900].

[2] United States *v.* Harris, 106 U. S. 629, 635 [1883]; Mugler *v.* Kansas, 123 U. S. 623, 661 [1887]; Hooper *v.* California, 155 U. S. 648, 657 [1895]; Sweet *v.* Rechel, 159 U. S. 380, 392 [1895].

In the execution of a power Congress is not restricted to the employment of those means alone without which the power would be nugatory, and if the end may be reached indirectly by one mode, it may be reached directly by another. The limitation of necessity and propriety expressed in this clause extends only to incidental legislation, and in no way affects the powers expressly granted.[1]

[1] Boske *v.* Comingore, 177 U. S. 459, 468 [1900]; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 486 [1894].

"But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are

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appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." [1]

[1] McCulloch v. Maryland, 4 Wheat. 316, 421 [1819]. *See also* Logan v. United States, 144 U. S. 263, 282 [1892].

Within the legitimate scope of this grant, Congress is permitted to determine for itself what is necessary and what is proper.[1] In Legal Tender Cases, 12 Wall. 457, 543 [1871], the Court said: "Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or because they make the Government stronger. There must be some relation between the means and the end; some adaptedness or appropriateness of the laws to carry into execution the powers created by the Constitution." But in Interstate Commerce Commission v. Brimson, 154 U. S. 447, 473 [1894], Mr. Justice Harlan stated: "Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. * * * The test of the power of Congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It cannot go beyond that inquiry without intrenching upon the domain of another department of the Government."

[1] Ex parte Curtis, 106 U. S. 371 [1883]; Hoke v. United States, 227 U. S. 308 [1913].

The power of Congress to make all laws "necessary and proper" for carrying into execution the powers vested in the Government of the United States includes the power to enact such legislation as is appropriate to give effect to any stipulations which it is competent for the President, by and with the advice and consent of the Senate, to insert in a treaty with a foreign power.[1]

[1] Neely v. Henkel, 180 U. S. 109, 121 [1901]. *See also* Missouri v. Holland, 252 U. S. 416 [1920].

SPECIFIC INSTANCES.

Civil Rights.

An act providing punishment for any two or more persons conspiring to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, etc., was upheld as protecting the exercise of the right to vote,[1] the right to make homestead entry,[2] the right to inform public officers of violations of Federal laws,[3] and the right of a citizen in the custody of a United States

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marshal, under a lawful commitment to answer for an offense against the United States, to be protected against unlawful violence.[4]

[1] Ex parte Yarbrough, 110 U. S. 651 [1884].
[2] United States v. Waddell, 112 U. S. 76 [1884].
[3] In re Quarles, 158 U. S. 532, 537 [1895]; Motes v. United States, 178 U. S. 458 [1900].
[4] Logan v. United States, 144 U. S. 263 [1892]; United States v. Mosley, 238 U. S. 383 [1915]. *See also* Rakes v. United States, 212 U. S. 55 [1909].

Courts and Judicial Proceedings.*

Under this clause Congress passed the judiciary act of 1789, under which the judicial system of the United States was organized, the powers of the courts defined, and the manner of their exercise regulated. In Rhode Island *v.* Massachusetts,[1] 12 Pet. 657, 721 [1838], the court said: "It was necessarily left to the legislative power to organize the Supreme Court, to define its powers consistently with the Constitution, as to its original jurisdiction; and to distribute the residue of the judicial power between this and the inferior courts, which it was bound to ordain and establish, defining their respective powers, whether original or appellate, by which and how it should be exercised. In obedience to the injunction of the Constitution, Congress exercised their power, so far as they thought it necessary and proper, * * * for carrying into execution the powers vested by the Constitution in the judicial as well as all other departments and officers. * * * No department could organize itself; the Constitution provided for the organization of the legislative power, and the mode of its exercise, but it delineated only the great outlines of the judicial power * * * leaving the details to Congress, in whom was vested, by express delegation, the power to pass all laws necessary and proper for carrying into execution all powers, except their own."

[1] *See also* Martin *v.* Hunter, 1 Wheat. 304, 326 [1816]; United States *v.* Bevans, 3 Wheat. 336, 389 [1818]; Ableman *v.* Booth, 21 How. 506, 521 [1859].

This clause was considered in support of the legislation in Revised Statutes, section 643, relating to the removal of causes against Federal officers.[1] The power to prescribe what effect shall be given to the judicial proceedings of the Federal courts is conferred by this clause and other provisions of the Constitution.[2] Suspension of operation of a statute of limitations was upheld as incidental to the war power.[3]

[1] Tennessee *v.* Davis, 100 U. S. 257, 263 [1880].
[2] Embry *v.* Palmer, 107 U. S. 3 [1883].
[3] Stewart *v.* Bloom, 11 Wall. 493, 507 [1871].

Congress may, as incidental to the power to establish courts, make all laws necessary for carrying into execution the judgments of Federal courts, and having the power to make such laws may proceed under them to satisfy a judgment in favor of the Government.[1] This

* *See also* pp. 241, 259, 428.

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power of regulating proceedings may be delegated by Congress to the courts themselves.[2] So also when a territory is admitted as a State, Congress may designate the court to which records shall be transferred and prescribe the mode for enforcement and review of judgments.[3]

[1] Bank of United States *v.* Halstead, 10 Wheat. 51, 53 [1825].

[2] Wayman *v.* Southard, 10 Wheat. 1, 22 [1825], cited in Rhea *v.* Smith, 274 U. S. 434 [1927].

[3] Hunt *v.* Palao, 4 How. 589, 590 [1846]; United States Exp. Co. *v.* Kountze Bros., 8 Wall. 342, 350 [1869].

The United States Court for China and the consular courts are legislative courts created as a means of carrying into effect powers conferred by the Constitution respecting treaties and commerce with foreign countries. The authority of Congress to create them and to clothe them with such jurisdiction has been upheld by the Supreme Court and is well recognized.[1]

[1] Ex parte Bakelite Corp., 279 U. S. 438, 451 [1929].

Crimes.

Although the Constitution contains no grant, general or specific, to Congress of the power to provide for the punishment of crimes except piracies and felonies on the high seas, offenses against the law of nations, treason, and counterfeiting the securities and current coin of the United States, no one doubts the power of Congress to provide for the punishment of all crimes within one of the States of the Union or within the territory over which Congress has plenary and exclusive jurisdiction.[1] "Besides the particular cases, which the eighth section of the first article designates, there is a power granted to Congress to create, define, and punish, crimes and offences, whenever they shall deem it necessary and proper by law to do so, for effectuating the objects of the Government * * *." [2]

[1] United States *v.* Fox, 95 U. S. 670, 672 [1878]; United States *v.* Hall, 98 U. S. 343, 357 [1879]; Logan *v.* United States, 144 U. S. 263, 283 [1892].

[2] United States *v.* Worrall, 2 Dall. 384, 394 [1790]. *See also* McCulloch *v.* Maryland, 4 Wheat. 316 [1819]; United States *v.* Hall, 98 U. S. 343, 346 [1879].

Specific offenses have been punished under this power as follows: Alteration of registered bonds;[1] bringing into the country counterfeit bonds;[2] conspiracy to injure prisoners in custody of United States marshal;[3] impersonating a Federal officer with intent to defraud.[4]

[1] Ex parte Carll, 106 U. S. 521 [1883].

[2] United States *v.* Marigold, 9 How. 560, 567 [1850].

[3] Logan *v.* United States, 144 U. S. 283 [1892].

[4] United States *v.* Barnow, 239 U. S. 74 [1915].

Incorporations by the United States.

Congress may create corporations as appropriate means of executing the powers of government; as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States,[1] or national banks, with capacity, for their own profit as well as for the use

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of the Government in its many transactions, of issuing bills ordinarily current as a legal tender,[3] or a railroad corporation,[3] or a corporation to construct an interstate bridge [4] for the purpose of promoting commerce among the States, or a corporation to manufacture aircraft [5] or merchant vessels [6] as incidental to the war-making power.

[1] McCulloch *v.* Maryland, 4 Wheat. 316 [1819]; Osborn *v.* Bank of United States 9 Wheat. 738 [1824].

[2] Legal Tender Case, 110 U. S. 421, 445 [1884]; Bank of United States *v.* Bank of Georgia, 10 Wheat. 333 [1825]; Ward *v.* Smith, 7 Wall. 447 [1869]; Farmers' & M. Nat. Bank *v.* Dearing, 91 U. S. 29, 33 [1875].

[3] Union P. R. Co. *v.* Meyers (Pacific Railroad Removal Cases), 115 U. S. 1, 18 [1885]; California *v.* Central P. R. Co., 127 U. S. 1, 39 [1888].

[4] Luxton *v.* North River Bridge Co., 153 U. S. 525 [1894].

[5] Clallam County *v.* United States, 263 U. S. 341 [1923].

[6] Sloan's Shipyards *v.* U. S. Fleet Corp., 258 U. S. 549 [1922].

Interstate and Foreign Commerce.

Congress may create a railroad corporation [1] or a corporation to build an interstate bridge [2] as appropriate means for promoting commerce. It may provide a penalty for obstructing interstate commerce;[3] and may empower the Interstate Commerce Commission to investigate the conduct of carriers.[4]

[1] Union P. R. Co. *v.* Meyers (Pacific Railroad Removal Cases), 115 U. S. 1, 18 [1885]; California *v.* Central P. R. Co., 127 U. S. 1, 39 [1888].

[2] Luxton *v.* North River Bridge Co., 153 U. S. 525 [1894].

[3] United States *v.* Coombs, 12 Pet. 72, 78 [1838]; In re Debs, 158 U. S. 564, 578 [1895].

[4] Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 473 [1894].

Maritime Law.

Congress having, under authority of this clause enacted legislation (secs. 24, 256 of the Judicial Code) for carrying into effect section 2 of article III (extending the judicial power to cases of admiralty and maritime jurisdiction), the maritime law thus established may not be changed or modified by the States so as to interfere with its proper harmony and uniformity in its international and interstate relations.[1] The attempt by Congress (act of October 6, 1917, 40 Stat. 395), to amend these sections of the Judicial Code by saving "to claimants the rights and remedies under the workmen's compensation law of any State", was held unconstitutional as a delegation of the legislative power of Congress under this clause and section 2 of article III.[2] On similar reasoning the act of June 10, 1922 (42 Stat. 634), which undertook to permit application of State laws in case of injuries or death of persons other than the masters and members of the crew, was held unconstitutional.[3]

[1] Southern Pacific Co. *v.* Jensen, 244 U. S. 205 [1917]; Clyde S. S. Co. *v.* Walker, 244 U. S. 255 [1917].

[2] Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149 [1920].

[3] Washington *v.* Dawson & Co., 264 U. S. 219 [1924].

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Where a longshoreman employed in unloading a vessel, while standing upon a wharf was struck by a sling loaded with cargo, knocked into the water, and later died, the cause of death was on the wharf and right of action was controlled by the State and not by the maritime law. So held, over objection that the application of State law would violate the power of Congress under this clause.[1]

[1] Smith & Son v. Taylor, 276 U. S. 179 [1928].

Congress, under article III, section 2, and article I, section 8, paragraph 18 of the Constitution, has paramount power to determine the maritime law which shall prevail throughout the country; but in so doing it is necessarily restricted to the sphere of the admiralty and maritime jurisdiction, the boundaries of which are determined by the exercise of the judicial power.[1]

[1] Detroit Trust Co. v. The "Thomas Barlum", 293 U. S. 21 [1934].

Money.*

The comprehensive national authority over the subjects of revenue, finance, and currency is derived from the aggregate of the enumerated powers granted to the Congress, and the added express power to make all laws necessary and proper for carrying them into execution.[1]

[1] Norman v. Baltimore & O. R. Co., 294 U. S. 240, 303 [1935].

The act of Congress incorporating the Bank of the United States was held to be a law made in pursuance of the Constitution and part of the supreme law of the land.[1] Congress has the power to incorporate national banks with the capacity, for their own profit as well as for the use of the Government in its money transactions, of issuing bills which under ordinary circumstances pass from hand to hand as money at their nominal value, and which, when so current, the law has always recognized as a good legal tender in payment of money debts, unless specifically objected to at the time of the tender.[2]

[1] McCulloch v. Maryland, 4 Wheat. 316, 407 [1819]. *See also* Osborn v. Bank, 9 Wheat. 738 [1824].

[2] Bank of United States v. Bank of Georgia, 10 Wheat. 333 [1825]; Ward v. Smith, 7 Wall. 447 [1869]; Farmers' & M. National Bank v. Dearing, 91 U. S. 29, 33 [1875]; Legal Tender Case, 110 U. S. 445 [1884].

The acts of Congress making Treasury notes legal tender were attributed to the power to borrow money on the credit of the United States and to regulate the currency, and were held to be valid when applied to contracts made before their passage as well as to debts contracted since their enactment.[1]

[1] Legal Tender Cases, 12 Wall. 457, 544 [1871], overruling Hepburn v. Griswold, 8 Wall. 603 [1870]. *See also* Dooley v. Smith, 13 Wall. 604 [1872]; Norwich & W. Railroad Co. v. Johnson, 15 Wall. 195 [1873]; Legal Tender Case, 110 U. S. 449 [1884].

* *See also* pp. 228, 296, 297.

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National Banks.

Power to incorporate national banks,[1] and to regulate and control exercise of their operations,[2] have been upheld. So, an act empowering the Federal Reserve Board to permit banks to act as trustees,[3] although such business is not inherently such that Congress may empower banks to engage in it.

[1] Bank of United States *v.* Bank of Georgia, 10 Wheat. 333 [1825]; Ward *v.* Smith, 7 Wall. 447 [1869]; Farmers' & M. Nat. Bank *v.* Dearing, 91 U. S. 29, 33 [1875]; Legal Tender Case 110 U. S. 445 [1884].

[2] Easton *v.* Iowa, 188 U. S. 220 [1903].

[3] First National Bank *v.* Fellows ex rel. Union Trust Co., 244 U. S. 416 [1917].

A statute securing title to persons occupying lands for 7 years in good faith does not apply to the receiver of a national bank acquiring title to its assets by a secret trust.[1]

[1] Baker *v.* Schofield, 243 U. S. 114 [1917].

The act of June 3, 1864 (13 Stat. 99), subjecting bank shares in hands of shareholders to State taxation, was valid without regard to fact bank capital was invested in national tax-exempt securities.[1]

[1] Churchill *v.* Utica (Van Allen *v.* Assessors), 3 Wall. 573, 581 [1866].

Congress may prohibit any taxation of national banks by States, cities, counties, or towns, and its mere silence on the subject, if it were silent, would be a prohibition.[1]

[1] First Nat. Bank of Richmond *v.* Richmond, 39 Fed. 309 [1889], appeal dismissed, 149 U. S. 769 [1892].

Protection and Control of Government Personnel.

Congress possesses the constitutional power and is charged with the constitutional duty to protect all the agencies of the Federal Government, including the courts, their officers, and all persons whose attendance is necessary in the proceedings of those courts, such as parties, witnesses, and jurors.[1] Congress may use all known and appropriate means for collecting and disbursing the revenue, and may provide for the protection of revenue collectors and officers, and in case of the death of a collector may provide that the Government shall be the first paid out of his estate.[2] Whether it is competent for Congress to exempt the employees of the United States from arrest on criminal process from the State courts for crimes charged against them *mala in se*, doubted.[3]

[1] United States *v.* Sanges, 48 Fed. 78 [1891], writ of error dismissed in 144 U. S. 310 [1892], holding that a writ of error does not lie in behalf of the United States in a criminal case.

[2] The "Exchange" *v.* McFadden, 7 Cr. 116 [1812]; Dugan *v.* United States, 3 Wheat. 172, 179 [1818]; United States *v.* Bevans, 3 Wheat. 336, 388 [1818]; United States *v.* Tingey, 5 Pet. 115 [1831]; Den ex dem. Murray *v.* Hoboken Land Improv. Co., 18 How. 272 [1856].

[3] United States *v.* Kirby, 7 Wall. 482, 486 [1869].

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The act of Congress of August 15, 1876 (19 Stat. 143, 169), section 6, providing "that all executive officers or employees of the United States not appointed by the President * * * are prohibited from requesting, giving to, or receiving from any other officer or employee of the Government, any money or property or other thing of value for political purposes", is constitutional.[1]

[1] Ex parte Curtis, 106 U. S. 371 [1883].

The act of Congress of March 4, 1909 (35 Stat. 1088, 1095), section 32, making it an offense falsely to assume or pretend to be an officer or employee acting under the authority of the United States or any department with intent to defraud held to be within the general power of Congress.[1]

[1] United States v. Barnow, 239 U. S. 74 [1915].

War Powers.

As incident to its power to carry on war, Congress had power to suspend the operation of the statute of limitations during the Rebellion;[1] and to pass the nonintercourse acts;[2] and subsequently to provide for monuments upon the battlefields of Gettysburg.[3]

[1] Stewart v. Bloom (Kahn), 11 Wall. 493, 507 [1871].
[2] Hamilton v. Dillin, 21 Wall. 73, 93 [1875].
[3] United States v. Gettysburg Electric R. Co., 160 U. S. 668, 681 [1896].

The power of the United States to create corporations as instrumentalities for war purposes was more recently upheld in cases involving the manufacture of aircraft,[1] manufacture of merchant vessels,[2] and the construction of Wilson Dam under authority of the National Defense Act of 1916 (39 Stat. 166).[3]

[1] Clallam County v. United States, 263 U. S. 341 [1923].
[2] Sloan's Shipyards v. United States Fleet Corp., 258 U. S. 549 [1922].
[3] Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 326 [1936].

Miscellaneous.

Other instances in which this incidental power has been held to have been validly exercised are: An act levying a tax on State bank notes in circulation;[1] acts prohibiting the mailing of letters or circulars concerning lotteries;[2] act protecting homesteads on the public lands;[3] acts providing for condemnation of land for public use,[4] for distraint of property to satisfy a Federal tax,[5] for extension of patent rights,[6] for lease of public lands,[7] for priority of claims of the United States against insolvent debtors.[8]

[1] Veazie Bank v. Fenno, 8 Wall. 533 [1869]; Springer v. United States, 102 U. S. 586, 593 [1881]. *See also* cases under art. I, sec. 8, cl. 1.
[2] Ex parte Jackson, 96 U. S. 727, 732 [1878]; In re Rapier, 143 U. S. 110, 133 [1892].
[3] United States v. Waddell, 112 U. S. 76 [1884].
[4] Kohl v. United States, 91 U. S. 367, 373 [1876]; United States v. Fox, 94 U. S. 315, 320 [1877].
[5] Van Brocklin v. Anderson (Tennessee), 117 U. S. 151, 154 [1886].

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[6] Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 656 [1890].
[7] United States *v.* Gratiot, 14 Pet. 526, 537 [1840].
[8] United States *v.* Fisher, 2 Cr. 358 [1805].

The obligation laid upon the President in article 2, section 3, to take care that the laws be faithfully executed, confirms the conclusions that the removal of civil officers is an executive function vested in the President by article 2, section 1;[1] and justifies the appointment of a deputy marshal to protect a justice of the Supreme Court while on circuit.[2]

[1] Myers *v.* United States, 272 U. S. 52 [1926].
[2] In re Neagle, 135 U. S. 1 [1890].

Article I. Sec. 9. Powers denied to Congress. Cl. 1. Importation of slaves.

SECTION 9.* The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Scope of Restriction.

This provision does not, in its words or meaning, apply to the State governments,[1] but it does restrict the general power of Congress to regulate commerce (art. I, sec. 8, clause 3).[2] When the Constitution was adopted, slaves were as much articles of commerce with foreign nations and among the several States as any other species of merchandise. Their importation was then lawful, but under the grant of power to regulate commerce, Congress could abolish the foreign slave trade. This section was, therefore, a temporary exception to the commerce power.[3]

[1] Butler *v.* Hopper, 1 Wash. (U. S.) 499 [1806].
[2] Smith *v.* Turner (Passenger Cases), 7 How. 283, 401 [1849].
[3] Groves v. Slaughter, 15 Pet. 449, 513–515 [1841].

*This section of the Constitution (containing eight clauses restricting or prohibiting legislation affecting the importation of slaves, the suspension of the writ of habeas corpus, the enactment of bills of attainder or *ex post facto* laws, the levying of taxes on exports, the granting of preference to ports of one State over another, the granting of titles of nobility, etc.) is devoted to restraints upon the power of Congress and of the National Government. Morgan's L. & T. R. & S. S. Co. *v.* Louisiana Board of Health, 118 U. S. 455, 467 [1886]. The ninth section of art. I operates only as a limitation on the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs. Munn *v.* Illinois, 94 U. S. 113, 135 [1877]; Johnson *v.* Chicago & P. Elevator Co., 119 U. S. 388, 400 [1886]. The tenth section in turn places restraints upon the powers of the States. Morgan's L. & T. R. & S. S. Co. *v.* Louisiana Board of Health, 118 U. S. 455, 467 [1886]. It will be noted that several powers forbidden to the Federal Government by sec. 9 are similarly forbidden to the States by sec. 10, e. g., the prohibition against the granting of titles of nobility, and the enactment of *ex post facto* laws or bills of attainder.

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Migration or Importation.

There has never been any doubt that this clause had exclusive reference to persons of the African race. The two words "migration" and "importation" refer to different conditions of this race as regards freedom and slavery. When the free black came here, he migrated; when the slave came he was imported. The latter was property subject to an import duty.[1] If the word "migration" were not used, this clause would apply to slaves only. Migration and importation are not synonyms. Two separate and distinct classes of persons are intended to be provided for by this clause. While both classes are subjects of commerce, slaves only are the subject of trade and importation. Slaves are not immigrants.[2]

[1] Scott *v.* Sandford, 19 How. 393, 411 [1857]; New York *v.* Compagnie Générale Transatlantique, 107 U. S. 59, 62 [1883].

[2] Smith *v.* Turner (Passenger Cases), 7 How. 283, 453 [1849].

This clause seems to class migration with importation. Migration applies as appropriately to voluntary, as importation does to involuntary arrivals; and so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men, who pass from place to place voluntarily, and to those who pass involuntarily.[1]

[1] Gibbons *v.* Ogden, 9 Wheat. 1, 216 [1824].

This clause, which sanctioned the importation of slaves by the States for 20 years after the adoption of the Constitution, when considered with the section requiring escaped slaves to be returned to their masters (art. IV, sec. 1, clause 3), shows conclusively that such persons and their descendants were not embraced within the term "citizen" as used in the Constitution.[1]

[1] Chief Justice Taney in Scott *v.* Sandford, 19 How. 393, 411 [1857].

Article I. Sec. 9. Powers denied to Congress. Cl. 2. Writ of habeas corpus.

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.

In General.*

The meaning of this provision in the Constitution of the United States would seem to be, that when the public safety is endanged by rebellion or invasion, the privilege of this writ may be suspended as to persons suspected of or charged with aiding, sustaining, or promoting such rebellion or invasion, and thereby endangering the public

See also pp. 417, 500.

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safety. It was never designed, either here or in England, to prevent the discharge of persons illegally held as soldiers.[1]

[1] People (New York) ex rel. Starkweather v. Gaul, 44 Barb. (N. Y.) 105 [1865].

This provision has no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.[1]

[1] Neely v. Henkel, 180 U. S. 109 [1901].

The guaranty of the privilege of habeas corpus is not violated by act of February 20, 1907 (34 Stat. 898), section 3, providing for deportation of aliens for practicing prostitution within 3 years after entry, though findings of fact of Department of Commerce and Labor are made conclusive.[1]

[1] Zakonaite v. Wolf, 226 U. S. 272 [1912].

A distinction is to be drawn between the suspension of the writ under this clause and the *ipso facto* suspension which takes place when martial law actually exists. Martial law is the law of military necessity in the actual presence of war; it finds its justification only where, from actual necessity or civil war, the courts are closed, and it is impossible to administer justice according to law, and its duration is limited by its necessity.[1]

[1] Ex parte Milligan, 4 Wall. 2, 127 [1866]; United States v. Diekelman, 92 U. S. 520, 526 [1876]; Coleman v. Tennessee, 97 U. S. 509, 517 [1879].

Definition and Purpose of Writ.

"Habeas corpus" is a generic term and includes every species of that writ, but when used as in this clause "the writ of habeas corpus" means the writ *ad subjiciendum*, and if as so used it had a well known meaning, the framers of the Constitution must have had reference to that meaning.[1]

[1] Calder v. Bull. 3 Dall. 386 [1798]; Ex parte Bollman, 4 Cr. 75, 95 [1807]; The "Santissima Trinidad," 7 Wheat. 283, 305 [1822]; United States v. Wilson, 7 Pet. 150 [1833]; Watson v. Mercer, 8 Pet. 88 [1834]; Luther v. Borden, 7 How. 1 [1849]; Fleming v. Page, 9 How. 603, 615 [1850]; Carpenter v. Pennsylvania, 17 How. 456 [1855].

To ascertain the meaning of the term "habeas corpus" and the appropriate use of the writ in the Federal courts, recourse must be had to the common law, from which the term was drawn. Originating as a writ by which the superior courts of the common law and the chancellor sought to extend their jurisdiction at the expense of inferior or rival courts, it ultimately took form and survived as the writ of habeas corpus *ad subjiciendum*, by which the legality of the writ of habeas corpus ad subjiciendum, by which the legality of the detention of one in the custody of another could be tested judicially.[1] The English judges, being originally under the influence of the crown, neglected to issue this writ where the Government entertained suspicions which could not be sustained by evidence; and the writ when issued was sometimes disregarded or evaded, and great individual

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oppression was suffered in consequence of delays in bringing prisoners to trial. To remedy this evil the celebrated Habeas Corpus Act of 1679, 31st of Charles II, was enacted, for the purpose of securing the benefits for which the writ was given.[2]

[1] McNally *v.* Hill, 293 U. S. 131, 136 [1934].
[2] Ex parte Watkins, 3 Pet. 193, 201 [1830].

The writ, in its historic form, like that now in use in the Federal courts, was directed to the disposition of the custody of the prisoner. It commanded the officer to "have the body of the prisoner" "detained in our prison under your custody", "together with the day and cause of his being taken and detained", before the judge at a specified time and place "to do and receive all and singular those things which our said Chief Justice shall then and there consider of him in this behalf."

The writ of habeas corpus, as authorized by the Constitution, is the prerogative writ known to the common law to obtain the liberation of those who may be imprisoned without sufficient cause, and it is in the nature of a writ of error to examine the legality of the commitment.[1] It is a writ of right, but not a writ of course, since cause must be shown for its issuance. The object of the writ is to determine whether a prisoner can be lawfully detained, to protect against unwarranted encroachments upon personal liberty (equally as well from the unauthorized acts of courts and judges as of individuals [2]). The proceedings under the writ are to be deemed civil rather than criminal (even when instituted to arrest a criminal prosecution [3]) in which the civil right of personal liberty is asserted.[4]

[1] Ex parte Watkins, 3 Pet. 193 [1830].
[2] In re Bonner, 151 U. S. 242, 259 [1894].
[3] Farnsworth *v.* Montana, 129 U. S. 104, 113 [1889].
[4] Ex parte Watkins, 3 Pet. 193, 201 [1830]; Ex parte Milligan, 4 Wall. 2, 110 [1866]; Ex parte Tom Tong, 108 U. S. 556, 560 [1883]; Kurtz *v.* Moffitt, 115 U. S. 487, 494 [1885]; Ex parte Terry, 128 U. S. 289, 301 [1888].
For proceeding by habeas corpus as a suit, *see* Holmes *v.* Jennison, 14 Pet. 514 [1840].

This clause is not a grant of power to the Federal courts, but a prohibition against its suspension by Congress or the Executive.[1]

[1] Ex parte Caldwell, 138 Fed. 487 [1905], order reversed in Carfer *v.* Caldwell, 200 U. S. 293 [1906].

Issue of the Writ in General.

It is usual for a court, on application for a writ of habeas corpus, to issue the writ, and, on the return, to dispose of the case; but the court can elect to waive the issuing of the writ and consider whether, upon the facts presented in the petition, the prisoner, if brought before it, could be discharged.[1]

[1] Ex parte Milligan, 4 Wall. 2, 110 [1866].

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The writ of habeas corpus will be denied if it be apparent that the only result if the writ were issued, would be the remanding of the petitioner to custody, for the object of the writ is to ascertain whether the prisoner applying for it can legally be detained, and it is the duty of the court, justice or judge, granting the writ, on hearing, "to dispose of the party as law and justice may require." [1] Similarly, it may not be used as a means of securing the judicial decision of a question, which, even if determined in the prisoner's favor, could not result in his immediate release.[2]

[1] In re Boardman, 169 U. S. 39, 43 [1898].
[2] McNally v. Hill, 293 U. S. 131 [1934].

In the Federal courts a discharge on habeas corpus of a prisoner confined under a criminal accusation or conviction is granted only in the exercise of a sound judicial discretion.[1]

[1] Goto v. Lane, 265 U. S. 393 [1924].

The strict doctrine of *res judicata* does not apply to habeas corpus.[1] But the court, in its sound discretion, may dismiss a petition for habeas corpus because of a prior refusal, when the ground for the second application was set up, with another, in the first, and when the evidence to support it then was withheld without excuse for use on a second attempt if the first failed. Where unreasonable delays have been caused by resort to habeas corpus proceedings, the mandate of the court will issue forthwith.[2]

[1] Salinger v. Loisel, 265 U. S. 224 [1924].
[2] Wong Doo v. United States, 265 U. S. 239 [1924].

In Ex parte Kearney[1], it was held that the Supreme Court has authority to issue a habeas corpus where a person is imprisoned under the warrant or order of any other court of the United States, but has no appellate jurisdiction in criminal cases, confided to it by the laws of the United States, and cannot revise the judgments of the circuit courts by writ of error in any case where a party has been convicted of a public offense.

[1] 7 Wheat. 38 [1822].

Suspension of the Privilege.

WHAT IS SUSPENDED.

The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The suspension merely denies to one arrested the privilege of obtaining his liberty by means of the writ; it does not affect the duty of a court to issue the writ, but requires the dismissal of the writ upon its return, without inquiry as to its merits.[1]

[1] Ex parte Milligan, 4 Wall. 2, 130 [1866]; Ex parte Vallandigham, 1 Wall. 243 [1864]; Ex parte Yerger, 8 Wall. 85, 95 [1869].

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WHO MAY SUSPEND.

In Ex parte Bollman,[1] Marshall, C. J., incidentally expressed the opinion that the suspension of the writ was a power to be exercised by "the legislature." This dictum was long accepted as settling that the Constitution was to be construed as empowering not the President but Congress alone to suspend the privilege of the writ, and was reasserted by Taney, C. J., on circuit at Baltimore. Congress by an express provision of the act of March 3, 1863 (12 Stat. 755), specifically vested in the President the authority, "whenever in his judgment the public safety might require it, to suspend the privilege of the writ in any case arising in any part of the United States," thus impliedly asserting that the power so to authorize rested in itself alone.[2]

[1] 4 Cr. 75, 101 [1807].
[2] Ex parte Merryman, 17 Fed. Cas. No. 9487 [1861].

Under this clause Congress alone has power to authorize the suspension of the privilege of the writ. But direct enactment by Congress is not necessary; the President may be authorized to suspend the privilege when in his judgment the public safety so requires. The power conferred is discretionary, to be exercised upon an opinion of certain facts, and carries also the exclusive power to judge as to the existence of those facts.[1]

[1] Martin v. Mott, 12 Wheat. 19, 31 [1827]; Luther v. Borden, 7 How. 1, 44 [1849].

No express power is given to Congress to secure the right given by this clause in the nonenumerated cases, or to suspend the writ in cases of rebellion or invasion. And yet it would be difficult to say, since this great writ of liberty is usually provided for by the ordinary functions of legislation, and can be effectually provided for only in this way, that it ought not to be deemed by necessary implication within the scope of legislative power of Congress.[1]

[1] Prigg v. Pennsylvania, 16 Pet. 539, 619 [1842].

Congress is the exclusive judge of "when in cases of rebellion or invasion" the public safety requires the suspension of "the privilege of the writ of habeas corpus." [1] The introduction of the limiting words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise before they give the Government of the United States such power over the liberty of a citizen.[2]

[1] McCall v. McDowell, 15 Fed. Cas. No. 8673 [1867].
[2] Ex parte Merryman, 17 Fed. Cas. No. 9487 [1861].

Congress may authorize the President to suspend the writ of habeas corpus whenever in his judgment the public safety requires. In Ex parte Milligan [1] upholding act of March 3, 1863 (12 Stat. 755), authorizing suspension "during the present rebellion", the Court

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said: "This law was passed in a time of great national peril, when our heritage of free government was in danger. An armed rebellion against the national authority, of greater proportion than history affords an example of, was raging; and the public safety required that the privilege of writ of habeas corpus should be suspended. The President had practically suspended it, and detained suspected persons in custody without trial; but his authority to do this was questioned. It was claimed that Congress alone could exercise this power; and that the legislature, and not the President, should judge of the political considerations on which the right to suspend it rested. The privilege of this great writ had never before been withheld from the citizen; and as the exigence of the times demanded immediate action, it was of the highest importance that the lawfulness of the suspension should be established. It was under these circumstances, which were such as to arrest the attention of the country, that this law was passed. The President was authorized by it to suspend the privilege of the writ of habeas corpus, whenever, in his judgment, the public safety required; and he did, by proclamation, bearing date of the 15th of September 1863, reciting, among other things, the authority of this statute, suspend it. The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty."

[1] 4 Wall. 2, 114 [1866].

The President cannot suspend the privilege of the writ of habeas corpus without the authority of Congress.[1]

[1] Ex parte Benedict, 3 Fed. Cas. No. 1292 [1862].

A proclamation of the President suspending the writ of habeas corpus was held valid and efficient in law to suspend all proceedings pending upon habeas corpus which was issued and served prior to the date of the proclamation.[1]

[1] Matter of Dunn, 8 Fed. Cas. No. 4171 [1863].

EFFECT UPON STATE COURTS.

This section is not restrictive of State but only of National action.[1]

[1] Gasquet *v.* Lapeyre, 242 U. S. 367 [1917].

The State governments have, in their sovereign capacity, full authority of the writ of habeas corpus, and the Federal Government is inhibited from suspending its privileges, except in case of rebellion or invasion. This power to suspend the writ was necessary to be vested in Congress, because in such cases it might become essential to the preservation of the United States Government, or that of a State or States. But it is only in case of rebellion or invasion that the General Government can interfere with the privileges of the writ.[1]

[1] Bagnall *v.* Ableman, 4 Wis. 163 [1856].

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The suspension of the writ, under the Constitution, in times of rebellion, does not confer on a State court the power to enjoin against an arrest.[1]

[1] Kneedler *v.* Lane, 45 Pa. 238 [1863].

In Ableman *v.* Booth,[1] it was held that a prisoner of the United States could not be released on habeas corpus by a State.

[1] 21 How. 506 [1859].

Defendant, having been tried for a misdemeanor before one Federal judge and having consented to the substitution of another who received the verdict and imposed sentence of imprisonment, sought habeas corpus upon the ground that the substitution was contrary to the constitutional provision for trial of all crimes by jury. Held, that the error, if any, did not go to the jurisdiction of the court or render the judgment void, and that review should have been sought by writ of error.[1]

[1] United States *v.* Valante, 264 U. S. 563 [1924].

Article I. Sec. 9. Powers denied to Congress. Cl. 3. Attainder and ex post facto laws.

No Bill of Attainder or ex post facto Law shall be passed.

Bill of Attainder.*

A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties.[1] A bill of attainder may affect the life of an individual, or may confiscate his property, or many do both.[2] In passing such an act the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or not; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense.[3]

[1] Cummings *v.* Missouri, 4 Wall. 277, 323 [1867].
[2] Fletcher *v.* Peck, 6 Cr. 87, 138 [1810].
[3] Cummings *v.* Missouri, 4 Wall. 277, 323 [1867].

An act depriving a person, for past conduct and without judicial trial, of an existing right partakes of the nature of a bill of pains and penalties prohibited by the Constitution.[1] Hence, an act of Congress prescribing an oath that the deponent had not participated in

* *See also* p. 299, 510.

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the Rebellion against the United States, as a qualification for further practice before the Federal courts, is unconstitutional.[2]

[1] Pierce *v.* Carksadon, 16 Wall. 234 [1873].
[2] Ex parte Garland, 4 Wall. 333, 377 [1867].

Ex Post Facto Laws.*

DEFINITION.

Every law that makes an act done before the passage of such law criminal, which was innocent when done,[1] or that aggravates a crime or makes it greater than it was when committed,[2] or that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed,[3] or that alters the rules of evidence, permitting less or different evidence to convict a person of an offense committed prior to its passage,[4] or that operates in any way to the disadvantage of one accused of a crime committed prior to the enactment of the law[5] is an *ex post facto* law and within the prohibition of this clause.

[1] Calder *v.* Bull, 3 Dall. 386, 390 [1798]; Ex parte Garland, 4 Wall. 333, 377 [1867]; Cummings *v.* Missouri, 4 Wall. 277, 325–328 [1867]; Burgess *v.* Salmon, 97 U. S. 381, 384 [1878].
[2] Calder *v.* Bull, 3 Dall. 386, 390 [1798].
[3] Calder *v.* Bull, 3 Dall. 386, 390 [1798]; Fletcher *v.* Peck, 6 Cr. 87, 137 [1810]; Ex parte Garland, 4 Wall. 333, 377 [1867]; Cummings *v.* Missouri, 4 Wall. 277, 326–328 [1876].
[4] Calder *v.* Bull, 3 Dall. 386, 390 [1798]; Cummings *v.* Missouri, 4 Wall, 277, 326–328 [1876]. Subsequent cases have somewhat restricted the rule that changes in the rules of evidence make a law *ex post facto* as to crimes previously committed. *See* Hopt *v.* Utah, 110 U. S. 574, 589 [1884].
[5] Medley, Petitioner, 134 U. S. 160 [1890]; Thompson *v.* Utah, 170 U. S. 343, 351 [1898].

The provision against *ex post facto* laws applies only to penal and criminal statutes. The debates in the Constitutional Convention show that the term was understood in a restricted sense relating to criminal cases only.[1] It is inapplicable to retrospective legislation of any other kind.[2] However, the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal.[3]

[1] Johannessen *v.* United States, 225 U. S. 227 [1912]; Bugajewitz *v.* Adams, 228 U. S. 585 [1913]; Calder *v.* Bull, 3 Dall. 386, 393 [1798]; Watson *v.* Mercer, 8 Pet. 88, 110 [1834]; Ogden *v.* Saunders, 12 Wheat. 213, 266 [1827]; Locke *v.* New Orleans, 4 Wall. 172 [1867]; Baltimore & S. R. Co. *v.* Nesbit, 10 How. 395 [1850]; Carpenter *v.* Pennsylvania, 17 How. 456 [1855]; In re Sawyer, 124 U. S. 200, 219 [1888]; Mahler *v.* Eby, 264 U. S. 32, 39 [1924].
[2] Bankers Trust Co. *v.* Blodgett, 260 U. S. 647, 652 [1923].
[3] Burgess *v.* Salmon, 97 U. S. 381 [1878].

* *See also* p. 299.

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CHANGE IN JUDICIAL DISTRICT.

If no place of trial was provided when an offense was committed, Congress may designate place of trial, or change place of trial after commission of the offense.[1] A change of the place of trial of an alleged offense after its commission is not *ex post facto*.[2]

[1] Cook *v.* United States, 138 U. S. 157, 183 [1891].
[2] Gut *v.* Minnesota, 9 Wall. 35, 38 [1870]

CHANGE IN NUMBER OF JURORS.

The provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the Territory became a State, because, in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of 12 persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.[1]

[1] Thompson *v.* Utah, 170 U. S. 343, 355 [1898].

REMOVING DISABILITIES OF WITNESSES.

Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage.[1]

[1] Hopt *v.* Utah, 110 U. S. 574, 589 [1884].

EXCLUSION, DEPORTATION, AND NATURALIZATION OF ALIENS.*

The Chinese Exclusion Act (25 Stat. 504) providing that it shall be unlawful for any Chinese laborer, who shall at any time heretofore have been a resident within the United States and who shall have departed therefrom and shall not have returned before the passage of this act, to return to this country, is not unconstitutional as being an *ex post facto* law since there is nothing in the nature of an offense in the departure of a Chinese from this country.[1]

[1] In re Chae Chan Ping, 36 Fed. 431 [1888], order affirmed in Chae Chan Ping *v.* United States, 130 U. S. 581 [1889].

A deportation law authorizing the Secretary of Labor to expel aliens for criminal acts committed before its passage is not *ex post facto*. While deportation may be burdensome and severe for the alien, it is not a punishment. The right to expel aliens is a sovereign power. And the fact of prior conviction, even under laws since repealed (the Espionage and Selective Draft Acts), may be made the basis for classification as an "undesirable" subject to deportation.[1] Nor is an act of Congress authorizing the deportation of an alien found practicing prostitution after her admission in this country *ex post facto*.[2]

[1] Mahler *v.* Eby, 264 U. S. 32 [1924].
[2] Bugajewitz *v.* Adams, 228 U. S. 585 [1913].

**See also* pp. 164, 645, 657, 957 for other cases involving aliens.

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An act permitting the cancellation of naturalization certificates obtained by fraud long prior to the passage of said law imposes no punishment upon the alien; it simply deprives him of his ill-gotten privileges, and hence is not unconstitutional.[1]

[1] Johannessen *v.* United States, 225 U. S. 227 [1912].

EXTRADITION TREATIES.

An extradition treaty for the surrender to a foreign country of fugitives from justice is not an *ex post facto* law as to a crime committed before the making of the treaty; extradition is not a punishment.[1]

[1] In re De Giacomo, 12 Blatchf (U. S.) 391 [1874].

An American citizen who commits a crime in Cuba and flees to the United States is subject to the provisions of an extradition treaty, and will be returned to Cuba. He cannot claim the protection of the *ex post facto* clause for a crime committed abroad.[1]

[1] Neely *v* Henkel, 180 U. S. 109, 123 [1901].

DISFRANCHISEMENT FOR BIGAMY.

An act of Congress denying to bigamists or polygamists the right to vote in a territorial election, even though such person since the passage of the act has cohabited with but one person, and even though a polygamous marriage was legal when contracted, is not an *ex post facto* law. Such a law does not operate as an additional penalty prescribed for the offense of bigamy, but merely defines it as a disqualification of a voter.[1]

[1] Murphy *v.* Ramsey, 114 U. S. 15 [1885].

TEST OATH FOR ATTORNEYS.

An act of Congress prescribing as a qualification for practice before the Federal courts an oath that deponent had not participated in the Rebellion is *ex post facto* in that it imposes a punishment for some acts which were not punishable at the time they were committed, and for others it adds a new punishment to that before prescribed.[1]

[1] Ex parte Garland, 4 Wall. 333, 377 [1867].

Article I. Sec. 9. Powers denied to Congress. Cl. 4. Capitation and direct taxes.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

In General.*

It was with the idea that the power of direct taxation should be exercised only in cases of "absolute necessity" that the framers of the Constitution inserted this clause limiting the taxing power of Congress.[1]

**See also* pp. 106, 1025.

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The original draft of the instrument did not contain the words "or other direct tax"; this phrase was inserted to avoid any possible misconstruction which would narrow the intention.[2]

[1] Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 574 [1895].
[2] Documentary Hist. Const., vol. III, pp. 578, 747.

In Knowlton *v.* Moore,[1] the Court said that the requirement that direct taxes should be apportioned among the several States "contemplated the protection of the States, to prevent their being called upon to contribute more than was deemed their due share of the burden."

[1] 178 U. S. 41, 89 [1900].

The imposition of a 50 percent penalty for nonpayment of a direct property tax does not render the statute unconstitutional because the the penalty is not apportioned.[1]

[1] De Treville *v.* Smalls, 98 U. S. 517, 527 [1879].

Definition.

A capitation tax is a direct tax, but the term "direct taxes" comprehends also taxes on lands and taxes on personal property by general valuation. A tax upon property holders in respect of their estates, real or personal, or of the rents therefrom, which cannot be avoided, is a direct tax, while a tax paid primarily by persons who can shift the burden upon others, or who are not under compulsion, is an indirect tax.[1]

[1] Pollock *v.* Farmers Loan & Trust Co., 157 U. S. 429, 558 [1895].

Distinction Between Direct Taxes and Indirect Taxes or Excises.

A tax levied on property because of its ownership is direct, one levied on property because of its use is an excise duty or impost.[1] To levy a tax by reason of ownership of property is the same as taxing the property itself.[2]

[1] Brushaber *v.* Union P. R. Co., 240 U. S. 1, 14 [1916].
[2] Dawson *v.* Kentucky Distilleries & Warehouse Co., 255 U. S. 288, 294 [1921].

What Constitutes a Direct Tax.

It was held in Pollock *v.* Farmers Loan & Trust Co.[1] that a tax on the income from either real estate or personal property was not an indirect tax but was a direct tax subject to the requirement of apportionment. Prior to the Pollock decision the Supreme Court had held the following taxes levied by Congress to be indirect and therefore not required to be apportioned: On carriages kept for pleasure; [2] on receipts of insurance companies; [3] on the circulating notes of State banks; [4] on succession to real estate; [5] on all gains and profits,

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whether divided or undivided, derived from manufacturing companies; [6] on all income.[7]

[1] 157 U. S. 429 [1895]; 158 U. S. 601 [1895].
[2] Hylton *v.* United States, 3 Dall. 171 [1796].
[3] Pacific Ins. Co. *v.* Soule, 7 Wall. 433 [1869].
[4] Veazie Bank *v.* Fenno, 8 Wall. 533 [1869].
[5] Scholey *v.* Rew, 23 Wall. 331 [1875].
[6] Brainard *v.* Hubbard, 12 Wall. 1 [1871].
[7] Springer *v.* United States, 102 U. S. 586 [1881].

A tax on one of the incidents of ownership of property is not a direct tax but an excise, e. g.: on the privilege of selling property on exchanges and Boards of Trade; [1] on use of foreign-built yachts; [2] on transfers by gift.[3]

[1] Nicol *v.* Ames, 173 U. S. 509 [1899].
[2] Billings *v.* United States, 232 U. S. 261 [1914].
[3] Bromley *v.* McCaughn, 280 U. S. 124 [1929]. *See also* Milliken *v.* United States, 283 U. S. 15, 24 [1931].

In Knowlton *v.* Moore,[1] a tax on the right to inherit property was held not to be a direct tax. Similarly, a statute requiring the inclusion in gross estate for tax purposes of value of property held in a joint account or as joint tenants,[2] or by husband and wife as tenants by the entirety; [3] or the amount (over an exemption) receivable by beneficiaries as insurance under policies taken out by the decedent upon his own life [4] does not impose a direct tax in violation of the constitutional requirement of apportionment.

[1] 178 U. S. 41 [1900]. *See also* Murdock *v.* Ward, 178 U. S. 139 [1900].
[2] Phillips *v.* Dime Trust & Safe Deposit Co., 284 U. S. 160 [1931].
[3] Tyler *v.* United States, 281 U. S. 497 [1930].
[4] Chase National Bank *v.* United States, 278 U. S. 327 [1929].

A tax on the net income of a corporation is not a tax on the franchise or property of the corporation, but a tax upon doing business in the corporate capacity.[1] A tax on the conduct of business in a corporate capacity, measured by net income, is not a direct tax.[2] The inclusion for tax purposes of the rental value of property where taxpayer made deductions for taxes, expenses and depreciation thereon, does not constitute a direct tax on the rental value of such property.[3]

[1] Flint *v.* Stone Tracy Co., 220 U. S. 107 [1911]. *See also* Doyle *v.* Mitchell Bros. Co., 247 U. S. 179 [1918].
[2] Stratton's Independence *v.* Howpert, 231 U. S. 399 [1914].
[3] Helvering *v.* Indep. Life Ins. Co., 292 U. S. 371 [1934].

A tax levied under a war-revenue act upon tobacco already taxed is not a direct tax within the meaning of this clause; [1] nor is a tax imposed by such act direct because required to be measured by

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gross receipts.[2] A stamp tax on sales of stock in corporations is not a direct tax.[3]

[1] Patton v. Brady, 184 U. S. 608 [1902].
[2] Spreckles Sugar Ref. Co. v. McClain, 192 U. S. 397 [1904].
[3] Thomas v. United States, 192 U. S. 363 [1904].

The Sixteenth Amendment qualifies this clause, but "income" as used in that amendment does not include common stock dividends declared in favor of common stockholders, and any taxation of them must be in accordance with this clause and clause 3 of section 2 of article I.[1]

[1] Eisner v. Macomber, 252 U. S. 189 [1920]; Koshland v. Helvering, 298 U. S. 441 [1936]; Helvering v. Gowran, 302 U. S. 238 [1937]. *See* further cases cited under the 16th Amendment.

No Tax or Duty shall be laid on Articles exported from any State.

Article I. Sec. 9. Powers denied to Congress. Cl. 5. Export duties.

In General.

This clause is the only positive prohibition against taxation by Congress [1]—the clauses requiring uniformity and apportionment not being strictly limitations upon power, but merely prescribing modes of exercise. The word "export" applies only to goods exported to a foreign country.[2]

[1] State (South Carolina) ex rel Mordecai & Capers & Heyward v. Charleston, 10 Rich. L. (S. C.) 245 [1857].
[2] Dooley v. United States, 183 U. S. 151, 154 [1901]. *See also* Hylton v. United States, 3 Dall. 171 [1796]; License Tax Cases, 5 Wall. 462, 471 [1867]; Lane County v. Oregon, 7 Wall. 71, 77 [1869]; Veazie Bank v. Fenno, 8 Wall. 533, 540 [1869]; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 557 [1895].

This prohibition (as well as that in sec. 10, clause 2 of this article) has reference to the imposition of duties on goods by reason or because of exportation.[1] Therefore, a general tax laid on all property alike and not levied on goods in course of exportation nor because of their intended exportation is not within the prohibition.[2]

[1] Turpin & Bro. v. Burgess, 117 U. S. 504, 507 [1886] (examining Coe v. Errol, 116 U. S. 517 [1886]). *Cf.* Almy v. California, 24 How. 169, 174 [1861].
[2] Cornell v. Coyne, 192 U. S. 418, 428 [1904] (quoting from Turpin & Bro. v. Burgess, *supra*).

"These cases * * * seem to hold that only such property as is in the actual process of exportation, and which has begun its voyage or its preparation for the voyage, can be said to be an export." (Justice Miller, Lectures on the Constitution, p. 592.)

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Delivery of Goods to Carrier as a Step in Exportation.

A sale of goods made in this country to a commission merchant for a foreign consignee, for the sole purpose of export, and consummated only when the goods, addressed to the foreign consignee, are delivered by the vendor to the exporting carrier, is a step in their exportation, and, under this clause, cannot be taxed by the United States, even though the law under which the tax is imposed is a general one, not aimed specially at exports.[1]

[1] Spalding & Bros. *v.* Edwards, 262 U. S. 66 [1923].

Income Tax on Export Business.

Section II of the act of October 3, 1913 (38 Stat. 166), subjecting every domestic corporation to an annual tax upon its entire income arising or accruing from all sources during the preceding calendar year, is not invalid under this clause insofar as it applies to income derived by a corporation from its export trade.[1]

[1] Peck & Co. *v.* Lowe, 247 U. S. 165 [1918].

Stamp Taxes.

A stamp tax imposed on foreign bills of lading,[1] charter parties,[2] marine insurance policies,[3] or cargo manifests [4] is in effect a tax or duty upon exports, and so void; but an act requiring the stamping of all packages of tobacco intended for export, the object being to prevent fraud, is not a tax upon exports.[5]

[1] Fairbank *v.* United States, 181 U. S. 283 [1901].
[2] United States *v.* Hvoslef, 237 U. S. 1 [1915].
[3] Thames & Mersey Ins. Co. *v.* United States, 237 U. S. 19 [1915].
[4] United States *v.* New York & Cuba Mail S. S. Co., 125 Fed. 320 [1903], judgment reversed on other grounds in 200 U. S. 488 [1906].
[5] Pace *v.* Burgess, 92 U. S. 372 [1876]; Turpin & Bro. *v.* Burgess, 117 U. S. 504, 505 [1886]. *See also* Thompson *v.* United States, 142 U. S. 471 [1892] (tax upon distilled spirits intended for exportation held valid).

Article I. Sec. 9. Powers denied to Congress. Cl. 6. Preferences to ports.

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.

This provision operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs.[1] It is devoted to restraints upon the power of Congress and of the National Government.[2] In the early cases involving laws of Massachusetts and New York taxing the alien passengers arriving in the ports of those States, there was no opinion of

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the Court as such, but Justice Wayne stated that he thought the Court meant to decide, inter alia, that while the present clause is a limitation upon the power of Congress to regulate commerce, for the purpose of producing entire commercial equality within the United States, it is also a prohibition upon the States to destroy such equality by any legislation prescribing a condition upon which vessels bound from one State shall enter the ports of another State.[3]

[1] Munn v. Illinois, 94 U. S. 113, 135 [1877]; Johnson v. Chicago & P. Elevator Co., 119 U. S. 388, 400 [1886].

[2] Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health, 118 U. S. 455, 467 [1886].

[3] Smith v. Turner (Passenger Cases), 7 How. 283, 414 [1849].

A Pennsylvania statute requiring payment of one-half the usual pilotage fee by vessels failing to take on a pilot, the same to go for the benefit of needy pilots and their dependents, was held not repugnant to this clause; it neither required the payment of duties within the meaning of the Constitution, nor gave a preference to the port of Philadelphia—it was an objection to, and not a ground of preference of a port, that a charge of this kind must be borne by vessels entering it.[1]

[1] Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299, 314 [1851].

The clause does not deny the power to Congress to permit the several States to adopt pilotage regulations.[1]

[1] Thompson v. Darden, 198 U. S. 310 [1905].

The specified limitations on the power of Congress were set to prevent preference as between States in respect of their ports or the entry and clearance of vessels. They do not forbid such discriminations as between ports. Congress, acting under the commerce clause, causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States. The establishing of ports of entry, erection and operation of lighthouses, improvement of rivers and harbors and the providing of structures for the convenient and economical handling of traffic are examples.[1]

[1] Louisiana Public Service Comm. v. Texas & New Orleans Railroad Co., 284 U. S. 125 [1931], citing Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421, 433 [1856] and Armour Packing Co. v. United States, 209 U. S. 56, 80 [1908], and holding that the Interstate Commerce Commission had authority to require intrastate rates to be increased to correspond with interstate rates, and to allow an additional 8 cents a ton on road material ferried across the Mississippi River in Louisiana, although such allowance may benefit ports in Texas to the incidental disadvantage of ports in Louisiana.

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A diversion of water from one channel of the Savannah River (on the South Carolina side) to another (on the Georgia side) for the purpose of thereby improving the navigation of the river, does not constitute a preference to the ports of one State over those of another.[1]

[1] South Carolina *v.* Georgia et al., 93 U. S. 4 [1876].

Alaska was held not a State within the meaning of this clause.[1]

[1] Alaska *v.* Troy, 258 U. S. 101 [1922].

The power to establish their ports of entry and clearance by the States was given up and left to Congress. But the rights of the States were secured by the exemption of vessels from the necessity of entering or paying duties in the ports of any State other than that to which they were bound, or to obtain a clearance from any port other than at the home port, or that from which they sailed; and also by the provision that no preference should be given, by any regulation of commerce or revenue, to the ports of one State over those of another. So far as the regulation of revenue is concerned, the prohibition in the clause does not seem to have been very important—and as to a preference by a regulation of commerce, the history of the provision, as well as its language, looks to a prohibition against granting privileges or immunities to vessels entering or clearing from the ports of one State over those of another. That these privileges and immunities, whatever they may be in the judgment of Congress, shall be common and equal in all the ports of the several States. Thus much is undoubtedly embraced in the prohibition; and it may certainly also embrace any other description of legislation looking to a direct privilege or preference of the ports of any particular State over those of another. Indeed, the clause, in terms, seems to import a prohibition against some positive legislation by Congress to this effect, and not against any incidental advantages that might possibly result from the legislation of Congress upon other subjects connected with commerce and confessedly within its power.[1]

[1] Pennsylvania *v.* Wheeling & B. Bridge Co., 18 How. 421, 434 [1856].

In Williams *v.* United States,[1] it was argued that the Reed Amendment of March 3, 1917 (39 Stat. 1058), prohibiting interstate transportation of liquor into States whose laws prohibited manufacture or sale of liquor for beverage purposes was repugnant to the present clause; but the Court stated that "the want of merit" in the contention was clearly demonstrated by Clark Distilling Co. *v.* Western Maryland Ry. Co.,[2] United States *v.* Hill,[3] and cases following them.

[1] 255 U. S. 336 [1921].
[2] 242 U. S. 311 [1917].
[3] 248 U. S. 420 [1919].

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Article I.
Sec. 9. Powers denied to Congress.
Cl. 7. Appropriations and accounting of Public money.

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.

Definition.

An appropriation is *per se* nothing more than the legislative authorization prescribed by the Constitution that money may be paid out at the treasury.[1]

[1] Campagna v. United States, 26 Ct. Cl. 316 [1891].

A statute providing that the proceeds of the sale of public lands are hereby reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "Reclamation Fund," is a sufficient appropriation.[1]

[1] United States v. Hanson, 167 Fed. 881 [1909]. *Cf.* 34 Stat. 764 (U. S. C. 31:627), requiring that no act shall be construed to make an appropriation unless so declaring in specific terms.

Power of Congress.*

The absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people. This clause is a mere limitation and restriction upon the executive officers of the Treasury Department, and does not prevent Congress, the law-making power, from involving the Government in liabilities to pay money to any extent,[1] nor from indicating the class of persons who shall not be paid out of the general appropriations, but shall come to Congress for relief.[2] When such contracts are made the parties who acquire rights to compensation thereunder must wait until an appropriation is made before they can receive their money, but the right on their part and the obligation on the part of the United States remain unchanged.

[1] Knote v. United States, 95 U. S. 149, 154 [1877]; Collins v. United States, 14 Ct. Cl. 568 [1878], 15 Ct. Cl. 22 [1879]; Mitchell v. United States, 18 Ct. Cl. 281 [1883].

[2] Hart's Case [1880], 16 Ct. Cl. 459, 484 [1880], affirmed Hart v. United States, 118 U. S. 62 [1886].

Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation may be expended only through appropriation. Conversely, moneys merely deposited with the Treasurer under the Captured and Abandoned Property Act (12 Stat. 820) are not subject to this provision,[1] nor moneys received by the United States under an award of a tribunal of

**See* p. 248 as to limitation on appropriations for the Army.

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arbitration for the satisfaction of all claims referred to the tribunal.[2] They can never accomplish the objects for which they were collected unless the power to appropriate is as broad as the power to tax. Having power, under section 8 of article 1, to lay and collect taxes, duties, imposts, and excises, to pay the debts of the United States, it follows that Congress has power when the money is raised to appropriate it to the same object.[3] The necessary implication from the terms of the grant is that the public funds may be appropriated "to provide for the general welfare of the United States." These words cannot be meaningless, else they would not have been used. The conclusion must be that they were intended to limit and define the granted power to raise and to expend money. Since the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a Government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Mr. Justice Story, in his commentaries, espouses the Hamiltonian position. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.[4]

[1] United States v. Johnston, 124 U. S. 236 [1888].
[2] Great Western Ins. Co. v. United States, 19 Ct. Cl. 206 [1884].
[3] United States v. Realty Co., 163 U. S. 427, 440 [1896].
[4] United States v. Butler, 297 U. S. 1, 65 [1936].

Congress may recognize and pay a claim of an equitable, moral, or honorary nature, and whether the facts are such as to authorize relief is for Congress alone to determine, and where Congress directs a specific sum to be paid to a certain person, neither the Secretary of the Treasury nor any court has discretion to determine whether the person is entitled to receive it.[1] While it has the power to prevent the payment of claims by refusing to appropriate money therefor, an appropriation of a less amount than is specified by a law fixing compensation does not abrogate or suspend such law nor impair the validity of the claim, nor does the fact that the appropriation out of which the claim should have been paid has lapsed constitute a defense to the claim itself. Where an appropriation is insufficient to satisfy a claim, the claimant's remedy is by appeal to Congress. An act appropriating less than the amount recommended by the head of a department

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to the payment of a claim does not operate as an adoption of the recommendation or a recognition of the amount therein named as due.[2]

[1] United States v. Price, 116 U. S. 43 [1885]; United States v. Realty Co., 163 U. S. 427, 439 [1896]; Allen v. Smith, 173 U. S. 389, 393 [1899].
[2] United States v. Langston, 118 U. S. 389, 394 [1886]; Nutt v. United States, 125 U. S. 650, 655 [1888]; Dunwoody v. United States, 143 U. S. 578, 586 [1892]; Hart's case, 16 Ct. Cl. 459 [1880].

No officer of the Government can pay a debt due from the United States (whether the claim is by a verdict or judgment or without either) without an appropriation by Congress, and no mandamus will issue for that purpose.[1]

[1] Reeside v. Walker, 11 How. 272 [1851].

The constitutional prohibition applies to judgments of the Court of Claims as it did to the claim itself.[1]

[1] Collins v. United States, 15 Ct. Cl. 22 [1879].

When the Constitution of the United States, or any act of Congress, authorizes and requires the President to do a thing which involves expenditure of public money, then, and in such case, the legality of an engagement of the President to have the thing done, that is, of a contract for its performance, is wholly independent of the question whether there is or is not an adequate appropriation by Congress for the object, and the cost of the thing becomes a lawful charge on the Government.[1]

[1] Contracts for Extension of Capitol, 6 Op. Atty. Gen. 28 [1853].

A presidential pardon cannot have the effect of restoring to the offender the proceeds of property already sold and paid into the Treasury;[1] nor of authorizing the payment out of a general appropriation, of a debt which a law of Congress has said should not be paid.[2]

[1] Knote v. United States, 95 U. S. 149, 154 [1877]; Austin v. United States, 155 U. S. 417, 427 [1894].
[2] Hart v. United States, 118 U. S. 62, 67 [1886].

Article I.
Sec. 9. Powers denied to Congress.
Cl. 8. Titles of nobility and gifts from foreign States.

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.

In distinguishing between constitutional prohibitions which "go to the very root of the power of Congress to act at all, irrespective of time or place" and such others as are operative only "throughout

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the United States" or among the several States, the Court said of the present clause that "it goes to the competency of Congress to pass a bill of that description." [1]

[1] Downes *v.* Bidwell, 182 U. S. 244, 277 [1901].

Although it is manifest that the particular collocation of words in the Constitution refers generally to a foreign government and its regular executive, a titular prince is included in the constitutional prohibition, for the phrase of the prohibition is "any king, prince, or foreign State," and a titular prince, although not reigning, might have the function of bestowing an office or title of nobility or decoration which would clearly fall under the provision. And even a simple remembrance of courtesy, like a photograph, which, from motives of delicacy, recognizes the policy suggested by this clause, falls under the inclusion of "any present * * * of any kind whatever." As the constitutional provision expressly and exclusively relates to official persons, it cannot properly be extended to a department of the Government and to Government institutions. A minister of the United States abroad is not prohibited by the Constitution from rendering a friendly service to a foreign power, even that of negotiating a treaty for it, provided he does not become an officer of that power, but the acceptance of a formal commission, as minister plenipotentiary, creates an official relation between the individual thus commissioned and the government which in this way accredits him as its representative, which is prohibited by this clause of the Constitution.[1]

[1] 13 Op. Atty. Gen. 538 [1871].

Article I.
Sec. 10. Powers denied to the States.
Cl. 1. Not to make treaties, coin money, pass ex post facto laws, impair contracts, etc.

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make 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.

No State Shall Enter Into Any Treaty, Alliance, or Confederation.*

State Defined.

A State, in the sense of the Constitution, is a political community of free citizens occupying definite territory and organized under a government sanctioned and limited by a written constitution, and the union of such States, under the Constitution forms the United States. With respect to the General Government the States are not sovereign powers but members of the Union, whose Constitution is

See also pp. 389, 455, 575.

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supreme, but as respects their local government they are sovereign within their own limits and foreign as to each other. The sovereignty of the States in their relation with one another, however, is qualified; they have surrendered their treaty-making powers to the General Government, and they cannot declare war or authorize reprisals on other States.[1]

[1] Texas v. White, 7 Wall. 700, 721 [1869]; Fletcher v. Peck, 6 Cr. 87, 136 [1810]; Buckner v. Finley, 2 Pet. 586, 591 [1829]; Holmes v. Jennison, 14 Pet. 540, 571 [1840]; Mahon v. Justice, 127 U. S. 700, 705 [1888].

Treaty, Alliance, or Confederation.

In expounding the Constitution every word must have its due force and appropriate meaning; no word was unnecessarily used and needlessly added. Every word appears to have been weighed with the utmost deliberation. No word in the instrument, therefore, can be rejected as superfluous or unmeaning. This principle of construction applies with peculiar force to the first and third clauses of article I, section 10: "no State shall enter into any treaty, alliance, or confederation," and no State without the consent of Congress shall "enter into any agreement or compact with another State or with a foreign power." The words "agreement" and "compact" cannot be construed as synonymous with the word "treaty", because the States with the consent of Congress may enter into the former, but the States are positively and unconditionally forbidden to enter into the latter.[1]

[1] Holmes v. Jennison, 14 Pet. 540, 571 [1840].

Surrender of Treaty-Making Power.

By this clause and section 2 of article I the States have surrendered the treaty-making power to the General Government and have vested it in the President and Senate.[1] Hence a city ordinance directing the mayor to visit certain places in Europe is good as a leave of absence, but since he can have no ambassadorial functions in view of this section it does not entitle him to his salary in the face of a statute that pay shall cease after 30 days absence.[2] Even the consent of Congress cannot authorize the States to enter into a treaty, alliance, or confederation. No power under the Government can validate such a treaty or dispense with the Constitutional prohibition.[3]

[1] In re Parrott, 1 Fed. 481 [1880].
[2] Sloan use of City of Portland v. Baker, 139 Or. 370 [1932].
[3] Rhode Island v. Massachusetts, 12 Pet. 657, 724 [1838]; Holmes v. Jennison, 14 Pet. 540, 571 [1840].

The Confederate States of America.

By reason of this clause the confederation formed by Virginia and other States, called the Confederate States of America, could not be recognized as having any legal existence.[1]

[1] Williams v. Bruffy, 96 U. S. 176, 183 [1878].

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The States had no right to secede from the Union, and at no time were they out of the Union. Their attempt to separate themselves from the Union did not destroy their identity as States nor free them from the binding force of the United States Constitution; their rights under the Constitution were suspended, not destroyed; but their constitutional duties and obligations remained the same.[1]

[1] Texas *v.* White, 7 Wall. 700, 725 [1869]; White *v.* Hart, 13 Wall. 646, 651 [1872]; Keith *v.* Clark, 97 U. S. 454, 461 [1878]; Daniels *v.* Tearney, 102 U. S. 415, 418 [1880].

While the Government of the United States is not bound to recognize as valid any action by a State engaged in rebellion, yet laws were upheld so far as they did not tend to impair the supremacy of the National Government or the constitutional rights of citizens, for example, statutes necessary for the protection of persons and property; laws for the regulation of business transactions; statutes regulating the creation of corporations; and statutes in aid of railroad corporations.[1]

[1] Texas *v.* White, 7 Wall. 700, 733 [1869]; Thorington *v.* Smith, 8 Wall. 1 [1869]; Confederate Note Case, 19 Wall. 548 [1874]; Thomas *v.* Richmond, 12 Wall. 349, 357 [1871]; Davis *v.* Gray, 16 Wall. 203, 225 [1873]; Huntington *v.* Texas, 16 Wall. 402, 413 [1873]; Horn *v.* Lockhardt, 17 Wall. 570, 580 [1873]; United States *v.* Home Insurance Co., 22 Wall. 99, 103 [1875].

No State Shall Grant Letters of Marque and Reprisal.

For the States to grant letters of marque and reprisal would lead directly to war, the power of declaring which is expressly given to Congress.[1]

[1] Barron *v.* Baltimore, 7 Pet. 243, 249 [1833].

No State Shall Coin Money.*

The term "money" means gold, copper, and silver coins, and to "coin money" is to mold into form a metallic substance of intrinsic value.[1] The act of coining money being prohibited, cannot be done by a State, either directly or indirectly. Certainly a State cannot incorporate a number of individuals and authorize them to coin money. Such an act would be as much a violation of the Constitution as if the money were coined by an officer of the State.[2] A provision in a sales tax statute authorizing use of tokens in payment of the tax on small purchases does not amount to the coining of money, when tokens were not to pass currently as coin but were to be used only as evidence that tax was paid. The right of the State to use such tokens cannot be questioned by the individual; the Federal Government

**See also* pp. 228, 271, 297.

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alone can complain, since the limitation on the power of the States to coin money is a reservation in favor of the National Government.[3]

[1] Griswold v. Hepburn, 63 Ky. 20 [1865].
[2] Briscoe v. Bank of Kentucky, 11 Pet. 257, 318 [1837].
[3] Morrow v. Henneford, 182 Wash. 625 [1935].

The power to coin money was denied to the States and vested in Congress in order to create and preserve uniformity and purity of standard of value, and to prevent the inequalities and confusion incident to different views of policy on the part of the several States.[1] The clause declares that "no State shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts." These prohibitions, associated with the powers granted to Congress "to coin money, to regulate the value thereof, and of foreign coin," most obviously constitute members of the same family, being upon the same subject and governed by the same policy. This policy was to provide a fixed and uniform standard of value throughout the United States by which the commercial dealing between citizens of different States as well as the moneyed transactions of the Government should be regulated.[2]

[1] United States v. Marigold, 9 How. 560, 567 [1850].
[2] Ogden v. Saunders, 12 Wheat. 213, 265 [1827].

No State Shall Emit Bills of Credit.

Bills of Credit.

Bills of credit signify a paper medium, intended to circulate between individuals, and between Government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing, and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all, the people declared in their Constitution that no State should emit bills of credit. If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium by a State government for the purpose of common circulation.[1]

[1] Craig v. Missouri, 4 Pet. 410, 425 [1830]; Byrne v. Missouri, 8 Pet. 40 [1834].

To constitute a bill of credit within the Constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life.[1] The bills prohibited by the Constitution are those which were intended to circulate as money, those which were designed to be a substitute

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for money.[2] This clause does not forbid the States to issue coupons receivable for taxes,[3] auditor's warrants for money due,[4] or to execute instruments binding themselves to pay money at a future day for services rendered or for money borrowed.[5]

[1] Briscoe v. Bank of Kentucky, 11 Pet. 257, 314 [1837]; Darrington v. Bank of Alabama, 13 How. 12 [1851].
[2] Houston, & T. C., R. Co. v. Texas, 177 U. S. 66, 87 [1900].
[3] Poindexter v. Greenhow (Virginia Coupon Cases), 114 U. S. 270 [1885]; Chaffin v. Taylor, 116 U. S. 567 [1886].
[4] Houston, & T. C., R. Co. v. Texas, 177 U. S. 66, 87 [1900].
[5] Houston, & T. C., R. Co. v. Texas, 177 U. S. 66 [1900].

State Bank Issues.

Bills issued by State banks are not bills of credit.[1] The fact that the State is the sole stockholder in the bank,[2] that the officers of the bank are elected by the State legislature,[3] or that the capital of the bank was raised by sale of State bonds,[4] is immaterial.

[1] Briscoe v. Bank of Kentucky, 11 Pet. 257 [1837].
[2] Darrington v. Bank of Alabama, 13 How. 12, 15 [1851]; Curran v. Arkansas, 15 How. 304, 317 [1853].
[3] Briscoe v. Bank of Kentucky, 11 Pet. 257 [1837].
[4] Woodruff v. Trapnall, 10 How. 190, 205 [1851].

Power of Congress to Emit.

The several States are prohibited from emitting bills of credit, but no intention can be inferred from this to deny to Congress this power.[1]

[1] Legal Tender Case, 110 U. S. 421, 446 [1884].

No State Shall Make Any Thing but Gold and Silver Coin a Tender in Payment of Debts.

As bills of credit were entirely abolished, the paper money of the State banks was the only currency or circulating medium to which the prohibition could have had any application, and was the only currency, except gold or silver, left to the States. The prohibition took from State bank paper all coercive circulation, and left it to stand alone upon the credit of the banks.[1] Thus when a marshal has received State bank notes in payment and discharge of an execution, the creditor can demand payment in gold or silver.[2]

[1] Veazie Bank v. Fenno, 8 Wall. 533, 552 [1869].
[2] Gwin v. Breedlove, 2 How. 29, 38 [1844]. *See also* Griffin et al. v. Thompson, 2 How. 244 [1844].

The power to declare what shall constitute legal tender resides in Congress. The several States are prohibited from making anything but gold and silver coin a tender in payment of debts, but no intention can be inferred from this prohibition on the States to deny to Congress this power.[1]

[1] Legal Tender Case, 110 U. S. 421, 446 [1844].

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A State law providing that checks drawn on local banks, unless the contrary is specified, shall be payable by exchange drafts at the option of the bank is valid. There is nothing in the Federal Constitution which prohibits a depositor from consenting, when he draws a check, that payment may be by draft.[1]

[1] Farmers & Merchants Bank v. Federal Reserve Bank, 262 U. S. 649, 659 [1923].

No State Shall Pass Any Bill of Attainder.*

A bill of attainder is a legislative act which inflicts punishment without a judicial trial. The term as used in the Constitution embraces bills of pains and penalties, and comprehends laws confiscating property as well as those affecting the life of an individual. These bills are generally directed against named individuals, but they may be directed against a whole class.[1]

[1] Fletcher v. Peck, 6 Cr. 87, 138 [1810]; Ogden v. Saunders, 12 Wheat. 213, 266 [1827]; Cummings v. Missouri, 4 Wall. 277 [1867]; Drehman v. Stifle, 8 Wall. 595, 601 [1870].

The so-called test-oath acts contravene this clause in excluding certain persons from practicing their professions for previous acts of rebellion, or depriving such persons of the right to a rehearing in civil suits or denying to nonresidents the right to appear and defend without taking the prescribed oath.[1]

[1] Cummings v. Missouri, 4 Wall. 277, 323 [1867]; Klinger v. Missouri, 13 Wall. 257 [1872]; Pierce v. Carskadon, 16 Wall. 234, 239 [1873].

A New York statute excluding ex-convicts from the practice of medicine is not a bill of attainder, even when applied to a person who has been convicted of a felony, and has served his sentence prior to the enactment of the law, and who was again practicing medicine at the time said law was enacted.[1]

[1] Hawker v. New York, 170 U. S. 189, 198 [1898]. *Cf.* Dent v. West Virginia, 129 U. S. 114, 125 [1889].

No State Shall Pass Any Ex Post Facto Law.†

Scope of Provision.

An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or an additional punishment to that inflicted; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offense or its consequences, alters the situation of a party to his disadvantage.[1] This provision of the Constitution relates to penal and criminal proceedings, and not to civil proceedings which affect private rights retrospectively.[2]

* *See also* pp. 281, 510.

† *See also* p. 282.

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It is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts; it concerns the making of laws, not their construction by the courts.[3]

[1] Duncan *v.* Missouri, 152 U. S. 377, 382 [1894]; Calder *v.* Bull, 3 Dall. 386, 390 [1798]; Cummings *v.* Missouri, 4 Wall. 277, 325 [1867]; Kring *v.* Missouri, 107 U. S. 221 [1883]; Gibson *v.* Mississippi, 162 U. S. 565, 582 [1896]; Thompson *v.* Utah, 170 U. S. 343, 351 [1898]; Mallett *v.* North Carolina, 181 U. S. 589, 597 [1901]; Malloy *v.* South Carolina, 237 U. S. 180, 183 [1915].

[2] Watson *v.* Mercer, 8 Pet. 88, 110 [1834]; Calder *v.* Bull, 3 Dall. 386, 393 [1798]; Fletcher *v.* Peck, 6 Cr. 87 [1810]; Baltimore & S. R. Co. *v.* Nesbit, 10 How. 395, 401 [1850]; Carpenter *v.* Pennsylvania, 17 How. 456, 463 [1855]; Locke *v.* New Orleans, 4 Wall. 172 [1867]; Ex parte Sawyer, 124 U. S. 200, 217 [1888]; Ex parte Medley, 134 U. S. 160, 170 [1890]; Orr *v.* Gilman, 183 U. S. 278, 285 [1902]; Kentucky Union Co. *v.* Kentucky, 219 U. S. 140 [1911].

[3] Frank *v.* Mangum, 237 U. S. 309, 344 [1915]; Ross *v.* Oregon, 227 U. S. 150, 161 [1913].

A statute which mitigates the rigor of the law in force at the time the crime was committed is not *ex post facto* as to that crime.[1] Even though the statute may be *ex post facto* and invalid as to crimes committed prior to its enactment, it is nevertheless valid as to all subsequent offenses.[2]

[1] Rooney *v.* North Dakota, 196 U. S. 319, 325 [1905].

[2] Jaehne *v.* New York, 128 U. S. 189, 190 [1888].

A statute penalizing the failure of a railroad to cut drains through embankments built before the enactment of the statute is not *ex post facto*. The penalty attaches to the continued maintenance of an embankment in a prohibited manner, not to the manner in which the embankment was originally constructed.[1] Similarly a State law making the possession of intoxicating liquors illegal is not *ex post facto*, even as to liquors lawfully acquired prior to the passage of the prohibition law; it is the continued possession and not the original acquisition of the liquor which is made illegal.[2]

[1] Chicago & A. R. Co. *v.* Tranbarger, 238 U. S. 67 [1915].

[2] Samuels *v.* McCurdy, 267 U. S. 188 [1925].

A person licensed to practice medicine cannot object to a law as *ex post facto* which was subsequently enacted requiring continuing evidence of qualifications as a physician or surgeon.[1] A statute making it a misdemeanor to practice medicine after conviction of a felony is not *ex post facto* even when made to operate on one who had been convicted of a felony and had served his term prior to the enactment of the statute.[2]

[1] Reetz *v.* Michigan, 188 U. S. 505, 509 [1903]. *Cf.* Lehmann *v.* State Board of Public Accountancy, 263 U. S. 394 [1923].

[2] Hawker *v.* New York, 170 U. S. 189, 190 [1898].

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State constitutional or statutory provisions requiring office holders, teachers, preachers, and attorneys,[1] and suitors [2] to take test oaths relating to commission or noncommission of certain past offenses have been held in some cases to amount to a punishment, and hence to be *ex post facto* and invalid.

[1] Cummings v. Missouri, 4 Wall. 277, 316 [1867], involving a priest. *Cf.* Ex parte Garland, 4 Wall. 333 [1867].
[2] Pierce v. Carskadon, 16 Wall. 234 [1873].

Changes in Punishment.

A statute which changed the indeterminate sentence law so that a judge in sentencing persons convicted was obliged to impose the maximum (duration of confinement thereunder to be fixed by the parole board), whereas formerly he could impose a sentence between the minimum and maximum, was *ex post facto* as to a person convicted of an offense committed while the former law was in effect although the maximum fixed by the two laws was the same. The Court said, "It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term." [1]

[1] Lindsey v. Washington, 301 U. S. 397 [1937].

A State statute which provides for a 25-year sentence for a third offense, when each of the prior convictions have been for 3 years or more, is not an *ex post facto* punishment even as to the persons who had already been twice convicted. The punishment is for the new crime only; it is heavier if the offender is a habitual criminal.[1]

[1] McDonald v. Massachusetts, 180 U. S. 311 [1901].

A constitutional provision of Missouri abolishing a rule of law in that State (which had prevented a subsequent conviction of first-degree murder when a jury had once found the accused guilty in the second degree but where the verdict had been set aside) is *ex post facto* as to a crime committed prior to adoption of the provision.[1] This right to the benefit of acquittal of first-degree by conviction of second-degree murder is a substantial one, it being a complete defense against the charge of murder in the first degree.[2]

[1] Kring v. Missouri, 107 U. S. 221 [1883].
[2] Thompson v. Missouri, 171 U. S. 380, 383 [1898].

A statute changing the punishment from hanging to electrocution, fixing the place therefor in the penitentiary, and permitting the presence of a greater number of invited witnesses is not *ex post facto* as to previously committed crimes.[1] Similarly a law providing for "close confinement" of 6 to 9 months in the penitentiary in lieu of 3 to 6

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months in jail prior to the execution, and substituting the warden for the sheriff as hangman is not invalid.[2]

[1] Malloy *v.* South Carolina, 237 U. S. 180 [1915].
[2] Rooney *v.* North Dakota, 196 U. S. 319, 324 [1905].

But a statute requiring criminals sentenced to death to be kept thereafter in "solitary confinement" may be deemed *ex post facto* if applied to offenses committed before passage of said laws,[1] as may a statute which allows a warden to fix and keep secret within limits of 1 week the time of execution.[2]

[1] Holden *v.* Minnesota, 137 U. S. 483, 491 [1890].
[2] Ex parte Medley, 134 U. S. 160, 171 [1890].

Changes in Rules of Evidence.

A statute allowing the comparison of writings and the testimony of handwriting experts is not *ex post facto* as applied to evidence which was not admissible at the time of the commission of the alleged offense.[1] Similarly a statute which enlarges the class of persons who may be competent to testify is not *ex post facto* in its application to offenses previously committed.[2]

[1] Thompson *v.* Missouri, 171 U. S. 380, 381 [1898].
[2] Hopt *v.* Utah, 110 U. S. 574 [1884].

Changes in Procedure.

The inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The mode of trial is always under legislative control, subject only to the condition that the legislature may not violate the accepted principles that protect the accused person against *ex post facto* enactment.[1] If the procedural change affects the substantial rights of the accused, it cannot be considered outside the prohibition against *ex post facto* legislation.[2]

[1] Gibson *v.* Mississippi, 162 U. S. 565, 590 [1896].
[2] Kring *v.* Missouri, 107 U. S. 221, 232 [1883].

The prescribing of different modes of procedure and the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime are not considered within the constitutional inhibition.[1]

[1] Duncan *v.* Missouri, 152 U. S. 377, 382 [1894].

State statutes making the following modifications in procedure have been held not to amount to *ex post facto* legislation: A law changing place of trial from one county to another,[1] a law increasing number of appellate judges from five to seven and dividing the appellate court into two divisions,[2] a law granting to the State the right of appeal,[3] a law changing the method of selecting and summoning of jurors,[4] a law substituting prosecution by information for indictment by grand

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jury,[5] and a law providing for separate trials for persons jointly indicted only when granted by the court for good cause shown, in lieu of the former provision for separate trials as a matter of right.[6]

[1] Gut v. Minnesota, 9 Wall. 35, 37 [1870].
[2] Duncan v. Missouri, 152 U. S. 377 [1894].
[3] Mallett v. North Carolina, 181 U. S. 589, 593 [1901].
[4] Gibson v. Mississippi, 162 U. S. 565, 588 [1896].
[5] People (California) v. Campbell, 59 Cal. 243 [1881].
[6] Beazell v. Ohio, 269 U. S. 167 [1925].

However, a provision in the first constitution of Utah providing for a jury of eight is *ex post facto* in its application to felonies committed before the Territory became a State, inasmuch as the Sixth Amendment then guaranteed to the accused the protection of a common law jury of 12.[1]

[1] Thompson v. Utah, 170 U. S. 343 [1898].

Law Impairing the Obligation of Contracts.

Law-Making Agencies Affected.

IN GENERAL.

The contract clause of the Federal Constitution is a limitation on the power of the States, whatever form it may assume, if a contract right is thereby impaired.[1]

[1] Murray v. Charleston, 96 U. S. 432, 444 [1878]; Sturges v. Crowninshield, 4 Wheat. 122 [1819].

CONGRESS.

The contract clause is a limitation on the powers of the States, not of Congress or of the United States.[1] Thus, an act of Congress prescribing a 2 years' limitation for all suits based on torts arising out of the Civil War cannot be challenged as an interference with the validity of contracts.[2] The Constitution in fact even authorizes Congress, in the exercise of its currency, bankruptcy, and commerce powers, to impair under certain circumstances private contract obligations.[3] For example, Federal bankruptcy legislation which relieves insolvent persons from payment, in whole or in part, of previously contracted debts is valid. When the legislation is pertinent to powers conferred on Congress by the Constitution, such laws are not invalid because contracts are thereby collaterally or incidentally impaired or destroyed.[4] But, in some instances, impairment of a contract obligation by Congress may violate other provisions of the Constitution, e. g., the due process clause of the Fifth Amendment, or the clause forbidding the taking of private property without just compensation.[5]

[1] Central P. R. Co. v. Gallatin (Sinking Fund Cases), 99 U. S. 718 [1879]. *See also* Mitchell v. Clark, 110 U. S. 633, 643 [1884]; Legal Tender Cases, 12 Wall. 457, 529 [1871]; Continental Ill. Nat. Bank & T. Co. v Chicago, R. I. & P. R. Co., 294 U. S. 648 [1935]; St. Anthony Falls Water

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Power Co. *v.* Board of Water Comrs., 168 U. S. 349, 372 [1897]; Dubuque, S. C. R. Co. *v.* Richmond, 19 Wall. 584 [1874]; New York *v.* United States, 257 U. S. 591 [1922].

[3] Mitchell *v.* Clark, 110 U. S. 633 [1884].

[4] Norman *v.* B. & O. R. Co., 294 U. S. 240, 304 [1935]. *See also* Hepburn *v.* Griswold, 8 Wall. 603, 623 [1870]; St. Anthony Falls Water Power Co. *v.* Board of Water Comrs., 168 U. S. 349, 372 [1897]; Continental Illinois Nat. Bank & T. Co. *v.* Chicago, R. I. & P. R. Co., 294 U. S. 648 [1935].

[5] Continental Illinois Nat. Bank & T. Co. *v.* Chicago, R. I. & P. R. Co., 294 U. S. 648 [1935].

[6] The Sinking Fund Cases (Union Pac. R. Co. *v.* United States), 99 U. S. 700, 718 [1879], and *infra*, p. 637, 664.

The Federal Government cannot, of course, confer on the States its immunity from this provision of the Constitution. For example, Congress, by approving the new constitution of a State, on its readmission to the Union, cannot thereby sanction any provision therein amounting to an impairment of the obligation of a contract.[1] Similarly, congressional consent to an interstate compact will not validate a provision of the compact impairing the obligation of a previous contract.[2] Nor can Congress, under a purported exercise of its bankruptcy power, authorize a State or its political subdivisions to impair contract obligations. Federal legislation which would allow an embarrassed political subdivision of a State to scale down, compromise, or repudiate its incurred indebtedness would in effect sanction an impairment by the State of its contract obligations. Neither consent nor submission by the States can enlarge the powers of Congress nor justify an evasion by the States of a constitutional prohibition.[3]

[1] Gunn *v.* Barry, 15 Wall. 610, 623 [1873]. *Cf.* Kener *v.* LaGrange Mills, 231 U. S. 215 [1914].

[2] La Plata River and Cherry Creek Ditch Co. *v.* Hinderlider, 93 Colo. 128 [1933], appeal dismissed 291 U. S. 650 [1934].

[3] Ashton *v.* Cameron County Water Improvement District, 298 U. S. 513 [1936].

STATE LEGISLATURES.

A State legislature is prohibited from enacting laws impairing an existing contract.[1] Since laws in force at the time a contract is entered into form a part of the contract, any subsequent change of law which amounts to an impairment of the contract violates this provision of the Constitution.[2]

[1] New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336 [1902]; Louisiana ex rel. Southern Bank *v.* Pilsbury, 105 U. S. 278 [1882]; Boyce *v.* Tabb, 18 Wall. 546 [1873].

[2] Fletcher *v.* Peck, 6 Cr. 87 [1810]; Oden *v.* Saunders, 12 Wheat. 213 [1827]; Bronson *v.* Kinzie, 1 How. 311, 315 [1843]; McCracken *v.* Hayward, 2 How. 608, 612 [1844]; West River Bridge Co. *v.* Dix, 6 How. 507, 532 [1848]; United States ex. rel. Von Hoffman *v.* Quincy, 4 Wall. 535, 550 [1867]; Walker *v.* Whitehead, 16 Wall. 314 [1873]; Edwards *v.* Kearzey, 96 U. S. 595 [1878]; Abilene National Bank *v.* Dolley, 228 U. S. 1 [1913]; Chicago, B. & Q. R. Co. *v.* Cram, 228 U. S. 70 [1913].

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MUNICIPALITIES.

A municipal ordinance or resolution, legislative in character, is a law within the inhibition of the Constitution if it impairs the obligation of contract.[1] An ordinance not passed under supposed legislative authority cannot be regarded as a "law" within this prohibition.[2] An ordinance, the effect of which is merely to deny liability on the contract or to declare the repudiation thereof, is not legislation impairing the obligation of contract, even though the contract so repudiated is valid and binding.[3] Mere breach of a contract by a municipality raises no Federal question under the contract clause.[4]

[1] New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336 [1902]. *See also* New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18 [1888]; Bacon *v.* Texas, 163 U. S. 207 [1896]; St. Paul Gaslight Co. *v.* St. Paul, 181 U. S. 142 [1901]; Mercantile Trust & D. Co. *v.* Columbus, 203 U. S. 311 [1906]; United States ex rel. Ranger *v.* New Orleans, 98 U. S. 381 [1879]; Northern P. R. Co. *v.* Minnesota, 208 U. S. 583 [1908]; Cuyahoga River Power Co. *v.* Akron, 240 U. S. 462 [1916]; Atlantic Coast Line R. Co. *v.* Goldsborough, 232 U. S. 548 [1914]; Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1 [1898]; New Orleans Waterworks Co. *v.* Rivers, 115 U. S. 674 [1885]; Meriweather *v.* Garrett, 102 U. S. 472 [1880]; United States *v.* New Orleans, 98 U. S. 381 [1879]; Murray *v.* Charleston, 96 U. S. 432 [1878]; Vicksburg *v.* Vicksburg Waterworks Co., 202 U. S. 453 [1906]; Pacific Electric R. Co. *v.* Los Angeles, 194 U. S. 112 [1904]; Vicksburg Waterworks Co. *v.* Vicksburg, 185 U. S. 65 [1902].

[2] Hamilton Gaslight & Coke Co. *v.* Hamilton, 146 U. S. 266 [1892].

[3] St. Paul Gaslight Co. *v.* St. Paul, 181 U. S. 142 [1901]; Dawson *v.* Columbia Ave., Sav. Fund S. D. Title & T. Co., 197 U. S. 178, 181 [1905]; Brown *v.* Colorado, 106 U. S. 95, 98 [1883]; Hays *v.* Seattle, 251 U. S. 233, 237 [1920]; Shawnee Sewerage & Drainage Co. *v.* Stearns, 220 U. S. 462 [1911].

[4] Police Jury *v.* Courier Pub. Co., 82 F. (2d) 1 [1936], cert. den. 298 U. S. 675 [1936]; McCormick *v.* Oklahoma City, 236 U. S. 657 [1915].

CONSTITUTIONAL CONVENTIONS.

Since the constitution of a State is also a law within the meaning of this clause, the people of a State by adopting a new constitution can no more impair the obligation of a contract than can the State legislature by passing a law.[1]

[1] Mississippi & M. R. Co. *v.* McLure, 10 Wall. 511 [1871]. *See also* Gunn *v.* Barry, 15 Wall. 610 [1873]; Pacific R. Co. *v.* Maguire, 20 Wall. 36 [1874]; Louisville Gas Co. *v.* Citizens' Gaslight Co., 115 U. S. 683 [1885]; New Orleans Gaslight Co. *v.* Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650 [1885]; New Orleans Waterworks Co. *v.* Rivers, 115 U. S. 674 [1885]; Fisk *v.* Police Jury, 116 U. S. 131 [1885]; White *v.* Hart, 13 Wall. 646 [1872]; Shreveport *v.* Cole, 129 U. S. 36 [1889]; Dodge *v.* Woolsey, 18 How. 331 [1856]; Bier *v.* McGehee, 148 U. S. 137, 140 [1893]; Ohio & M. R. Co. *v.* McClure, 10 Wall. 515 [1871].

LEGISLATION BY THE PEOPLE.

Laws or charters impairing contracts are none the less void by reason of their adoption by initiative rather than by the legislature.[1]

[1] Denver *v.* New York Trust Co., 187 Fed. 890 [1911].

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EXECUTIVE AND ADMINISTRATIVE BODIES.

The prohibition is aimed at the legislative power of the State, and not at the acts of administrative or executive boards or officers, or the doings of corporations or individuals.[1] But when the order of a commission has the same force as if made by the legislature, it is a law within the meaning of the contract clause.[2] Thus, an order of a railroad commission may be a "law."[3] Where authority exercised by public officials is such as to make their action equivalent to a statute of a State, the action, if in conflict with private contracts, is void under the contract clause.[4]

[1] New Orleans Water Works Co. *v.* Louisiana Sugar Refining Co., 125 U. S. 18, 30 [1888]; Weber *v.* Rogan, 188 U. S. 10 [1903]; Hanford *v.* Davies, 163 U. S. 273, 278 [1896]. *Cf.* St. Paul Gaslight Co. *v.* St. Paul, 181 U. S. 142 [1901].

[2] Grand Trunk Western R. Co. *v.* Railroad Commission, 221 U. S. 400 [1911].

[3] Louisville & N. R. Co. *v.* Garrett, 231 U. S. 298 [1914].

[4] Appleby *v.* Delaney, 271 U. S. 403 [1926].

STATE COURTS.

The contract clause is a prohibition against legislative and not judicial action.[1] The constitutional inhibition applies only to the legislative enactments of the State and not to the judicial decisions or acts of State tribunals.[2] A decision of a State court is not a law within the meaning of the contract clause.[3] A judicial decision erroneously construing a valid statute, though it may operate to impair the obligation of contract, does not give rise to a Federal question.[4] A State court may erroneously determine questions arising under the contract; it may hold a contract void which in the opinion of the Supreme Court is valid; it may adjudge a contract valid which in their opinion is void; but in such cases the judgment of the State court is not reviewable under the contract clause unless that judgment, by its terms or necessary operations,[5] gives effect to some provision of the State constitution or some legislative enactment of the State impairing the contract.[6] The contract clause cannot be invoked against a change of decision by a State court.[7] There is no constitutional right to have all general propositions of law once adopted remain unchanged.[8]

[1] New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18 [1888]. *See also* Hanford *v.* Davies, 163 U. S. 273 [1896]; Detroit United R. Co. *v.* Michigan, 242 U. S. 238 [1916]; Long Sault Development Co. *v.* Call, 242 U. S. 272 [1916]; McCoy *v.* Union Elev. Co., 247 U. S. 354 [1918]; Columbia R. Gas & E. Co. *v.* South Carolina, 261 U. S. 236 [1923]; Tidal Oil Co. *v.* Flanagan, 263 U. S. 444 [1924]; Cleveland & P. R. Co. *v.* Cleveland, 235 U. S. 50 [1914]; Kryger *v.* Wilson, 242 U. S. 171 [1916]; Cross Lake Shooting and Fishing Club *v.* Louisiana, 224 U. S. 632 [1912].

[2] Weber *v.* Rogan, 188 U. S. 10 [1903].

[3] Brown *v.* Smart, 145 U. S. 454 [1892].

[4] Central Land Co. *v.* Laidley, 159 U. S. 103 [1895]. *See also* Long Sault Development Co. *v.* Call, 242 U. S. 272 [1916]; Dunbar *v.* New

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York, 251 U. S. 516 [1920]; Cross Lake Shooting and Fishing Club *v.* Louisiana, 224 U. S. 632 [1912]; Turner *v.* Wilkes County Commissioner, 173 U. S. 461 [1899].

[5] Columbia R. Gas & Electric Co. *v.* South Carolina, 261 U. S. 236 [1923]; Houston & Texas Central R. R. Co. *v.* Texas, 177 U. S. 66, 77 [1900].

[6] Willoughby *v.* Chicago, 235 U. S. 45 [1914]. *See also* Mississippi & M. R. Co. *v.* Rock, 4 Wall. 177, 181 [1867]; Ohio, etc., R. Co. *v.* McClure, 10 Wall. 511 [1871]; Knox *v.* Exchange Bank, 12 Wall. 379, 383 [1871]; Delmas *v.* Merchants' Mut. Ins. Co., 14 Wall. 661, 665 [1472]; Northwestern University *v.* Illinois ex rel. Miller, 99 U. S. 309, 319 [1879]; Chicago L. Ins. Co. *v.* Needles, 113 U. S. 574, 582 [1885]; Lehigh Water Co. *v.* Easton, 121 U. S. 388, 392, [1887]; Hubert *v.* New Orleans 215 U. S. 170 [1909]; Hardin Wyandot Lighting Co. *v.* Upper Sandusky, 251 U. S. 173 [1919].

[7] National Mut. Bldg. & L. Assoc. *v.* Brahan, 193 U. S. 635 [1904]; Stockholders of the Peoples Banking Co. *v.* Sterling, 300 U. S. 175 [1937]. *See also* Tidal Oil Co. *v.* Flanagan, 263 U. S. 444 [1924]; Fleming *v.* Fleming, 264 U. S. 29 [1924]; Hawks *v.* Hamill, 288 U. S. 52 [1933]; Cleveland, & P. R. Co. *v.* Cleveland, 235 U. S. 50 [1914].

[8] Patterson *v.* Colorado, 205 U. S. 454 [1907].

However, when a State court has once interpreted the contract, that interpretation becomes a part of the contract, and any subsequent change to the injury of a contracting party impairs the obligation of the contract.[1] Furthermore, after a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision operates as an impairment of the obligation of contract.[2] Hence, if a contract when made was valid by the laws of the State as then expounded and administered in its courts of justice, its validity cannot be impaired by any subsequent act of legislation or decision of the courts altering the construction of the law, or holding the act invalid.[3] Settled judicial construction by the State courts may be deemed to have been incorporated into the contract.[4]

[1] Sauer *v.* New York, 206 U. S. 536 [1907]; Muhlker *v.* New York & H. R. Co., 197 U. S. 544, 570 [1905].

[2] Douglass *v.* Pike County, 101 U. S. 677, 687 [1880]; Louisiana ex rel. Southern Bank *v.* Pilsbury, 105 U. S. 278, 295 [1882].

[3] Gelpcke *v.* Dubuque, 1 Wall. 175, 206 [1864]; Havemeyer *v.* Iowa County, 3 Wall. 294 [1866]; Thomson *v.* Lee County, 3 Wall. 327 [1866]; Kenosha *v.* Lamson, 9 Wall. 477 [1870]; Olcott *v.* Fond du Lac County, 16 Wall. 678 [1873]; Taylor *v.* Ypsilanti, 105 U. S. 60 [1882]; Anderson *v.* Santa Anna, 116 U. S. 356 [1886]; Wilkes County *v.* Colar & Co., 180 U. S. 506 [1901]; Terre Haute & I. R. Co. *v.* Indiana, 194 U. S. 579 [1904].

[4] Chicago *v.* Sheldon, 9 Wall. 50 [1870]. *See also* Ennis Water Works *v.* Ennis, 233 U. S. 652 [1914]; Burgess *v.* Seligman, 107 U. S. 20 [1883]; Great Southern Fire Proof Hotel Co. *v.* Jones, 193 U. S. 532, 548 [1904].

Retrospective and Prospective Laws.

The obligation of a contract cannot be said to be impaired by a statute in force when the contract was made;[1] only statutes enacted

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after the contract was made can be challenged as impairing the obligation of contract.[2] In fact, a foreign corporation may be deemed to have noted a law already passed but not yet effective at the time the corporation applied for admission to the State.[3]

[1] Blackstone *v.* Miller, 188 U. S. 189 [1903]; Levy Leasing Co. *v.* Siegel, 258 U. S. 242 [1922].

[2] Oshkosh Waterworks Company *v.* Oshkosh, 187 U. S. 437, 446 [1903]. *See also* Lehigh Water Co. *v.* Easton, 121 U. S. 388 [1887]; Pinney *v.* Nelson, 183 U. S. 144 [1901]; Munday *v.* Wisconsin Trust Co., 252 U. S. 499 [1920].

[3] Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611 [1903].

The inhibition of the Constitution is wholly prospective.[1] In the matter of impairing contract obligations, statutes and constitutions are construed to operate prospectively unless the legislative intent that they should operate retrospectively is clearly manifested.[2] In fact, even retrospective laws which do not impair the obligation of contracts or partake of the character of *ex post facto* legislation are not condemned by the contract clause [3] even though they may divest vested rights.[4]

[1] Denny *v.* Bennett, 128 U. S. 489 [1888]. *See also* Chicago B. & Q. R. Co. *v.* Cram, 228 U. S. 70 [1913]; Brown *v.* Smart, 145 U. S. 454 [1892].

[2] Shreveport *v.* Cole, 129 U. S. 36, 43 [1889]. *Cf.* Planters' Bank *v.* Sharp, 6 How. 301 [1848].

[3] Satterlee *v.* Matthewson, 2 Pet. 380, 410 [1829]; Baltimore & S. R. Co. *v.* Nesbit, 10 How. 395 [1850].

[4] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 539 [1837].

Furthermore, the clause does not protect rights which were impaired by a law enacted before the Federal Constitution was adopted.[1] Nor does it apply to laws impairing private rights passed by Texas before its admission into the Union.[2] Similarly, it does not protect a perpetual ferry franchise attached to land granted by the Spanish governor general of Louisiana after Spain had by treaty retroceded the Province of Louisiana to France.[3] It does, however, forbid a State which seceded from the Union from passing laws impairing contract obligations,[4] or from enforcing laws enacted by the Confederate Government which impair the obligations of contract.[5]

[1] Owings *v.* Speed, 5 Wheat. 420 [1820].

[2] Herman *v.* Phalen, 14 How. 79 [1852].

[3] Davis *v.* Concordia Parish, 9 How. 280 [1850].

[4] White *v.* Hart, 13 Wall. 646 [1872]. *See also* Tennessee ex rel. Bloomstein *v.* Sneed, 96 U. S. 69 [1877]; Keith *v.* Clark, 97 U. S. 454, 456 [1878].

[5] Williams *v.* Bruffy, 96 U. S. 176, 184 [1878].

Persons Protected.

One whose legal or equitable rights are in no way injured cannot be heard to complain of the impairment of the obligation of his contract as a mere abstract proposition.[1] A court of equity cannot

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enjoin the enforcement of a municipal ordinance, which it is alleged will impair a contract obligation, at the suit of one who has only an indirect interest therein.[2] A holder of tax-receivable coupons, who is not a taxpayer, cannot maintain a bill to restrain State officers from refusing to accept coupons in payment of taxes due by a taxpayer to the State.[3] A taxpayer has no such vested interest in public funds deposited by a county treasurer in a designated depository as to complain of a State law which subsequently released the treasurer and his bondsmen from losses which resulted from the insolvency of the depository.[4] A party who has by his own act or conduct waived his constitutional objection precludes himself from later insisting that his contract has been impaired.[5]

[1] Hooker *v.* Burr, 194 U. S. 422 [1904]. *See also* Phinney *v.* Sheppard & E. P. Hospital, 177 U. S. 170 [1900]; Walsh *v.* Columbus, H. V. & A. R. Co., 176 U. S. 479 [1900]; Williams *v.* Eggleston, 170 U. S. 309 [1898]; Hagar *v.* Reclamation District, 111 U. S. 701 [1884]; Williams *v.* Hagood, 98 U. S. 74 [1879]. *Cf.* Perry *v.* United States, 294 U. S. 330 [1935].

[2] Davis & F. Mfg. Company *v.* Los Angeles, 189 U. S. 219 [1903].

[3] Marye *v.* Parsons, 114 U. S. 325 [1885]; Hagood *v.* Southern, 117 U. S. 52 [1886].

[4] Schenebeck *v.* McCrary, 298 U. S. 36 [1936]. *Cf.* Wright *v.* Central Kentucky Natural Gas Co., 297 U. S. 537, 542 [1936].

[5] Lewis *v.* American Savings & L. Ass'n, 98 Wisc. 203 [1898].

Contracts Protected.

IN GENERAL.

The contracts which the Constitution protects are those which relate to property rights, not to governmental subjects.[1] Before the contract clause can be invoked, it must appear that there was a valid subsisting contract between the parties.[2] Hence, there must be a good consideration for the contract,[3] and mutual assent to its terms.[4] A mere bounty[5] or gratuity[6] or revocable license[7] or exemption from taxation[8] may be withdrawn without impairing the obligation of contract.

[1] Stone *v.* Mississippi ex rel. Harris, 101 U. S. 814 [1880]; Douglass *v.* Kentucky, 168 U. S. 488 [1897].

[2] Concord *v.* Portsmouth Sav. Bank, 92 U. S. 625 [1876]; Ochiltree *v.* Iowa Contracting Co., 21 Wall. 249 [1875].

[3] Free and A. Masons *v.* New Orleans, 166 U. S. 146 [1897]. *See also* Morley *v.* Lake Shore & M. S. R. Co., 146 U. S. 162 [1892]; Pearsall *v.* Great Northern R. Co., 161 U. S. 646 [1896]; Dartmouth College *v.* Woodward, 4 Wheat. 518 [1819]; Pennsylvania College Cases, 13 Wall. 190 [1872]; Wells *v.* Savannah, 181 U. S. 531 [1901].

[4] Louisiana *v.* New Orleans, 109 U. S. 288 [1883]; Crane *v.* Hahlo, 258 U. S. 142 [1922]; Garrison *v.* New York, 21 Wall. 196, 203 [1875].

[5] East Saginaw Salt Co. *v.* East Saginaw, 13 Wall. 373 [1872].

[6] Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 201 [1893].

[7] Pearsall *v.* Great Northern R. Co., 161 U. S. 667 [1896].

[8] Christ Church *v.* Philadelphia County, 24 How. 300 [1861].

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It must also appear that there was a legal contract subject to impairment, and not one void under the constitution and laws of the State.[1] County bonds illegally issued,[2] and void franchises given by a municipality [3] and treasury notes issued by a State or promissory notes executed by an individual in aid of the Rebellion [4] are not contracts which are protected by the Constitution. There can be no impairment of a contract based on a provision in a void statute.[5] Nor are *ultra vires* contracts of a corporation within the protection of this clause.[6] However, implied as well as express,[7] executed as well as executory contracts [8] are safeguarded by the contract clause.

[1] Hudson County Water Co. *v.* McCarter, 209 U. S. 349 [1908].

[2] Zane *v.* Hamilton County, 189 U. S. 370, 381 [1903]; Tucker *v.* Ferguson, 22 Wall. 527, 574 [1875].

[3] Pacific Electric R. Co. *v.* Los Angeles, 194 U. S. 112, 118 [1904].

[4] Taylor *v.* Thomas, 22 Wall. 479 [1875]; Hanover *v.* Doane, 12 Wall. 342 [1871]; Hanover *v.* Woodruff, 15 Wall. 439 [1873].

[5] New York ex rel. Gallatin Nat. Bank *v.* Commissioner of Taxes, 94 U. S. 415 [1877].

[6] New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 88 [1891].

[7] Louisiana ex rel. Stewart *v.* Jefferson, 116 U. S. 135 [1885].

[8] Farrington *v.* Tennessee, 95 U. S. 683 [1878]. *See also* Green *v.* Biddle, 8 Wheat. 92 [1823]; Fletcher *v.* Peck, 6 Cr. 87 [1810].

Constitution As A Contract.

A State constitution is not a contract in the sense that a State law which impairs its provisions is deemed to give rise to a Federal question under the contract clause. Before such a question can arise, the State law must impair an individual contract.[1]

[1] *See* Church *v.* Kelsey, 121 U. S. 283 [1887]; New Orleans *v.* Houston, 119 U. S. 275 [1886].

Statutes As Contracts.

A legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the State within the protection of this clause.[1] When absolute rights of property have been acquired and vested by authority of law, no subsequent legislation can divest such rights.[2]

[1] New Jersey *v.* Yard, 95 U. S. 104, 114 [1877].

[2] *See* Fletcher *v.* Peck, 6 Cr. 87 [1810]; Carondelet Canal & Nav. Co. *v.* Louisiana, 233 U. S. 362 [1914].

However, the contract clause does not prevent a State from adopting a different legislative policy.[1] General encouragements held out to all persons indiscriminately to engage in trade or business, whether such encouragement be in the shape of bounties, drawbacks, or other advantage, are always under legislative control and may be discontinued at any time.[2] For example, a provision in the general banking

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law of the State exempting shareholders from individual liability for the debts of the bank will not prevent the State from passing a later statute making shareholders individually liable for such obligations, even though the bank's charter also contained a stipulation likewise exempting its shareholders from liability.[3] Likewise a State guaranty fund law protecting depositors in State banks may be repealed without impairing a contract obligation.[4] A State may discontinue its policy of distributing among its subdivisions sums collected as penalties, or repeal the penalty altogether.[5] Furthermore, a State law attempting to cede to a railroad company the use of soil under navigable waters may be annulled by a subsequent repealing law without impairing any contract obligation, such land being held in trust for the common use.[6] Nor are contract rights impaired by a statute removing a county seat even though the former location was by law to be "permanent" when the citizens of the community had donated land and furnished bond for the erection of public buildings.[7] And a statute changing the boundaries of a school district, giving to the new district the property within its limits which had belonged to the former district, and requiring the new district to assume the debts of the old district does not impair the obligation of contracts.[8] The rights of school teachers employed under an act forbidding their removal or reduction in salary after 3 years' service are not infringed by a later act permitting reduction notwithstanding service, the court holding there was no contract, under the original act, but rather merely a limitation on administrative authority.[9]

[1] Lobrano *v.* Nelligan, 9 Wall. 295 [1870]; United States *v.* Thoman, 156 U. S. 353 [1895]; Dodge *v.* Board of Education of Chicago, 302 U. S. 74 [1937].

[2] East Saginaw Salt Mfg. Co. *v.* East Saginaw, 13 Wall. 373, 379 [1872].

[3] Sherman *v.* Smith, 1 Black 590 [1862]. *See also* Stockholders of the Peoples Banking Co. *v.* Sterling, 300 U. S. 175 [1937].

[4] Able State Bank *v.* Bryan, 282 U. S. 765 [1931].

[5] Maryland *v.* Baltimore &. O. R. Co., 3 How. 534 [1845].

[6] Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 460 [1892].

[7] Newton *v.* Mahoning County, 100 U. S. 548 [1880].

[8] Attorney General ex rel. Kies *v.* Lowrey, 199 U. S. 233 [1905].

[9] Phelps *v.* Board of Education, 300 U. S. 319 [1937].

A statute allowing the State to be sued does not constitute a contract on the part of the State; and a subsequent law withdrawing such right or one prescribing new conditions on which suit may be maintained impairs no obligation of contract.[1] The repeal of a right to have a claim against the State examined and recommended to the legislature by the highest court of that State is no impairment of the obligation of contract. Parties cannot sue or have their action against the State, except as the same may be allowed by the constitution or statutes of the State.[2] Furthermore, suits on a contract cannot be

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maintained in the Federal courts against a State by citizens of another State because of the limitation of the Eleventh Amendment.[3]

[1] Beers *v.* Arkansas, 20 How. 527, 528 [1858]; Bank of Washington *v.* Arkansas, 20 How. 530 [1858].

[2] Baltzer *v.* North Carolina, 161 U. S. 240, 245 [1896]. *Cf.* Memphis & C. R. Co. *v.* Tennessee, 101 U. S. 338 [1880]; South and North Alabama R. Co. *v.* Alabama, 101 U. S. 832 [1880].

[3] Louisiana *v.* Jumel, 107 U. S. 711 [1883]; Ex parte Ayers, 123 U. S. 443, 502 [1887].

But when a State has consented to be sued, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty.[1] While a State cannot be compelled by suit to perform its contracts, any attempt on its part to violate rights acquired under its contracts may be judicially resisted; any laws passed impairing such rights will be held void.[2]

[1] Davis *v.* Gray, 16 Wall. 203, 232 [1873].

[2] Hans *v.* Louisiana, 134 U. S. 1 [1890].

A rightful judgment against the State gives a vested right which cannot be taken away, pending writ of error, by a repeal of the statute authorizing the State to be sued.[1]

[1] McCullough *v.* Virginia, 172 U. S. 102 [1898].

Judgments and Awards as Contracts.

A judicial determination of rights under an existing law does not establish rights of such nature that they may not be changed by subsequent legislation, otherwise valid.[1] An award made by commissioners in a condemnation proceeding is not a contract in the constitutional sense.[2] A State law reducing the interest rate on unpaid judgments impairs no contract obligations; whether interest shall accrue upon the judgment is a matter not of contract but of legislative discretion.[3] Thus, when a party had recovered on noninterest-bearing warrants a judgment for $13,000 with interest at 6 percent until paid, the legislature is not prevented from passing a law providing that such judgment on county warrants shall henceforth bear no interest.[4]

[1] New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79 [1891].

[2] Garrison *v.* New York, 21 Wall. 196 [1875].

[3] Morley *v.* Lake Shore & M. S. R. Co., 146 U. S. 162 [1892]; Read *v.* Mississippi County, 188 U. S. 739 [1903].

[4] Missouri & A. Lumber & Min. Co. *v.* Greenwood Dist., 249 U. S. 170 [1919]

A judgment for a tort is not a contract.[1] A liability for damages is created by a law of the legislature and can be withdrawn or limited at pleasure, and its character is not at all changed by the fact that the amount of loss, in pecuniary estimation, has been ascertained and

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established by judgments. Judgments for torts are imposed upon the losing party by a higher authority against his will and protest. The prohibition of this clause was intended to secure the observance of good faith in the stipulation of parties against any State action, and where a transaction is not based upon any assent of parties it cannot be said that any faith is pledged by it, and no case arises for the operation of the prohibition.[2] The fiction that a judgment is a contract of record does not convert a proceeding based upon a transaction wanting the assent of a party into a contract within the meaning of this clause.[3]

[1] Louisiana *v.* New Orleans, 109 U. S. 285 [1883]; Louisiana *v.* St. Martin's Parish, 111 U. S. 716 [1884]; Freeland *v.* Williams, 131 U. S. 405 [1889].

[2] Louisiana ex rel. Folsom Bros. *v.* New Orleans, 109 U. S. 287 [1883].

[3] Garrison *v.* New York, 21 Wall. 196, 203 [1875].

A judgment is only a contract because it is evidence of a prior debt or obligation on the part of the defendant due to the plantiff. The judgment itself presupposes, and is founded on, some antecedent obligation or contract, and is only a higher evidence of that contract, because it now has the sanction of the judicial determination of its validity and amount by a court of law. The essential nature and character of the original contract remains unchanged; and, in deciding how far it may be affected by legislation, reference must be had mainly to the original contract.[1]

[1] Blount *v.* Windley, 95 U. S. 173, 176 [1877].

CONTRACTS OF STATES.

Generally.

A State can no more impair by legislation the obligation of its own contracts than it can those between private individuals.[1] The contract clause applies to the contracts of the State and those of its agents as well as to contracts between individuals.[2] Since it is within the power of the legislature to bind the State by a contract, the rights conferred thereby cannot be impaired by subsequent legislation.[3] The State cannot impair even an injudicious contract.[4]

[1] Woodruff *v.* Trapnall, 10 How. 190, 207 [1851]. *See also* Providence Bank *v.* Billings, 4 Pet. 514, 560 [1830]; Green *v.* Biddle, 8 Wheat. 92 [1823]; Fletcher *v.* Peck, 6 Cr. 87, 127 [1810].

[2] New Jersey *v.* Wilson, 7 Cr., 164 [1812]. *See also* United States ex rel. Wolff *v.* New Orleans, 103 U. S. 358 [1881]; Poindexter *v.* Greenhow, 114 U. S. 270 [1885]; New Orleans Gaslight Co. *v.* Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650 [1885].

[3] Richmond, F. & P. R. Co. *v.* Louisa R. Co., 13 How. 71 [1851]; Dodge *v.* Board of Education of Chicago, 302 U. S. 74 [1937].

[4] Ohio Life Insurance & T. Co. *v.* Debolt, 16 How. 416 [1854].

A State is likewise prohibited by this clause from impairing its compacts with other States.[1] For example, where two States have

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agreed by compact that the navigation of a river should remain free, the subsequent authorization by one State of a bridge obstructing navigation would impair the obligation of the compact.[2] Nor can a State impair its agreements with the United States.[3] Where a State has accepted a conditional grant of lands by the United States, there is a binding contract which cannot be impaired by subsequent State legislation without infringement of the Constitution.[4] When an act of Congress vested in the Indiana legislature an additional township for the sole use of a seminary of learning (Vincennes University), the State could not defeat the trust without impairing contract obligations.[5] A grant to a private person resulting from joint action by two States is also protected by the contract clause.[6]

[1] Green *v.* Biddle, 8 Wheat. 1 [1823].

[2] Pennsylvania *v.* Wheeling & B. Bridge Co., 13 How. 518 [1852]. *Cf.* Olin *v.* Kitzmiller, 259 U. S. 260 [1922].

[3] *See* Walsh *v.* Columbus, H. V. & A. R. Co., 176 U. S. 469, 475 [1900]. *Cf.* Morris *v.* Duby, 274 U. S. 135 [1927].

[4] McGehee *v.* Mathis, 4 Wall. 143 [1866].

[5] Vincennes University *v.* Indiana, 14 How. 268, 275 [1853].

[6] Rundle *v.* Delaware & R. Canal Co., 14 How. 80, 83 [1853].

Charters of Public Corporations as Contracts.

MUNICIPAL CHARTERS.—Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers may be enlarged, abridged, or entirely withdrawn at the pleasure of the legislature. There is no contract between the State and the public that the charter of a city shall not at all times be subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the legislature. An individual has no vested right in the legislative power granted to the municipal corporation.[1]

[1] Meriwether *v.* Garrett & Sons, 102 U. S. 472 [1880]. *Cf.* Trenton *v.* New Jersey, 262 U. S. 182 [1923]; Broughton *v.* Pensacola, 93 U. S. 266 [1876]; New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79 [1891].

Laws establishing and regulating municipalities are not "contracts," and may be altered or repealed at the will of the legislature unless affecting a third person's rights acquired thereunder. The membership of a board in charge of municipal water and drainage matters may be modified by the legislature; neither the city, the tax payers, nor bondholders may thereby complain of any impairment of contract.[1]

[1] State (La.) ex rel. Porterie *v.* Walmsly, 183 La. 139 [1935], appeal dismissed *sub nom.* Board of Liquidation *v.* Board of Commissioners of Port of New Orleans, 296 U. S. 540 [1935], rehearing denied, 296 U. S. 663 [1935].

If the act of incorporation be a grant of political power, if it creates a civil institution to be employed in the administration of the government, the arrangement may be changed by the legislature at

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will.[1] A municipal corporation is a police instrumentality established to aid in the administration of the affairs of the State. Neither its charter nor any statute regulating the use of its public property is a contract; if the State choose to tax the public property of the municipality, the validity of such legislation, so far as the Federal Constitution is concerned, cannot be questioned.[2] In fact, a State may require municipalities in the future to pay private water supply companies a reasonable rate for water furnished for fire purposes, even though when the water works were established such companies were required to supply the city with free water.[3] A State may repeal a ferry privilege granted a municipality.[4] Where a city has conferred on a street railway the use of its streets on condition that the company pave certain portions thereof, the State legislature may none the less with the assent of the railroad provide a different method of repairing and paving the streets.[5]

[1] Dartmouth College *v.* Woodward, 4 Wheat. 518, 629 [1819]. *See also* Pawhuska *v.* Pawhuska Oil & Gas Co., 250 U. S. 394 [1919].

[2] Covington *v.* Kentucky, 173 U. S. 231, 241 [1899]. *See also* Williamson *v.* New Jersey, 130 U. S. 189, 190 [1889]; Pawhuska *v.* Pawhuska Oil & Gas Co., 250 U. S. 394 [1919].

[3] Boise Artesian, Hot & Cold Water Co. *v.* Boise, 230 U. S. 84 [1913].

[4] East Hartford *v.* Hartford Bridge Co., 10 How. 511, 532 [1851].

[5] Worcester *v.* Worcester Consol. St. R. Co., 196 U. S. 539, 548 [1905].

A statute authorizing the annexation of two cities in close proximity to each other does not impair any contract obligation between the citizens and taxpayers of the smaller city and the corporation itself.[1] A State may exempt new wards recently added to a city from liability for municipal debts previously contracted,[2] but a State, in the exercise of its powers to divide, consolidate, or alter boundaries of municipal corporations, cannot impair the rights of existing creditors of the old municipality.[3]

[1] Hunter *v.* Pittsburgh, 207 U. S. 161 [1907].

[2] United States ex rel. Brown *v.* Memphis, 97 U. S. 284 [1878].

[3] Mt. Pleasant *v.* Beckwith, 100 U. S. 514 [1880].

A grant of the power of taxation by the legislature to a municipality is not a contract; it is subject to revocation, modification, or control by the State legislature,[1] provided such revocation does not operate directly upon existing contracts of the municipality so as to abrogate the means of their enforcement.[2]

[1] Williamson *v.* New Jersey, 130 U. S. 189 [1889].

[2] Louisiana ex rel. Folsom Bros. *v.* New Orleans, 109 U. S. 285 [1883].

Other Public Charters.—The charter of a drainage district does not constitute a contract with its members that the laws it was created to administer will not be changed.[1] The same principle applies to school districts, tax districts, levee districts, and other chartered subdivisions of the State.

[1] Houck *v.* Little River Drainage Dist., 239 U. S. 254 [1915]; Dartmouth College *v.* Woodward, 4 Wheat. 518 [1819].

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Charters of Private Corporations as Contracts.

IN GENERAL.—The charter of a private corporation which has been accepted and acted upon is a contract between the State and the corporators, and within the provision of the constitution prohibiting legislation impairing the obligation of contracts.[1] Thus, a charter granted a college [2] or a bank [3] or a railroad corporation [4] may constitute a valid and binding contract conclusive between the parties. Whatever is granted is secured, subject only to the limitation and reservation in the charter or in the laws or constitution which govern it.[5] Every valuable privilege given by the charter of a bank, and which conduced to an acceptance of it and organization under it, is a contract. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other essential provisions cannot without the bank's consent become a subject for legislative action.[6]

[1] Dartmouth College *v.* Woodward, 4 Wheat. 627 [1819]; Jefferson College *v.* Washington & J. College (Pennsylvania College Cases) 13 Wall. 190, 213 [1872].

[2] Dartmouth College *v.* Woodward, 4 Wheat. 518 [1819].

[3] Providence Bank *v.* Billings, 4 Pet. 514 [1830]; Deposit Bank *v.* Frankfort, 191 U. S. 499 [1903].

[4] Georgia Railroad & Bkg. Co. *v.* Smith, 128 U. S. 174 [1888]. *See also* Atlantic Coast Line Railroad Co. *v.* Goldsboro, 232 U. S. 548 [1914]; Underground Railroad Co. *v.* New York, 193 U. S. 416 [1904].

[5] Delaware Railroad Tax, 18 Wall. 206, 225 [1874]. *See also* Atlantic Coast Line Railroad Co. *v.* Goldsboro, 232 U. S. 548 [1914]; Chicago, B. & Q. R. Co. *v.* Cutts, 94 U. S. 155, 161 [1877]; Wilmington & W. R. Co. *v.* Reid, 13 Wall. 264, 269 [1872]; Chenango Bridge Co. *v.* Binghamton Bridge Co., 3 Wall. 51, 73 [1866]; Dartmouth College *v.* Woodward, 4 Wheat. 627 [1819]; Davis *v.* Gray, 16 Wall. 203, 206 [1874]; Maine C. R. Co. *v.* Maine, 96 U. S. 499 [1878]; United States ex rel. Citizens' Nat. Bank *v.* Knox, 102 U. S. 422 [1880].

[6] Piqua Branch of State Bank *v.* Knoop, 16 How. 369, 380 [1854].

A charter is more than an executed grant; it is a continuing contract.[1] Strictly speaking it is not the charter which is protected by the contract clause, but only a contract which the charter may contain.[2] Rights acquired under a general corporation law are as much protected from subsequent alteration, when the right to amend has not been reserved, as are rights conferred by special act of the legislature.[3]

[1] Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685 [1897].

[2] Stone *v.* Mississippi ex rel. Harris, 101 U. S. 814, 816 [1880].

[3] Stanislaus County *v.* San Joaquin & K. River Canal & Irrig. Co., 192 U. S. 201 [1904].

A charter of incorporation and the rights and privileges it declares constitute a contract between the corporation and the State which the State cannot violate,[1] unless the right to alter or repeal is reserved.[2] Wherever property rights have been acquired by virtue of a corporate charter, such rights, so far as necessary to a full enjoyment

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of the main object of the grant, are contracts, and beyond the reach of destructive legislation.[3] A charter of a canal company, which specified that its properties might revert to the State upon due compensation being made, prevents the State from appropriating the property without payment therefor at the expiration of the corporate charter.[4] Similarly a State cannot substitute an indeterminate permit to supply a city with water, for a clear contract between the city and the company, granting to the latter an exclusive franchise to supply water for a definite term with an obligation on the part of the city to purchase at a specified price the supply system upon the expiration of the term.[5] The public purposes to be attained by the establishment of a charitable or an educational institution constitute a consideration on which contracts exempting such institutions from taxation may be based.[6] But where the legislature exempts a college, after its incorporation, from subsequent taxation, the grant is nothing more than a revocable privilege.[7]

[1] West River Bridge Co. *v.* Dix, 6 How. 507 [1848]. *See also* Wilmington & W. R. Co. *v.* Reid, 13 Wall. 624 [1872]; Chicago, B. & Q. R. Co. *v.* Cutts, 94 U. S. 155 [1877]; Tomlinson *v.* Jessup, 15 Wall. 454 [1873].

[2] East Saginaw Salt Co. *v.* East Saginaw, 13 Wall. 373 [1872]; Central R. & Bkg. Co. *v.* Georgia, 92 U. S. 665 [1875].

[3] Pearsall *v.* Great Northern R. Co., 161 U. S. 646 [1896].

[4] Carondelet Canal & Nav. Co. *v.* Louisiana, 233 U. S. 362 [1914].

[5] Superior Water, Light & P. Co. *v.* Superior, 263 U. S. 125 [1923].

[6] Washington University *v.* Rouse, 8 Wall. 439, 440 [1869].

[7] Seton Hall College *v.* South Orange, 242 U. S. 100 [1916].

Reservation of Power to Amend.—Where a provision is inserted in the charter authorizing the legislature to amend or repeal the grant at pleasure, the subsequent exercise of that power does not impair a contract obligation,[1] however harshly such legislation may operate.[2] Thus, no contract with a chartered water company is impaired by an act of the legislature authorizing a city to erect its own waterworks.[3] The fact that there is outstanding an issue of bonds and a mortgage on the property of the corporation does not limit the power of the legislature to exercise its right of repeal under the charter;[4] a contract between a private individual and the corporation will not inhibit the legislature from altering the corporate charter.[5]

[1] Pennsylvania College Cases (Jefferson College *v.* Washington & J. College), 13 Wall. 213 [1872].

[2] Hamilton Gaslight & Coke Co. *v.* Hamilton, 146 U. S. 270 [1892].

[3] Newburyport Water Co. *v.* Newburyport, 193 U. S. 561, 577 [1904].

[4] Calder ex rel. Ellis *v.* Michigan, 218 U. S. 591 [1910].

[5] Pennsylvania College Cases, 13 Wall. 190 [1872].

Since a corporation takes its charter subject to existing laws,[1] a provision in the constitution [2] or general laws [3] of the State reserving the power to amend or repeal corporate charters is read into all subsequent grants of the legislature. When a railway charter was granted

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by the Territorial Legislature of Wisconsin, but not accepted by the corporation until after the admission of the Territory as a State, the charter is taken subject to the new constitution of the State reserving the power to amend corporate charters.[4] However, when this power to amend is only reserved by general statute, a State may if it desires make an irrepealable contract with a corporation. Subsequent legislatures may disregard a provision of a general law retaining the right to amend corporate charters.[5] For example, the general right to amend is waived when the legislature grants to a gas company a charter declaring that no alteration or amendment thereto shall be made without the concurrence of the city council and the directors of the company.[6] This power to amend should not be frittered away by any construction of subsequent statutes, based upon mere inference.[7] But, if the right to amend is reserved in the State constitution, the legislature is without authority to make an irrepealable contract.[8]

[1] Pennsylvania R. Co. *v.* Miller, 132 U. S. 75 [1889].

[2] Northern C. R. Co. *v.* Maryland, 187 U. S. 258 [1902]. *See also* Great Northern R. Co. *v.* Minnesota, 216 U. S. 206 [1910]; Hammond Packing Co. *v.* Arkansas, 212 U. S. 322 [1909].

[3] Miller *v.* New York, 15 Wall. 478 [1873]. *See also* Greenwood *v.* Union Freight R. Co., 105 U. S. 13 [1882]; Chesapeake & O. R. Co. *v.* Miller, 114 U. S. 176 [1885]; Home of the Friendless *v.* Rouse, 8 Wall. 430, 438 [1869]; Louisville Water Co. *v.* Clark, 143 U. S. 1 [1892].

[4] Stone *v.* Wisconsin, 94 U. S. 181 [1877].

[5] Maine C. R. Co. *v.* Maine, 96 U. S. 499 [1878].

[6] Louisville Gas Co. *v.* Citizens' Gaslight Co., 115 U. S. 683 [1885].

[7] Covington *v.* Kentucky, 173 U. S. 231, 239 [1899].

[8] New Jersey *v.* Yard, 95 U. S. 104, 111 [1877].

It has been said that no question can arise as to impairment of contract obligations where a corporation has accepted its charter subject to the legislative power to amend.[1] Such a provision, at the least, reserves to the legislature the power to make any alteration which will not defeat or substantially impair the object of the grant or rights vested thereunder,[2] and which the legislature deems necessary to protect the rights of the public or of the corporations, its stockholders or creditors.[3] In fact where the State law authorizes repeal at the pleasure of the legislature the validity of an act repealing the charter of a corporation does not depend upon the necessity for such action or the soundness of the reasons which prompted it.[4]

[1] Sioux City Street R. Co. *v.* Sioux City, 138 U. S. 98, 108 [1891]; Ramapo Water Co. *v.* New York, 236 U. S. 579 [1915].

[2] Holyoke Water Power Co. *v.* Lyman, 15 Wall. 500 [1873]; Fair Haven & W. R. Co. *v.* New Haven, 203 U. S. 379 [1906].

[3] Looker *v.* Maynard ex rel. Dusenbury, 179 U. S. 46 [1900]; Spring Valley Waterworks *v.* Schottler, 110 U. S. 347 [1884].

[4] Greenwood *v.* Union Freight R. Co., 105 U. S. 13 [1882]. *Cf.* Jefferson College *v.* Washington & J. College (Pennsylvania College Cases), 13 Wall. 190 [1872].

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The reservation of the power to amend or repeal a charter granted a corporation places under the legislative control all rights, privileges, and immunities derived thereunder.[1] For example, a State may subject a corporation to taxation from which it was previously exempt [2] unless an irrevocable exemption was clearly expressed.[3] It may require a railroad company to pay an assessment towards defraying the expenses of a supervisory railroad commission [4] or State banks to make contributions for purpose of creating a depositor's guaranty fund.[5]

[1] Sinking Fund Cases (Central P. R. Co. *v.* Gallatin), 99 U. S. 727 [1879]. *See also* Sherman *v.* Smith, 1 Black 587 [1862]; Missouri P. R. Co. *v.* Kansas ex rel. Taylor 216 U. S. 262 [1910].

[2] Tomlinson *v.* Jessup, 15 Wall. 454 [1873]. *See also* Pearsall *v.* Great Northern R. Co., 161 U. S. 646 [1896]; New York ex rel. Schurs *v.* Cook, 148 U. S. 397 [1893].

[3] Covington *v.* Kentucky, 173 U. S. 231 [1899]. *See also* Seton Hall College *v.* South Orange, 242 U. S. 100 [1916]; Gulf & S. I. R. Co. *v.* Hewes, 183 U. S. 66 [1901]; Louisville Water Co. *v.* Kentucky, 170 U. S. 127 [1898]; Citizens Savings Bank *v.* Owensboro, 173 U. S. 636, 644 [1899]; Stone *v.* Bank of Commerce, 174 U. S. 412 [1899].

[4] Charlotte, C. & A. R. Co. *v.* Gibbes, 142 U. S. 386 [1892].

[5] Noble State Bank *v.* Haskell, 219 U. S. 104 [1911], 219 U. S. 575 [1911]. *Cf.* Assaria State Bank *v.* Dolley, 219 U. S. 121 [1911].

The power to alter a corporate charter does not extend to the taking of property of the corporation, either by confiscation or indirectly by other means.[1] Neither vested property rights nor obligations of private contracts may be destroyed or impaired by a State under its reserved power to amend corporate charters.[2] It cannot be used to take from the corporation property already acquired under the operation of the charter, nor to deprive the corporation of the fruits actually reduced to possession.[3] The right to abrogate a charter is qualified by the duty of providing indemnity for the damage or burden caused by such change,[4] unless the resulting destruction of property rights is within the police power of the State.[5] The right to amend a charter does not authorize the taking of the company's property without just compensation or due process of law.[6] Furthermore, where a constitutional provision authorizes the legislature to amend corporate charters provided "no injustice be done to stockholders", a contract right is impaired by the establishment of a municipal water plant in competition with a private company which had exclusive rights for a stated period.[7]

[1] Lake Shore & M. S. R. Co. *v.* Smith, 173 U. S. 684 [1899].

[2] Coombes *v.* Getz, 285 U. S. 434 [1932].

[3] Central P. R. Co. *v.* Gallatin (Sinking Fund Cases), 99 U. S. 727 [1879].

[4] St. Anna's Asylum *v.* New Orleans, 105 U. S. 362 [1882].

[5] Boston Beer Co. *v.* Massachusetts, 97 U. S. 25 [1878].

[6] Chicago, M. & St. P. R. Co. *v.* Wisconsin, 238 U. S. 491 [1915]. *See also* Berea College *v.* Kentucky, 211 U. S. 45 [1908]; Stearns *v.* Minnesota ex rel. Marr, 179 U. S. 223 [1900]; Shields *v.* Ohio, 95 U. S. 319, 324 [1877].

[7] Vicksburg *v.* Vicksburg Waterworks Co., 202 U. S. 453 [1906].

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By way of summary it may be said that the reserved power to amend corporate charters is not unlimited and cannot be exerted to defeat the purpose for which the corporate powers were granted, or to take property without compensation, or arbitrarily to make alterations that are inconsistent with the scope and object of the charter or to destroy or impair any vested property right.[1] On the other hand it extends to any alteration or amendment which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs.[2]

[1] Phillips Petroleum Co. *v.* Jenkins, 297 U. S. 629 [1936], citing Tomlinson *v.* Jessup, 15 Wall. 454, 459 [1873]; Miller *v.* New York, 15 Wall. 478, 488, 493 et seq. [1873]; Shields *v.* Ohio, 95 U. S. 319, 324 [1877]; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 33 [1878]; Central P. R. Co. *v.* Gallatin (Sinking-Fund Cases), 99 U. S. 727 [1879]; Greenwood *v.* Union Freight R. Co., 105 U. S. 13, 17 et seq. [1882]; Close *v.* Glenwood Cemetery, 107 U. S. 466, 474–476 [1883]; Lake Shore & M. S. R. Co. *v.* Smith, 173 U. S. 684, 698 [1899]; Fair Haven & W. R. Co. *v.* New Haven, 203 U. S. 379, 388 et seq. [1906]; Berea College *v.* Kentucky, 211 U. S. 45, 57 [1908]; Hammond Packing Co. *v.* Arkansas, 212 U. S. 322, 345, 346 [1909]; Missouri P. R. Co. *v.* Kansas ex rel. Taylor, 216 U. S. 262, 274 [1910]; Chicago, M. & St. P. R. Co. *v.* Wisconsin, 238 U. S. 491, 501 [1915]; Sears *v.* Akron, 246 U. S. 242, 248 [1918]; Coombes *v.* Getz, 285 U. S. 434, 441 [1932]; Public Service Commission of Puerto Rico *v.* Havemeyer, 296 U. S. 506 [1936].

[2] Phillips Petroleum Co. *v.* Jenkins, 297 U. S. 629 [1936], quoting Looker *v.* Maynard ex rel. Dusenburg, 179 U. S. 46, 52 [1900].

Dissolution of Corporations.—The right of a State to withdraw corporate privileges which have been abused is implied in every charter.[1] The State may reclaim the franchises and privileges given where they are so misused as to defeat the objects of her grant, or where the company has become insolvent.[2]

[1] Eagle Ins. Co. *v.* Ohio ex rel. Kinder, 153 U. S. 446 [1894].

[2] Chicago L. Ins. Co. *v.* Needles, 113 U. S. 574 [1885].

Where a corporation is lawfully dissolved by the legislature or the courts, such dissolution does not impair the obligation of contracts with creditors any more than the death of the individual impairs the obligation of his contracts. The obligation survives. Every creditor is presumed to contract with reference to the possibility of the dissolution of the corporate body.[1]

[1] Mumma *v.* Potomac Co., 8 Pet. 281 [1834].

Consolidation and Succession of Corporations.—A corporate privilege or immunity cannot pass to a new corporation when the State

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constitution, at the time, limits the power of the State to confer such privilege or immunity.[1]

[1] Chicago G. W. R. Co. *v.* Minnesota, 216 U. S. 234 [1910]. *See also* San Antonio Traction Co. *v.* Altgelt, 200 U. S. 304 [1906]; Minneapolis & St. L. R. Co. *v.* Gardner, 177 U. S. 332 [1900]; Keokuk & W. R. Co. *v.* Missouri, 152 U. S. 301, 310 [1894]; St. Louis, I. M. & S. R. Co. *v.* Berry, 113 U. S. 465, 475 [1885]; Louisville & N. R. Co. *v.* Palmes, 109 U. S. 244, 254 [1883]; Shields *v.* Ohio, 95 U. S. 319, 321 [1877]; Trask *v.* Maguire, 18 Wall. 391, 405 [1874].

Where a new company is formed by consolidation or by purchase under foreclosure,[1] it takes its new charter subject to all provisions of existing law authorizing the legislature to amend charters. The new company cannot thereafter claim the benefit of privileges enjoyed by its predecessors under a law which did not reserve the power to amend. The State may, therefore, tax the property of the new company,[2] lower the rates which it may charge,[3] or abrogate other privileges which the older company enjoyed and which the legislature could not have modified as against the former company.[4] Exemption from taxation, being a personal privilege, cannot be assigned or conveyed to a successor.[5]

[1] Norfolk & W. R. Co. *v.* Pendleton, 156 U. S. 667, 673 [1895]; Pickard *v.* East Tennessee, V. & G. R. Co., 130 U. S. 637, 641 [1889].

[2] Atlantic & G. R. Co. *v.* Georgia, 98 U. S. 359 [1879].

[3] Shields *v.* Ohio, 95 U. S. 319 [1877].

[4] Northern C. R. Co. *v.* Maryland, 187 U. S. 258 [1902]. *See also* San Antonio Traction Co. *v.* Altgelt, 200 U. S. 304 [1906]; People's Gaslight & Coke Co. *v.* Chicago, 194 U. S. 1 [1904]; Rochester R. Co. *v.* Rochester, 205 U. S. 236 [1907]; Covington & L. Turnpike Road Co. *v.* Sanford, 164 U. S. 578, 586 [1896]; Yazoo & M. V. R. Co. *v.* Vicksburg, 209 U. S. 358 [1908].

[5] Memphis & L. R. R. Co. *v.* Berry, 112 U. S. 617 [1884]. *See also* Pickard *v.* East Tennessee, 130 U. S. 637, 641 [1889]; Louisville & N. R. Co. *v.* Palmes, 109 U. S. 244, 251 [1883]; Morgan *v.* Louisiana, 93 U. S. 217 [1876]; Wilson *v.* Gaines, 103 U. S. 417 [1881].

Franchises, Privileges, and Licenses.

Corporate franchises accepted by private corporations are contracts which cannot be impaired by subsequent legislation.[1] A franchise granted by a State to a quasi public corporation is also protected from legislative impairment.[2] For example, a bridge franchise is within the protection of the Constitution.[3] However, powers necessary to a corporate objective are, until exercised, mere licenses subject to revocation.[4] The power of the legislature to alter a franchise does not permit changes inconsistent with the intent and purposes of the charter.[5]

[1] Miller *v.* New York, 15 Wall. 478 [1873]. *See also* Jefferson College *v.* Washington & J. College (Pennsylvania College Cases), 13 Wall. 190 [1872]; Tipton County *v.* Rogers Locomotive & Mach. Works, 103 U. S. 523 [1881].

[2] New Orleans Gaslight Co. *v.* Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650 [1885]; New Orleans Waterworks Co. *v.* Rivers, 115 U. S. 674 [1885].

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[3] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420 [1837].

[4] Louisville & N. R. Co. *v.* Kentucky, 161 U. S. 677 [1896]; Galveston, H. & S. A. R. Co. *v.* Texas, 170 U. S. 226 [1898].

[5] Miller *v.* New York, 15 Wall. 478 [1873]; Ohio Pub. Serv. Commission *v.* Ohio, 274 U. S. 12 [1927]; Adirondack R. Co. *v.* New York, 176 U. S. 335 [1900].

When a State has induced a foreign corporation to enter it by granting of a franchise, a contract results.[1] If such a corporation has been allowed to construct and operate a railroad upon prescribed conditions, the State cannot subsequently impose greater burdens except in the exercise of its police powers.[2]

[1] *Cf.* American Smelting & Ref. Co. *v.* Colorado ex rel. Lindsley, 204 U. S. 103 [1907].

[2] New York, L. E. & W. R. Co. *v.* Pennsylvania, 153 U. S. 628, 642 [1894].

When, by a State statute, a railway company has become vested with exclusive rights to operate a street railway, a city cannot by ordinance grant a conflicting privilege to a competitor prior to the expiration of the former's charter.[1]

[1] City R. Co. *v.* Citizens' Street R. Company, 166 U. S. 557 [1897].

Grants of exclusive privileges, such as the right to furnish water and gas or to use bridges and highways, are contracts, the obligations of which are fully protected by the contract clause.[1] The granting of an exclusive franchise to maintain gas works is a matter within the discretion of the legislature and creates a contract which cannot be impaired by a grant to another company during the term of the exclusive franchise.[2] The grant of an exclusive bridge franchise is likewise protected.[3]

[1] New Orleans Gaslight Co. *v.* Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650 [1885]. *See also* Proprietors of Bridges *v.* Hoboken Land & Improv. Co., 1 Wall. 116 [1864]; Tennessee *v.* Whitworth, 117 U. S. 138, 147 [1886]; Chesapeake & O. R. Co. *v.* Virginia, 94 U. S. 718, 726 [1877]; Philadelphia & W. R. Co. *v.* Maryland, 10 How. 376, 392 [1851]; Central R. Bkg. Co. *v.* Georgia, 92 U. S. 665, 670 [1876]; Minot *v.* Philadelphia, W. & B. R. Co. (Delaware Railroad Tax), 18 Wall. 206, 228 [1874]; Tomlison *v.* Branch, 15 Wall. 460, 463 [1873]; New Orleans Waterworks Co. *v.* Rivers, 115 U. S. 674, 680 [1885].

[2] New Orleans Gas Light Co. *v.* Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650, 671 [1885].

[3] Chenango Bridge Co. *v.* Binghamton Co., 3 Wall. 51, 77 [1866]; Proprietors of Bridges *v.* Hoboken, Land & Improv. Co., 1 Wall. 116 [1864].

A charter purporting to grant an exclusive privilege will be limited to the words of the grant.[1] For instance, the grant to a certain company of the exclusive privilege of supplying a city with water from a particular stream for a named period does not prevent the

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State from granting to others the privilege of supplying the same city with water from a different stream.[2] An exclusive bridge franchise authorizing a company to charge toll for the passage of persons on foot, animals, and vehicles does not preclude the State from granting to a railroad a franchise to erect viaducts across the river to be used by its passenger trains.[3] Merely because a corporation is authorized to make bylaws for the management of its affairs will not prevent the legislature from enacting conflicting regulatory measures.[4] A charter authorizing a railroad to lease its property "upon such terms as may be mutually agreed upon" will not prevent the legislature from enacting subsequent legislation rendering the lessor and lessee jointly liable for torts committed by the latter, even though a different liability had been provided for in the lease agreement.[5] A charter exempting a railroad from consequential damages arising from construction of its road, without specifying time limit of such exemption, is subject to the general law of the State authorizing changes in corporate charters.[6] However, a grant by a county board authorizing a company to construct and operate an interurban electric railway, without limitation as to time, has been held to constitute a perpetual franchise.[7] And an exclusive grant to a particular company to supply the city and its inhabitants with water has been held to preclude the right of a State to grant to an individual the privilege of laying pipes to his own property.[8] An exclusive ferry privilege granted by a State to an individual is a contract between the State and the lessee.[9]

[1] Richmond, F. & P. R. Co. v. Louisa R. Co., 13 How. 71, 80 [1851]. *Cf.* United R. Co. v. San Francisco, 249 U. S. 517 [1919].

[2] Stein v. Bienville Water Supply Co., 141 U. S. 67, 68 [1891].

[3] Proprietors of Bridges v. Hoboken Land & Improv. Co., 1 Wall. 116, 148 [1864].

[4] Stone v. Farmers Loan & T. Co. (Railroad Commission Cases), 116 U. S. 307, 329 [1886].

[5] Chicago & A. R. Co. v. McWhirt, 243 U. S. 422 [1917].

[6] Pennsylvania R. Co. v. Miller, 132 U. S. 75, 82 [1889].

[7] Northern Ohio Traction & Light Co. v. Ohio ex rel. Pontius, 245 U. S. 574 [1918].

[8] New Orleans Waterworks Co. v. Rivers, 115 U. S. 674 [1885].

[9] Larson v. South Dakota, 278 U. S. 429 [1929].

But an exclusive right to enjoy a certain franchise is never presumed; unless the contract contains words of exclusion, it is not impaired by a subsequent grant of permission to another even though it wholly destroy the value of the franchise to the first grantee.[1] An exclusive franchise must be given in language explicit and express or necessarily to be implied; it must be declared in clear and unmistakable terms.[2] A grant of exclusive privilege is not to be implied as against the State.[3] If susceptible of another reasonable construction, a contract will not be construed as granting an exclusive privilege.[4] All doubts are resolved against the claim of privilege.[5] The grant

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will be limited to the exact and express language used, strictly construed,[6] and will not be enlarged by implication.[7]

[1] Pearsall *v.* Great Northern R. Co., 161 U. S. 646 [1896]. *See also* Charles River Bridge *v.* Warren Bridge, 11 Pet. 420 [1837]; New York ex rel. Metropolitan Street R. Co. *v.* State Bd. of Tax Comrs., 199 U. S. 1 [1905]; Ruggles *v.* Illinois, 108 U. S. 526, 531 [1883]; Annapolis & E. Ridge R. Co. *v.* Anne Arundel County, 103 U. S. 1, 3 [1881]; St. Louis, I. M. & S. R. Co. *v.* Loftin, 98 U. S. 559, 564 [1879]; Memphis & C. R. Co. *v.* Gaines, 97 U. S. 697, 708 [1878]; North Missouri R. Co. *v.* Maguire, 20 Wall. 46, 61 [1874]; Minot *v.* Philadelphia, W. & B. R. Co. (Delaware Railroad Tax), 18 Wall. 206, 225 [1874]; Perrine *v.* Chesapeake & D. Canal Co., 9 How. 172 [1850]; Washington & B. Turnp. Co. *v.* Maryland, 3 Wall. 210 [1866]; Coosaw Min. Co. *v.* South Carolina ex rel. Tillman, 144 U. S. 550 [1892].

[2] Morris Canal & Bkg. Co. *v.* Baird, 239 U. S. 126 [1915]. *See also* Home Teleph. & Teleg. Co. *v.* Los Angeles, 211 U. S. 265 [1908]; Detroit Citizens' Street R. Co. *v.* Detroit R. R. Co., 171 U. S. 48 [1898]; New Orleans City & L. R. Co. *v.* New Orleans, 143 U. S. 192, 195 [1892].

[3] Home Bldg. & Loan Assoc. *v.* Blaisdell, 290 U. S. 398 [1934].

[4] Great Northern R. Co. *v.* Minnesota, 216 U. S. 206 [1910]. *See also* Stanislaus County *v.* San Joaquin & K. River Canal & Irrig. Co., 192 U. S. 201, 208 [1904]; Georgia R. & Bkg. Co. *v.* Smith, 128 U. S. 174, 177 [1888].

[5] Perry (J. W.) Co. *v.* Norfolk, 220 U. S. 472 [1911]; St. Louis *v.* United R. Co., 210 U. S. 266 [1908].

[6] Ford *v.* Delta & P. Land Co., 164 U. S. 602, 666 [1897]; Yazoo & M. V. R. Co. *v.* Thomas, 132 U. S. 174, 185 [1889]; Memphis & L. R. R. Co. *v.* Berry, 112 U. S. 609, 617 [1884]; Union Pass. R. Co. *v.* Philadelphia, 101 U. S. 528, 532 [1880].

[7] Larson *v.* South Dakota, 278 U. S. 429 [1929].

Where a company was originally granted an exclusive ferry privilege, but was later authorized to construct a toll bridge in place of the ferry, the bridge company did not succeed to the exclusive rights under the ferry franchise. The subsequent grant to another company to erect a free bridge impaired no contract obligations.[1] Similarly, an exclusive ferry franchise containing a stipulation that the State would grant no other ferry leases within 2 miles is not violated by the erection of a bridge within said restricted area.[2]

[1] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 427 [1837].

[2] Larson *v.* South Dakota, 278 U. S. 429 [1929].

Grants of special privileges affecting general interests are to be liberally construed in favor of the public; no government shall be held upon mere implication or presumption to have divested itself of its powers.[1] From the legislative interpretation of the contract manifested by failure to impose a tax on a corporation for a number of years does not bind subsequent legislatures if the contract does not in fact clearly confer a tax exemption privilege.[2]

[1] Knoxville Water Co. *v.* Knoxville, 200 U. S. 22 [1906].

[2] New York ex rel. Metropolitan Street R. Co. *v.* State Bd. of Tax Comrs., 199 U. S. 1, 43 [1905].

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For example, a license granted to a ferry company at a time when the State law forbade the issuance of ferry licenses to companies operating within half a mile of each other is not impaired by the subsequent repeal of said law and the awarding of a license to another to operate within territory previously restricted.[1] An exclusive lease of oyster beds for 20 years from the State of Virginia is not impaired by a subsequent authorization to the city of Newport News to discharge sewage into such waters, with resulting damage to the leased oyster beds therein.[2]

[1] Wheeling & B. Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287 [1891]. *Cf.* Butcher's Union S. H. & S. L. Co. v. Crescent City, 111 U. S. 746 [1884]. Williams v. Wingo, 177 U. S. 601 [1900].

[2] Darling v. Newport News, 249 U. S. 540 [1919].

Where a privilege has been abused or misemployed, its revocation does not impair the contract clause.[1] Failure to exercise the franchise within a reasonable time authorizes a revocation of the grant.[2] And where, before an exclusive privilege is exercised by a light company, the city avails itself of its right to establish its lighting plant, no contract rights are impaired.[3] Authorization granted to a railroad to connect and consolidate is, while unexercised, subject to repeal.[4]

[1] Columbus v. Mercantile Trust & D. Co., 218 U. S. 645 [1910]. *See also* New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336 [1902]; Farmers' Loan & T. Co. v. Galesburg, 133 U. S. 156 [1890]; Chicago Life Ins. Co. v. Needles, 113 U. S. 574 [1885]; Cosmopolitan Club v. Virginia, 208 U. S. 378 [1908].

[2] New York Electric Lines Co. v. Empire City Subway Co., 235 U. S. 179 [1914].

[3] Capital City Light & Fuel Co. v. Tallahassee, 186 U. S. 401 [1902].

[4] Louisville & N. R. Co. v. Kentucky, 161 U. S. 677 [1896].

When a street-railway franchise has expired, the State may impose other conditions for its renewal or require the company to remove its tracks.[1] But it cannot order the company to continue its services after the expiration of the franchise.[2]

[1] Detroit United R. Co. v. Detroit, 229 U. S. 39 [1913].

[2] Union Light, H. & P. Co. v. Kentucky, 17 F. (2d) 143 [1926].

A lottery grant is not a contract; it is simply a gratuity and a license which the State under the police power may at any time revoke.[1] A grant of permission by the State to a municipality to establish a ferry is nothing more than a license; it is not a contract in view of the nature of the grant and the public character of the parties.[2]

[1] Douglass v. Kentucky, 168 U. S. 488 [1897].

[2] East Hartford v. Hartford Bridge Co., 10 How. 511 [1851].

Land Grants.

A land grant by the State to a private individual or corporation for a valuable consideration is a contract within the protection of this clause.[1] A grant to a railroad company of eight sections of land for

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every mile of railroad it constructs cannot be impaired by a constitutional provision subsequently adopted forbidding grants of land to railroad companies; in fact the railroad is entitled to grants for an extension line previously authorized but not completed when the constitutional change was adopted.[2] But it is not entitled to grants for construction of lines not authorized until after the provision took effect.[3] A grant of land to a railroad company, defeasible if certain conditions were not met within a specified time, is impaired by a law abrogating the grant at the conclusion of the Civil War, the war having rendered it impossible to comply with the terms of the grant.[4] A statutory grant of public lands to settlers is a contract.[5] When complainant has acquired a right to purchase land upon specified terms, a subsequent statute imposing additional conditions impairs the obligation of contract.[6]

[1] Fletcher *v.* Peck, 6 Cr. 87, 127 [1810]. *See also* Davis *v.* Gray, 16 Wall. 203 [1873]; Terrett *v.* Taylor, 9 Cr. 43 [1815]; Pawlet *v.* Clark 9 Cr. 292, 336 [1815].
[2] Houston & T. C. R. Co., *v.* Texas, 170 U. S. 243, 252 [1898].
[3] Galveston, H. & S. A. R. Co. *v.* Texas, 170 U. S. 226 [1898].
[4] Davis *v.* Gray, 16 Wall., 203, 216 [1873].
[5] Huidekoper *v.* Douglass, 3 Cr. 1 [1805].
[6] Pennoyer *v.* McConnaughy, 140 U. S. 1, 8 [1891].

But a mere application to purchase State land will not prevent a State from withdrawing the lands from sale, even though the prospective purchaser had expended money in making a survey.[1] And a law authorizing the land commissioner to declare land forfeited when a purchaser was in default of payment does not impair the obligation of contract even when applied to land contracts entered into prior to its passage; such a law simply provides a particular means by which the right of a State to rescind a contract may be enforced.[2] An act subjecting previously granted land to payment of debts due the State does not contravene the original grant; by that very act the full effect of the transfer by the State to the grantee is recognized and asserted.[3]

[1] Banning Co. *v.* California ex rel. Webb, 240 U. S. 142 [1916]. *Cf.* Sullivan *v.* Texas, 207 U. S. 416 [1908]; Campbell *v.* Wade, 132 U. S. 34, 37 [1889].
[2] Waggoner *v.* Flack, 188 U. S. 595, 603 [1903].
[3] Livingston *v.* Moore, 7 Pet. 469, 550 [1833].

The imposing of tax assessments on land leased by the State is not an unconstitutional impairment of a covenant generally implied between lessor and lessee that the lessor will pay all assessments.[1] A State law abandoning a canal constructed primarily for navigation purposes and substituting therefor a highway does not impair a lease granted by the State to a power company authorizing the lessee to take "surplus water" therefrom for hydraulic purposes.[2]

[1] Trimble *v.* Seattle, 231 U. S. 683 [1914].
[2] Kirk *v.* Maumee Valley Electric Co., 279 U. S. 797 [1929].

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A State statute exempting reclaimed land from taxation for a period of 10 years, when acted upon, will constitute a binding contract.[1] Tax-exempt land granted to Indian tribes in consideration of their releasing claims to other lands cannot be taxed even after conveyance to another grantee.[2] However, the sale of tax-exempt land by a university has been held to subject the lands thereafter to taxation,[3] and the payment of taxes over a period of years may be construed as a waiver of the exemption privilege.[4]

[1] McGehee v. Mathis, 4 Wall. 143, 156 [1866].
[2] New Jersey v. Wilson, 7 Cr. 164 [1812]. *Cf.* Choate v. Trapp, 224 U. S. 665 [1912].
[3] Armstrong v. Athens County, 16 Pet. 281 [1842].
[4] New Jersey v. Wright, 117 U. S. 648 [1886].

Fiscal Obligations.

Treasury Warrants.—Treasury warrants having been issued by the State, and later received by its officers as payment for obligations due, the contract is executed and the State cannot subsequently enact a statute upon the assumption that the treasury warrants were illegally issued.[1]

[1] Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 98 [1900].

Bonds.—A statute appropriating certain taxes for the purpose of paying bonds and coupons issued by the State creates a contract with the bondholders which is impaired by a subsequent diversion of said taxes for other purposes.[1] But a joint resolution ordering the State treasurer to write off the books certain bonds previously issued by the State is a mere matter of bookkeeping by the State officer, and cannot be challenged as a law impairing the obligation of contract; the obligation and remedy remain the same.[2]

[1] Louisiana ex rel. Elliott v. Jumel, 107 U. S. 711 [1883]; Ralls County Ct. v. United States, 105 U. S. 733 [1882].
[2] Smith v. Jennings, 206 U. S. 276 [1907]

A subsequent statute requiring the production of the bond in order to establish the genuineness of the tax-receivable coupons,[1] or a statute requiring the holders of coupons then in their possession to present them in payment of taxes within a single year,[2] or a later statute imposing a license tax prohibitory in effect on the business of selling coupons[3] impairs the obligation of contract.

[1] McGahey v. Virginia, 135 U. S. 662, 693 [1890].
[2] In re Brown, 135 U. S. 662, 707 [1890].
[3] Cuthbert v. Virginia, 135 U. S. 662, 700 [1890].

Since license fees for the sale of intoxicating liquors are imposed for regulatory purposes as well as for raising revenue, the State can require that the license be paid "in lawful money", and can refuse to accept coupons which are generally receivable in payment of taxes.[1] But when a license to practice as an attorney is a tax laid for revenue

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and not for regulation, the State cannot refuse to accept its tax-receivable coupons in payment thereof without impairing the obligations of contract.[2]

[1] Hucless v. Childrey, 135 U. S. 662, 712 [1890].
[2] Royall v. Virginia, 116 U. S. 572, 577 [1886].

The lien of a bondholder who has loaned money to a State on a pledge of property by a legislative act cannot be divested or postponed by a subsequent act.[1]

[1] Wabash & E. Canal Co. v. Beers, 2 Black 448 [1863].

Bank Notes.—When a State has publicly promised to accept notes issued by a State bank in payment of taxes, it impresses the credit of the State upon the notes, and every man who holds such notes has a right to rely upon this promise. The State's obligation cannot be withdrawn except as to after-issued notes upon reasonable notice.[1] However, a restored State government is not obliged to accept in payment of taxes notes issued by the bank while the State was a member of the Confederacy, even though such notes, not being issued in aid of the rebellion, were valid as between the bank and the holders.[2]

[1] South Carolina ex rel. Wagner v. Stoll, 17 Wall. 425 [1873]. *See also* Woodruff v. Trapnall, 10 How. 190 [1851]; Furman v. Nichol, 8 Wall. 44 [1869]; Knox v. Exchange Bank use of Camp, 12 Wall. 379 [1871].
[2] Hartman v. Greenhow, 102 U. S. 672 [1881]; Tennessee v. Sneed, 96 U. S. 69 [1877].

Where the charter of a bank of which the State is sole stockholder requires it to keep on hand sufficient specie to pay its bills on demand, there is a contract relationship between the bill holder and the State as to funds placed in the bank for such redemption purposes. Hence, the State has no right to withdraw those funds after the right of the creditor had accrued. While a State as sole stockholder of the bank may revoke its charter, it cannot destroy the executory contracts of the corporation with the bill holders.[1]

[1] Curran v. Arkansas, 15 How. 304, 305 [1854]. *See also* Barings v. Dabney, 19 Wall. 1 [1874].

Tenure and Salary Agreements with Public Officers.

An express contract between the State and an individual for the performance of services comes within the protection of the Constitution; it forms an exception to the rule that public officers are at all times subject to the control of the legislature.[1] A positive contract made by the State employing an agent in a particular service for a definite term cannot be rescinded by the State at will any more than a like contract by an individual employer can be.[2] For example, a contract made by the governor pursuant to statute authorizing the appointment of a commissioner to conduct a geological, mineralogical, and agricultural survey of the State for which a definite sum had

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been authorized over a period of years will be impaired by a subsequent repeal of said law.[3]

[1] Per Story, J., Dartmouth College v. Woodward, 4 Wheat. 518 [1819].
[2] Missouri ex rel. Walker v. Walker, 125 U. S. 339 [1888].
[3] Hall v. Wisconsin, 103 U. S. 5 [1880].

But the appointment to an office created for the public use does not establish a contract relation as to tenure and salary.[1] Nor does election to office for a definite term prevent the legislature from abolishing the office, diminishing its duration, or removing the incumbent.[2] Nor does appointment to a particular office for a fixed term prevent the legislature from changing the functions and duties of said office.[3] A university professor selected "subject to law" for a 6-year term has no contract that the legislature will not shorten his term of service.[4]

[1] Crenshaw v. United States, 134 U. S. 99 [1890]; Dodge v. Board of Education of Chicago, 302 U. S. 74 [1937].
[2] Fisk v. Police Jury, 116 U. S. 131 [1885].
[3] Mississippi v. Miller, 276 U. S. 174 [1928].
[4] Head v. University of Missouri, 19 Wall. 526 [1874].

An act fixing the salary of an officer is not a contract that it shall not be reduced during his term of office.[1] A subsequent law reducing the salary appropriation for said office prevents a recovery, during the time covered by the appropriation law, of the greater sum authorized by the former act.[2] A law providing for a fixed compensation for the services of a public officer may be modified and the salaries of the incumbent thereby reduced.[3] For example, a resolution of a New Jersey town board of education reducing teachers' salaries for the school year 1933–1934, pursuant to an act of the State legislature authorizing such boards to fix salaries to be paid for such period "notwithstanding any such person be under tenure" does not impair a contract obligation within the meaning of the contract clause of the constitution, even though by virtue of an earlier act of New Jersey the salary of a teacher was not to be reduced after 3 years' service except for inefficiency or misconduct.[4] However, once the services have been rendered, there arises an implied contract that they shall be paid for at the existing rate.[5] The "pension" or "annuity" provided for by an Illinois law regulating the retirement of school teachers may be reduced without impairing the obligation of a contract, even as to teachers who resigned in reliance on said law.[6]

[1] Butler v. Pennsylvania, 10 How. 402 [1850]; Mississippi v. Miller, 276 U. S. 174 [1928].
[2] United States v. Fisher, 109 U. S. 143 [1883]; United States v. Mitchell, 109 U. S. 146 [1883].
[3] Fisk v. Police Jury, 116 U. S. 131 [1885].
[4] Phelps v. Board of Education, 300 U. S. 319 [1937].
[5] Fisk v. Police Jury, 116 U. S. 131 [1885]; Mississippi v. Miller, 276 U. S. 174 [1928].
[6] Dodge v. Board of Education of Chicago, 302 U. S. 74 [1937].

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CONTRACTS OF MUNICIPAL CORPORATIONS.

Generally.

Within the scope of its authority, a city by ordinance or by contract may assume contractual obligations.[1] The inhibition of the Constitution against the impairment of contract obligations applies to the contracts of municipal corporations created by permission of the State.[2] For example a contract between a municipality and a street railway providing for agreed rates of fare, if such contract does not contravene public policy or positive rules of law, is valid and enforceable.[3] An ordinance granting to a telephone company the use of its streets, when accepted and acted upon by the company, is a contract which the municipality cannot unreasonably or arbitrarily impair.[4] Where a municipality has agreed to aid in the construction of a railroad, provided the railroad should be located on a certain line, and where the railroad had partially complied therewith, a constitutional provision subsequently adopted prohibiting donations to private corporations is invalid.[5] But a mere survey of the route is not sufficient part performance.[6]

[1] Puget Sound Traction Light & Power Co. *v.* Reynolds, 244 U. S. 574 [1917].

[2] Broughton *v.* Pensacola, 93 U. S. 266 [1876].

[3] Grand Rapids & I. R. Co. *v.* Osborn, 193 U. S. 17, 29 [1904]. *Cf.* Minneapolis *v.* Minneapolis St. R. Co., 215 U. S. 417 [1910]; Detroit *v.* Detroit Citizens St. R. Co., 184 U. S. 368 [1902]; Cleveland *v.* Cleveland City R. Co., 194 U. S. 517, 536 [1904].

[4] *Cf.* Pomona *v.* Sunset Teleph. & Teleg. Co., 224 U. S. 330 [1912]; Owensboro *v.* Cumberland Teleph. & Teleg. Co., 230 U. S. 58 [1913].

[5] Clay County *v.* Society for Savings, 104 U. S. 590 [1882].

[6] Buffalo & J. R. Co. *v.* Falconer, 103 U. S. 821, 824 [1881]. *Cf. also* Aspinwall *v.* Daviess County, 22 How. 364, 375 [1860]; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 666 [1896]; Norton *v.* Board of Comrs., 129 U. S. 479, 490 [1889]; Wadsworth *v.* Eau Claire County, 102 U. S 534, 536 [1881]; Concord *v.* Portsmouth Sav. Bank, 92 U. S. 625 [1876].

For a city to have the power to enter into a binding contract, it must have express statutory authority.[1] The power of a municipality to contract away its right to fix reasonable gas rates, for example, must be conferred by express legislative grant and not by doubtful construction of statutes.[2] Likewise, clear authority is needed to enable a city to establish by an inviolable contract rates to be charged by a telephone company. The grant of power "to fix and determine" the charges for telephone services gives ample authority to exercise the governmental power of regulating charges, but is no authority to enter into a contract to abandon the governmental power itself.[3] However, the legislature by statute may ratify a contract which a city originally entered into without authority; after such ratification the privileges therein granted cannot be impaired.[4] Municipal contracts are, of course, subject to restrictions contained in the State consti-

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tution. If a city grants an exclusive franchise to a street railway allowing it to charge a certain fare, such rates may be subsequently changed where the State constitution forbade irrevocable grants.[5]

[1] Puget Sound Traction Light & P. Co. *v.* Reynolds, 244 U. S. 574 [1917].

[2] Wyandotte County Gas Co. *v.* Kansas ex rel. Marshal, 231 U. S. 622 [1914].

[3] Home Teleph. & Teleg. Co. *v.* Los Angeles, 211 U. S. 265 [1908].

[4] Minneapolis *v.* Minneapolis St. R. Co. 215 U. S. 417 [1910].

[5] San Antonio Traction Co. *v.* Altgelt, 200 U. S. 304 [1906]. *Cf.* Murray *v.* Pocatello, 226 U. S. 318 [1912]; New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79 [1891].

General implications may not be resorted to for the purpose of converting a grant of a municipality which is, upon its face, a mere license into a contract for a stated period or in perpetuity. For example, a grant of "permission to occupy" a sidewalk with a spur track has been held to confer nothing more than a revocable license.[1] Where a city grants to an individual the right to construct wharves in front of private property, a subsequent closing of a street and approaches thereto, does not impair the obligation of a contract.[2] But where a city has conveyed submerged land in fee simple with wharfage rights, without reserving the right to regulate navigation, the enforcement of subsequent legislation fixing pier lines may interfere with the grantee's right and impair his contract.[3]

[1] Seaboard Air Line R. Co. *v.* Raleigh, 242 U. S. 15 [1916].

[2] Mead *v.* Portland, 200 U. S. 148 [1906].

[3] Appleby *v.* Delaney, 271 U. S. 403 [1926].

Municipal Franchises and Licenses.

The acceptance of a permit granted by a municipal corporation under legislative authority to place wires in the city streets creates a valid contract which cannot be impaired unless such franchise is lost by misuser or nonuser.[1] Unless granted within the charter powers of a municipality, the franchise creates no contract which will be protected against impairment.[2] A State may, however, ratify such a contract, and thereby bring it within the protection of the contract clause.[3]

[1] New York Electric Lines Co. *v.* Empire City Subway Co., 235 U. S. 179 [1914].

[2] Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1 [1898].

[3] Blair *v.* Chicago, 201 U. S. 400 [1906].

Neither the municipality nor the State can impair the franchises lawfully granted by the city.[1] Where a city grants the use of its streets for a specified number of years in consideration that a street-car company lay tracks and operate a railway thereon, a valid contract arises with the building of the road and the operating of cars as specified, which the State is not at liberty to impair.[2] Where a city has lawfully granted to a railway company the right to lay double tracks

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on certain streets, the municipality is without authority to prohibit the laying of the second track after the first is in use, unless the right to repeal the franchise grant was reserved.[3] In the exercise of its police power, however, the city may subsequently repeal the grant to lay double tracks on crowded and narrow streets.[4] Where the city by ordinance has granted to a water company an easement to construct and maintain water supply works and to lay pipes along the streets, there is a valid contract which is impaired by a subsequent ordinance charging a monthly license for the privilege.[5]

[1] Ohio Public Service Company *v.* Ohio, 274 U. S. 12 [1927]. *See also* Grand Trunk W. R. Co. *v.* South Bend, 227 U. S. 544 [1913].

[2] City R. Co. *v.* Citizens' Street R. Co., 166 U. S. 557 [1897]. *Cf.* Cleveland *v.* Cleveland City R. Co., 194 U. S. 517 [1904].

[3] Grand Trunk Western R. Co. *v.* South Bend, 227 U. S. 544 [1913].

[4] Baltimore *v.* Baltimore Trust & G. Co., 166 U. S. 673 [1897].

[5] Boise Artesian, Hot & Cold Water Co. *v.* Boise City, 230 U. S. 84 [1913].

A contract entered into by a municipality with a railroad company for the use of city streets is subject to the power of the city to regulate such use, provided the regulations do not materially impair rights granted by the contract.[1] For example, a grant of authority by a municipality to an electric company to lay its lines underground in a specified manner does not prevent the city from subsequently creating a subway commission to supervise the laying of such wires.[2] Similarly a municipal ordinance authorizing a railroad company to erect a new bridge and requiring the company to keep the approaches thereto in good repair does not constitute such a contract as would prevent the city changing the grade of the street leading to the bridge.[3] Likewise an agreement by the city with a railroad company to share two-fifths of the costs of constructing a viaduct over tracks of the railroad will not prevent the city under subsequent legislative authority from requiring the railroad to carry the entire burden of keeping the viaduct in repair.[4] Furthermore, an agreement requiring a street railway to pave between its tracks does not prevent the city from subsequently imposing on the company the burden of additional paving outside of the rails.[5]

[1] Baltimore *v.* Baltimore Trust & G. Co., 166 U. S. 673, 681 [1897].

[2] New York *v.* Squire, 145 U. S. 175, 190 [1892].

[3] Wabash R. Co. *v.* Defiance, 167 U. S. 88, 93 [1897].

[4] Chicago, B. & Q. R. Co. *v.* Nebraska, 170 U. S. 71 [1898].

[5] Sioux City Street R. Co. *v.* Sioux City, 138 U. S. 98, 105 [1891]. *Cf.* Oklahoma R. Co. *v.* Severns Pav. Co., 251 U. S. 104 [1919].

The ordinary grant of a franchise to organize a water company to supply a village with water contains no implied promise that the village will never do an act which might reduce the value of the franchise.[1] Such a grant does not prevent the city from establishing its own waterworks system.[2] Where a city was authorized by statute to construct

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its own electric plant or confer such a right on a private company, and decided on the latter course, it can subsequently erect its own lighting plant without impairing the contract rights of the private company.[3] In erecting a waterworks of its own the city is under no obligation to take the plant of a private existing company unless so required by State law.[4] And a promise not to erect waterworks of its own during the 25-year period covered by the franchise to a private company does not preclude the city from granting a similar franchise to another private company.[5] However, when the city has conferred an "exclusive" franchise for a definite period [6] or until the contract was avoided by the courts,[7] the city is precluded from constructing municipal waterworks during said period. And while a municipality generally has the power to regulate rates to be charged under the franchise, yet a municipal corporation may be invested with the power to bind itself by an irrevocable contract not to regulate water rates,[8] or not to reduce the rates below a stated charge.[9] Where a city in its ordinance permitting cars to be run along a street reserved the right "to prohibit the running of locomotives", a subsequent ordinance prohibiting the use of steam locomotives impairs no contract obligation.[10]

[1] Skaneateles Waterworks Co. *v.* Skaneateles, 184 U. S. 354, 363 [1902].

[2] Helena Waterworks Co. *v.* Helena, 195 U. S. 383, 388 [1904]. *See also* Madera Waterworks *v.* Madera, 228 U. S. 454 [1913]; Knoxville Water Co. *v.* Knoxville, 200 U. S. 22 [1906]; Vicksburg *v.* Vicksburg Waterworks Co., 202 U. S. 453 [1906].

[3] Joplin *v.* Southwest Missouri Light Co., 191 U. S. 150, 156 [1903].

[4] Skaneateles Waterworks Co. *v.* Skaneateles, 184 U. S. 354, 363 [1902].

[5] Walla Walla *v.* Walla Walla Water Works Co., 172 U. S. 1, 15 [1898].

[6] Vicksburg Waterworks Co. *v.* Vicksburg, 185 U. S. 65 [1902].

[7] Walla Walla *v.* Walla Walla Waterworks Co., 172 U. S. 1, 13 [1898].

[8] Freeport Water Co. *v.* Freeport, 180 U. S. 587 [1901].

[9] Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558 [1900]. *Cf.* Stanislaus County *v.* San Joaquin & K. River Canal & Irrig. Co., 192 U. S. 208 [1904].

[10] Southern Pacific Co. *v.* Portland, 227 U. S. 559 [1913].

Municipal Indebtedness.

When municipal corporations issue bonds under authority of law, they are to that extent to be deemed private corporations, and their obligations are secured by all the guarantees which protect the engagements of private individuals.[1] A pledge to levy and collect an annual tax for the payment of the interest and gradual retirement of said bonds forms a contract with the bondholders which is impaired by legislation forbidding the courts to issue a mandamus for the levy of a tax according to the original plan.[2]

[1] Mobile *v.* Watson, 116 U. S. 289, 304 [1886].

[2] Louisiana *v.* Pilsbury, 105 U. S. 278 [1882]; Galena *v.* United States ex rel. Amy, 5 Wall. 705 [1867]. *Cf.* Seibert *v.* United States ex rel. Lewis, 122 U. S. 284, 290 [1887].

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A fortiori, legislation repealing the taxing power of the municipality, so as to deprive the holder of a contract of all adequate and efficacious remedy, is within the constitutional inhibition; when a municipal corporation is authorized to contract and to exercise the power of local taxation, this power cannot be withdrawn until the contracts are satisfied.[1]

[1] Nelson *v.* Police Jury, 111 U. S. 721 [1884]. *See also* Louisiana ex rel. Hubert *v.* New Orleans, 215 U. S. 170 [1909]; United States ex rel. Von Hoffman *v.* Quincy, 4 Wall. 535, 554 [1867]; United States ex rel. Wolff *v.* New Orleans, 103 U. S. 358, 365 [1881]; Scotland County Ct. *v.* United States, 140 U. S. 41 [1891].

The laws existing at the time of the issuance of bonds, and under the authority of which they were issued, enter into and become a part of the contract in such way that the obligation cannot be impaired or its fulfillment obstructed by a change in the law [1] or by subsequent decisions.[2] The mere fact that the laws at the time bonds were issued authorized the city to levy taxes upon all property therein does not prevent a municipality from exempting some property from taxation.[3]

[1] Moore *v.* Otis, 275 Fed. 747 [1921].

[2] United States ex rel. Butz *v.* Muscatine, 8 Wall. 575, 584 [1869]; Douglass *v.* Pike County, 101 U. S. 677, 687 [1880].

[3] Gilman *v.* Sheboygan, 2 Black 510 [1863]; New Orleans *v.* Morris, 105 U. S. 600, 604 [1882].

Although a State may at any time abolish a municipal corporation, it cannot impair contracts already entered into by the municipality.[1] The laws establishing a municipal corporation cannot be altered or repealed so as to invade the constitutional rights of creditors.[2] For example, bonds issued for harbor improvements are impaired by a subsequent law repealing the act under which the harbor board was organized, leaving the board without money or bonds to pay balance due to contractors.[3] A State cannot, by abolishing townships or altering municipal or county boundaries, cancel existing indebtedness; the debt follows the territory, and the new corporation becomes liable on such obligation.[4] Similarly, where a municipal corporation is dissolved and annexed to another, the consolidated corporation must assume the debts of its components.[5]

[1] Ex parte Folsom, 200 U. S. 248 [1906].

[2] Mobile *v.* Watson, 116 U. S. 289 [1886].

[3] Kimball *v.* Mobile County, 102 U. S. 691 [1881].

[4] Mobile *v.* Watson, 116 U. S. 289, 300 [1886]; Ex parte Folsom, 200 U. S. 248 [1906]. *Cf.* Shapleigh *v.* San Angelo, 167 U. S. 646, 656 [1897].

[5] Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 520 [1880].

CONTRACTS OF INDIVIDUALS AND PRIVATE CORPORATIONS.

In General.

A voluntary trust deed under the terms of which the income of the trust property is to be paid to the settlers during their lives, and

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upon the death of the survivors the principal is to be divided among their sons, it is a contract within the meaning of the contract clause of the Federal Constitution.[1]

[1] Coolidge v. Long, 282 U. S. 582 [1931].

The contract of a private corporation, even though its uses are public, cannot be impaired by legislation.[1] Contracts of bondholders with private corporations are within the protection of the Constitution.[2]

[1] Minot v. Philadelphia, W. & B. R. Co. (Delaware Railroad Tax), 18 Wall. 206 [1874].

[2] Cleveland, P. & A. R. Co. v. Pennsylvania (State Tax on Foreign Held Bonds), 15 Wall. 300, 317 [1873].

Legislation abridging the rights of individuals to contract on certain matters is not unconstitutional; such restrictions may deprive persons of the "liberty" of entering into private contracts and thereby run afoul of the due process clause of the Fourteenth Amendment. But a California law deterring appellant from contracting for the purchase of sardines taken from the high seas and brought into the State does not become unconstitutional merely because it creates a condition of affairs which renders the making of related contracts, lawful in themselves, ineffective.[1]

[1] Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 427 [1936].

Marriage Contracts.

The contract of marriage is not a "contract" within the meaning of the Constitution.[1] The contract clause does not restrict the general right of the State to legislate upon the subject of divorce.[2] State laws in regard to divorce, being remedial in nature, do not come within this provision of the Constitution.[3] Statutes authorizing divorce do not impair the marriage "contract", but merely liberate one of the parties because it has been broken by the other.[4] However, a statute dissolving the marriage relation where there has been no breach on either side, or mutual assent thereto, would impair the obligation of the contract.[5]

[1] Maynard v. Hill, 125 U. S. 190 [1888]; Dartmouth College v. Woodward, 4 Wheat. 629 [1819]. *Cf.* Andrews v. Andrews, 188 U. S. 14 [1903].

[2] Maynard v. Hill, 125 U. S. 190 [1888].

[3] Dartmouth College v. Woodward, 4 Wheat. 629 [1819].

[4] Hunt v. Hunt, 131 U. S. appx. clxv [1889].

[5] Per Story, J., Dartmouth College v. Woodward, 4 Wheat. 518 [1819].

What Constitutes Impairment.

IN GENERAL.

The prohibition of the Constitution against the impairment of the obligation of contracts is not absolute, and is not to be used with literal exactness like a mathematical formula.[1] However, actual conditions cannot be ignored; the court ought not, by overnice refine-

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ments or through assumptions out of harmony with patent facts, to facilitate the practical destruction of admitted legal obligations.[2]

[1] Home Bldg. & Loan Assoc. v. Blaisdell, 290 U. S. 398 [1934].
[2] Hendrickson v. Apperson, 245 U. S. 105 [1917].

In determining whether legislation violates the contract clause, the question is not whether the legislation affects contracts incidentally or directly or indirectly, but whether it is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.[1] The boundary line distinguishing enactments which affect the remedy merely from those which, by limiting or changing the remedy, impair the obligation of pre-existing contracts has not been, and for obvious reasons cannot be, drawn so broadly as to furnish a satisfactory rule for the determination of all cases. Every case must be determined upon its own circumstances.[2]

[1] Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398 [1934].
[2] United States ex rel. Von Hoffman v. Quincy, 4 Wall. 535 [1867].

For a statute to impair the obligation of a contract, it must act upon the contract.[1] To constitute an impairment some subsequent legislation must be given effect as against the contract.[2] And, of course, the contract must contain a valid subsisting obligation, not a contingent or speculative one.[3]

[1] Charles River Bridge v. Warren Bridge, 11 Pet. 420 [1837].
[2] Cleveland v. Cleveland City R. Co., 194 U. S. 517 [1904].
[3] Ochiltree v. Iowa R. Contracting Co., 21 Wall. 249, 252 [1875].

It is a law which impairs the obligation of the contract—and not the contract itself—which is interdicted.[1] Legislation operating on contracts previously made and enhancing the cost and difficulty of performance or diminishing the value of such performance may impair the contract, but does not impair the obligation of the contract so long as the obligation of performance remains in full force.[2] The contract clause protects rights under the contract and not mere incidental advantages.[3]

[1] Ogden v. Saunders, 12 Wheat. 213, 257 [1827]; Walker v. Whitehead, 16 Wall. 314 [1873].
[2] Curtis v. Whitney, 13 Wall. 68, 70 [1872].
[3] Ochiltree v. Iowa R. Contracting Co., 21 Wall. 249, 253 [1875].

The obligation of a contract includes everything within its obligatory scope; among these elements nothing is more important than the means of enforcement; this is the breath of its vital existence. Without it the contract as such ceases to be; the ideas of right and remedy are inseparable.[1] The obligation of contract is in fact the law which binds the parties to perform their agreement.[2] It is the

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means which, at the time of its creation,[3] the law affords for its enforcement.[4]

[1] Edwards v. Kearsey, 96 U. S. 595, 600 [1878].
[2] Sturges v. Crowninshield, 4 Wheat. 122, 197 [1819]; Curran v. Arkansas, 15 How. 304 [1853].
[3] McCracken v. Hayward, 2 How. 608 [1844]; United States ex rel. Von Hoffman v. Quincy, 4 Wall. 535 [1867]; Worthen (W. B.) Co. ex rel. Street Improv. Dis. v. Kavanaugh, 295 U. S. 56 [1935].
[4] Louisiana ex rel. Nelson v. St. Martin's Parish, 111 U. S. 716, 720 [1884]; Louisiana ex rel. Ranger v. New Orleans, 102 U. S. 203, 206 [1880]; Walker v. Whitehead, 16 Wall. 314 [1873].

A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation.[1] For example, a statute seeking to convert a convenant contained in a prior act into a condition subsequent, and to impose as a penalty for is violation the forfeiture of valuable property impairs the contract obligation and is void.[2] Any law which, in its operation, amounts to a denial or obstruction of the rights [3] accruing under a contract impairs its obligation, as does a law which diminishes the duty to fulfill or impairs the right to enforce the contract.[4] In other words, any law which invalidates, extinguishes, releases, or derogates from substantial contractual rights impairs its obligation.[5]

[1] Cleveland, P. & A. R. Co. v. Pennsylvania (State Tax on Foreign Held Bonds), 15 Wall. 300, 320 [1873].
[2] Columbia R., Gas & E. Co. v. South Carolina, 261 U. S. 236 [1923].
[3] Bradley v. Lightcap, 195 U. S. 1 [1904].
[4] McCracken v. Hayward, 2 How. 608 [1844]; Pritchard v. Norton, 106 U. S. 124 [1883].
[5] Home Bldg. & Loan Asso. v. Blaisdell, 290 U. S. 398 [1934]; Hendrickson v. Apperson, 245 U. S. 105 [1917].

The constitutional prohibition against impairment of contract obligations has no reference to the degree of impairment.[1] The extent of the impairment which the law effects is not material.[2] It is not a question of degree; the obligation must not be diminished at all.[3]

[1] United States ex rel. Von Hoffman v. Quincy, 4 Wall. 535 [1867].
[2] Green v. Biddle, 8 Wheat. 1 [1823]; Walker v. Whitehead, 16 Wall. 314 [1873]; Farrington v. Tennessee, 95 U. S. 683 [1878].
[3] Planters' Bank v. Sharp, 6 How. 301 [1848].

It must not be forgotten, however, that all contracts are entered into subject to certain governmental powers. The State in the proper exercise of its police power, its taxing power, its supervision over rates charged by public utilities, and its power of eminent domain, can affect or even destroy the obligation of certain contracts.

Police Power.*

The contract clause does not restrict the power of the State to legislate for the protection of the public health,[1] public safety, and

**See also* pp. 149, 154, 174, 565, 719, 827, 969.

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public morals.[2] The police power cannot be contracted or bartered away.[3]

[1] New Orleans Gaslight Co. *v.* Drainage Commission, 197 U. S. 453 [1905].

[2] New Orleans Gas Light Co. *v.* Louisiana Light & Heat Mfg. Co., 115 U. S. 672 [1885]. *See also* Manigault *v.* Springs, 199 U. S. 478 [1905]; New York & N. E. R. Co. *v.* Bristol, 151 U. S. 567 [1894]; New Orleans Water Works *v.* Rivers, 115 U. S. 681 [1885]; Louisville Gas Co. *v.* Citizens' Gaslight Co., 115 U. S. 683 [1885]; Chicago, B. & Q. R. Co. *v.* Nebraska, 170 U. S. 57 [1898].

[3] Northern P. R. Co. *v.* Minnesota, 208 U. S. 583 [1908]; Grand Trunk Western R. Co. *v.* South Bend, 227 U. S. 554 [1913]; Atlantic Coast Line R. Co. *v.* Goldsboro, 232 U. S. 548 [1914]; Wabash R. Co. *v.* Defiance, 167 U. S. 100 [1897].

A provision in a railway charter exempting a corporation from liability for the death of an employee, even if caused by its negligence, is one over which the legislature has a regulating but not a contracting power; a subsequent law imposing liability on the corporation for negligent injury of its servants impairs no contract obligation.[1] Corporations already chartered may be subjected to additional police regulations.[2] Charters and franchises are subject to the lawful police authority of the State.[3]

[1] Texas & N. O. R. Co. *v.* Miller, 221 U. S. 408 [1911].

[2] Eagle Ins. Co. *v.* Ohio, 153 U. S. 446 [1894]; Missouri *v.* Murphy, 170 U. S. 99 [1898].

[3] Hammond Packing Co. *v.* Arkansas, 212 U. S. 322 [1909].

A railroad, for example, may be required, at its own expense and irrespective of benefits to itself, to eliminate grade crossings in the interest of public safety; such a regulation impairs no charter contracts of the company.[1] Similarly a railroad company may be required to make highway crossings reasonably safe and convenient for public use,[2] and to repair viaducts,[3] and to fence its right-of-way.[4] Though a railroad company owns the right-of-way along a street, the city may require the company to lay tracks to conform to the established grade, and to fill in tracks at street intersections; and may also regulate the shifting of cars along said street.[5] It may also require the company to remove tracks from a busy street intersection, even though the company have a vested right to maintain the tracks there, when the attendant disadvantages and expense are small and the safety of the public appreciably enhanced.[6]

[1] New York & N. E. R. Co. *v.* Bristol, 151 U. S. 566 [1894].

[2] Great Northern R. Co. *v.* Minnesota, 246 U. S. 434 [1918].

[3] Northern Pac. R. Co. *v.* Minnesota, 208 U. S. 583 [1908].

[4] Minneapolis & St. L. R. Co. *v.* Emmons, 149 U. S. 364 [1893].

[5] Atlantic Coast Line R. Co. *v.* Goldsboro, 232 U. S. 548 [1914]. *Cf.* New Orleans Pub. Service *v.* New Orleans, 281 U. S. 682 [1930].

[6] Denver & R. G. R. Co. *v.* Denver, 250 U. S. 241 [1919].

Likewise the State in the public interest may require a railroad to reestablish an abandoned station, even though the railroad commission

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had previously authorized its abandonment on condition that another station be established elsewhere, a condition which had been complied with.[1]

[1] New Haven & N. Co. v. Hamersley, 104 U. S. 1 [1881].

The State may also impose upon a railroad liability for fire communicated by its locomotives, even though the State had previously authorized the company to use said type of locomotive power,[1] and it may penalize the failure to cut drains through enbankments so as to prevent flooding of adjacent lands.[2]

[1] St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 5 [1897].
[2] Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67 [1915].

Under its police power a city may require a street-railway company to sprinkle the portion of the street between its track and for a sufficient distance beyond the outer rails so as to effectually lay the dust.[1]

[1] Pacific Gas & E. Co. v. Police Court, 251 U. S. 22 [1919].

A legislature by incorporating a company to manufacture malt liquors cannot barter away its right to provide for the protection of the lives, health, and property of citizens and the preservation of good order and public morals.[1] Nor will a charter granted to a corporation authorizing it to manufacture fertilizer prevent a subsequent legislature from ordering the business discontinued when it becomes a nuisance by reason of the growth of population around the locality.[2] Nor can the legislature of a State, by granting a charter to a lottery company, make a contract against future regulation or suppression of lotteries.[3]

[1] Boston Beer Co. v. Massachusetts, 97 U. S. 25 [1879].
[2] Northwestern Fertilizer Co. v. Hyde Park, 97 U. S. 659 [1878].
[3] Stone v. Mississippi, 101 U. S. 814 [1880]. *See also* Phalen v. Virginia, 8 How. 167 [1850]; Boyd v. Alabama, 94 U. S. 645 [1877]; Douglas v. Kentucky, 168 U. S. 488 [1897].

However, where a charter of a lottery company is specifically protected by provisions of the State constitution, the State legislature cannot under its police power impair the subject matter of the contract.[1]

[1] New Orleans v. Houston, 119 U. S. 265 [1886].

One legislature cannot by contract restrain the power of a subsequent legislature to legislate for the public welfare;[1] a State cannot renounce its power to legislate for the preservation of society or to secure the performance of essential governmental functions.[2] The doctrine that a corporate charter is a contract is limited by the equally well-settled principle that a legislature can neither bargain away the police power, nor in any wise withdraw from its successors the power to take appropriate measures to guard the safety, health, and morals

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of all who may be within their jurisdiction.[3] The right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, morals, and safety of its inhabitants.[4]

[1] Boyd *v.* Alabama, 94 U. S. 645 [1877]; Newton *v.* Mahoning County, 100 U. S. 557 [1880].

[2] Pennsylvania Hospital *v.* Philadelphia, 245 U. S. 20 [1917]. *See also* Goszler *v.* Georgetown, 6 Wheat. 593 [1821]; Pierce Oil Corp. *v.* Hope, 248 U. S. 498 [1919]; Texas & N. O. R. Co. *v.* Miller, 221 U. S. 408 [1911].

[3] Texas & N. O. R. Co. *v.* Miller, 221 U. S. 408 [1911].

[4] Wabash R. Co. *v.* Defiance, 167 U. S. 97 [1897]. *Cf.* Ettor *v.* Tacoma, 228 U. S. 148 [1913].

But the mere granting of an exclusive franchise is not in any legal sense to the prejudice of the public health or safety. Such a franchise is none the less a contract because, e. g., the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public. A State cannot abrogate the franchise under a purported exercise of the police power. It can, however, require the gas company to observe regulations which are not inconsistent with the essential rights granted by the charter and which are necessary for the protection of the public.[1] Likewise, a municipal contract conferring on a private company the exclusive right to supply the city with water for a term of years is not void as an attempt to barter away the police power of the city council. Should the company fail to carry out the contract with due regard to the good order of the city and the health of its inhabitants, then a question of police power may arise. But the mere grant of a charter which may be abused to the detriment of public health, safety, and morals does not justify an abrogation of the charter by the city prior to a breach.[2]

[1] New Orleans Gas Light Co. *v.* Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650, 671 [1885]; Louisville Gas Co. *v.* Citizens' Gaslight Co., 115 U. S. 683 [1885].

[2] Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1 [1898].

All contracts are inherently subject to the paramount power of the sovereign, and the exercise of such power is never understood to involve their violation.[1] It does not matter that legislation appropriate to a legitimate end has the result of modifying or abrogating contracts already in effect, as contracts are to be regarded as having been made subject to the future exercise of constitutional power; the reservation of essential attributes of sovereign power is read into contracts as a postulate of the legal order.[2] Parties entering into contracts do not estop the legislature from enacting laws intended for the promotion of the common weal, or necessary for the general public good, even though contracts previously entered into between individuals may thereby be affected.[3] For example, a Texas statute prohibiting the use of sweet natural gas for the manufacture of carbon black is a

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proper exercise of the State's police power over certain commodities, and such a statute, even though it prevents private parties from fulfilling their contracts to supply sweet gas, is not invalid. The statute merely deals with an article of commerce; its effect upon contracts is incidental. The contract clause has never been held to avoid a police statute dealing directly with physical things in the interest of the public welfare, and touching contractual relationships only incidentally as they may have attached to those things prior to the passage of the statute.[4]

[1] Osborn *v.* Nicholson, 13 Wall. 654 [1872]. *See also* Stone *v.* Mississippi ex rel. Harris, 101 U. S. 814 [1880]; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25 [1878].

[2] Home Bldg. & Loan Asso. *v.* Blaisdell, 290 U. S. 398 [1934].

[3] Manigault *v.* Springs, 199 U. S. 473 [1905].

[4] Henderson Co. *v.* Thompson et al., 300 U. S. 258 [1937].

Contracts made in the conduct of a business that is subject to regulation are also subject to such regulation.[1] For example, an act regulating dental advertising, where such regulation is a reasonable exercise of the protective power of the State, is valid even though it interferes with certain existing contracts for display signs and press notices.[2] An insurance company is subject to reasonable regulations prescribed by the legislature, provided such regulations do not materially interfere with the substantial enjoyment of privileges granted by the State and serve only to secure the ends for which the corporation was created.[3] Similarly a State may establish such reasonable and general regulations of banks as may be essential to public safety, and enforce them through a board supported by moderate assessments against the bank, despite the fact that the charter of the bank had confided the control of the bank's business to its stockholders.[4] An inheritance tax statute which requires the sealing of safe deposit boxes for at least 10 days after the death of the renter and requires the deposit company to retain assets found therein sufficient to pay the tax due the State does not impair the company's charter power to do a safe deposit business.[5] However, where a gas company was granted a permit to erect works within a prescribed area, and in reliance upon such authorization made contracts to purchase lands, material, etc., a subsequent ordinance excluding from the prescribed zone the lands so purchased impairs contract obligations.[6]

[1] Rast *v.* Van Denman & L. Co., 240 U. S. 342 [1916].

[2] Semler *v.* Oregon State Board of Dental Examiners, 294 U. S. 608 [1935].

[3] Chicago L. Ins. Co. *v.* Needles, 113 U. S. 574, 580 [1885].

[4] Bank of Oxford *v.* Love, 250 U. S. 603 [1919].

[5] National Safe Deposit Co. *v.* Stead, 232 U. S. 58 [1914].

[6] Dobbins *v.* Los Angeles, 195 U. S. 223 [1904].

The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding inter-

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ference with existing contracts. A reasonable and valid exercise of a State's reserved power to protect the vital interests of the public during an economic emergency does not violate the contract clause of the Constitution.[1] Similarly, emergency legislation relieving tenants from oppressive rental agreements is not invalid as an impairment of the obligation of contracts entered into under economic duress.[2]

[1] Home Bldg. & Loan Assoc. *v.* Blaisdell, 290 U. S. 398 [1934]; New York & N. E. R. Co. *v.* Bristol, 151 U. S. 556, 567 [1894].
[2] Levy Leasing Co. *v.* Siegel, 258 U. S. 242 [1922].

Though the obligations of contracts must yield to a proper exercise of the police power [1] and vested rights cannot inhibit the proper exertion of the power,[2] it must be exercised for an end which is in fact public, and the means adopted must be reasonably adapted to the accomplishment of that end and not arbitrary or oppressive.[3]

[1] Home Bldg. & Loan Assoc. *v.* Blaisdell, 290 U. S. 398 [1934].
[2] Nebbia *v.* New York, 291 U. S. 502 [1934].
[3] Treigle *v.* Acme Homestead Assn., 297 U. S. 189 [1936].

Taxation and Rate Regulation.

A legislature, unless prohibited by the State constitution, may exempt the property of a corporation from taxation, for a specified period or perpetually, or it may prescribe a maximum rate to which such property shall be subjected.[1] For example, where a railroad charter contains tax exemptions, such exemptions cannot be revoked by subsequent provisions in the State laws or constitution.[2] Where a charter provides for a specified tax "in lieu of all other taxes", the legislature is not at liberty to impose additional taxes,[3] and where the charter of a railroad exempts all its "property" from taxation, a tax on the "franchise" and "rolling-stock" impairs the contract.[4] Where a bank's charter provides that its capital shall be exempt from any tax, the State is not at liberty to impose a license tax on the bank,[5] and where a bank has paid a price for its charter which the legislature has accepted, the State cannot impose further taxes on the franchise as such.[6]

[1] New Jersey *v.* Wilson, 7 Cr. 164 [1812]; Williamson *v.* New Jersey, 130 U. S. 189 [1889].
[2] Central of Georgia R. Co. *v.* Wright, 248 U. S. 525 [1919].
[3] New Jersey *v.* Yard, 95 U. S. 104 [1877]. *See also* Piqua Branch of State Bank *v.* Knoop, 16 How. 369, 380 [1854]; Ohio L. Ins. & T. Co. *v.* Debolt, 16 How. 416 [1854]; Dodge *v.* Woolsey, 18 How. 331 [1856]; Mechanics' & T. Bank *v.* Debolt, 18 How. 380 [1856]; Powers *v.* Detroit G. H. & M. R. Co., 201 U. S. 543 [1906].
[4] Wilmington & W. R. Co. *v.* Reid, 13 Wall. 264 [1872].
[5] Citizens Bank *v.* Parker, 192 U. S. 73, 85 [1904].
[6] Gordon *v.* Appeal Tax Court, 3 How. 133 [1845].

The usual charter, however, is taken subject to the right of a State to tax.[1] The charter of a bank giving it ordinary powers is not

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impaired by a subsequent tax on the capital stock of the bank.[2] Similarly, a statute requiring banks to pay a tax on deposits and authorizing the bank to charge the amount paid against the deposit, does not interfere with existing contracts.[3] The exemption from further taxation of a banking franchise does not protect the stockholder from taxation on the capital stock which they may own.[4] And an exemption of the capital stock from taxation will not prevent a State from taxing the accumulated surplus of the bank.[5]

[1] Memphis Gas-Light Co. *v.* Shelby County, 109 U. S. 399 [1883]. *See also* Home Ins. Co. *v.* Augusta, 93 U. S. 116, 120 [1876]; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 370 [1883].

[2] Providence Bank *v.* Billings, 4 Pet. 514, 558 [1830].

[3] Clement Nat. Bank *v.* Vermont, 231 U. S. 120 [1914].

[4] Gordon *v.* Appeal Tax Court, 3 How. 133 [1845].

[5] Bank of Commerce *v.* Tennessee, 161 U. S. 134, 145 [1896]. *Cf.* Shelby County *v.* Union & Planters' Bank, 161 U. S. 149 [1896].

A provision in the charter that the railroad company shall annually pay a tax of one-quarter of 1 percent upon its capital stock carries no implication that no additional tax will be laid.[1]

[1] Minot *v.* Philadelphia, W. & B. R. Co. (Delaware Railroad Tax), 18 Wall. 206 [1874]. *Cf:* Erie R. Co. *v.* Pennsylvania, 21 Wall. 492 [1875]; Union Pass. R. Co. *v.* Philadelphia, 101 U. S. 528 [1880].

Since the power to tax is an exercise of a sovereign power, essential to the existence of the State, the surrender of the right to tax must be in language which cannot be otherwise reasonably construed; all doubts which arise as to intent to make such contract must be resolved in favor of the State.[1] The renunciation must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction.[2] For example, a charter exempting the capital stock of a railroad from taxation "for ten years after the completion of said road" does not prevent a State from taxing such stock before the railroad was completed, even though that was the period during which the railroad particularly needed the tax-exemption privilege,[3] and a charter which exempts railroad property from taxation does not extend to branch roads constructed under a subsequent statute.[4] And an exemption from "taxation" will not be construed to relieve the corporation from the obligation to pay special "assessments."[5] Nor will a statute granting to a new corporation all the "right and privileges" of an existing company which has charter "immunity" from taxation confer the exemption on the new company.[6] When an insurance company which was exempted from taxation changes its powers so as to conduct a banking business, it can no longer claim its former exemption.[7] Furthermore, a general exemption of the property of a corporation is to be construed as referring only to property held for the transaction of the business of the company; property not used for corporate purposes is subject to taxation.[8] Where a State exempts the "campus" and "endowment fund" of a college

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from taxation, other land held by the college as a part of its endowment is subject to taxation.[9] Similarly a provision in State bonds that they "shall be exempt from taxation" or that they "shall not be taxed" does not prevent a State, which had previously held that these exemptions were limited to "property" rather than "excise" taxes, from taxing the income therefrom. A holding that an income tax is an excise tax is not "plainly wrong."[10]

[1] Covington *v.* Kentucky, 173 U. S. 231 [1899]. *See also* St. Louis *v.* United R. Co., 210 U. S. 266 [1908]; Seton Hall College *v.* South Orange, 242 U. S. 100 [1916]; Hoge *v.* Richmond & D. R. Co., 99 U. S. 348 [1879]; Southwestern R. Co. *v.* Wright, 116 U. S. 231 [1886]; Winona & St. P. Land Co. *v.* Minnesota, 159 U. S. 526 [1895]. *Cf.* Erie R. Co. *v.* Pennsylvania, 21 Wall. 492, 498 [1875]; New York ex rel. Troy Union R. Co. *v.* Mealy, 254 U. S. 47 [1920].

[2] Milwaukee Elec. R. & Light Co. *v.* Railroad Commission, 238 U. S. 174 [1915].

[3] Vicksburg, S. & P. R. Co. *v.* Dennis, 116 U. S. 665 [1886].

[4] Chicago, B. & K. C. R. Co. *v* Missouri ex rel. Guffy, 120 U. S. 569, 574 [1887].

[5] Illinois C. R. Co. *v.* Decatur, 147 U. S. 190, 199 [1893]; Ford *v.* Delta & P. Land Co., 164 U. S. 662, 670 [1897].

[6] Phoenix F. & M. Ins. Co. *v.* Tennessee use of Memphis, 161 U. S. 174, 176 [1896]. *Cf.* Annapolis & E. Ridge R. Co. *v.* Anne Arundel County, 103 U. S. 1, 3 [1881]; Memphis & C. R. Co. *v.* Gaines, 97 U. S. 711 [1878]; Humphrey *v.* Pegues, 16 Wall. 244, 249 [1873]; Morgan *v.* Louisiana, 93 U. S. 217 [1876]; Tennessee *v.* Whitworth, 117 U. S. 139, 145 [1886]; Wilmington & W. R. Co. *v.* Alsbrook, 146 U. S. 279 [1892]; Wright *v.* Georgia R. & Bkg. Co., 216 U. S. 420 [1910].

[7] Memphis City Bank *v.* Tennessee use of Memphis, 161 U. S. 186, 190 [1896]. *Cf.* Bank of Commerce *v.* Tennessee, 104 U. S. 493, 495 [1882].

[8] Ford *v.* Delta & P. Land Co., 164 U. S. 662, 667 [1897]; Bank of Commerce *v.* Tennessee, 104 U. S. 493 [1882]; New Orleans *v.* Citizens' Bank, 167 U. S. 371, 406 [1897].

[9] Millsaps College *v.* Jackson, 275 U. S. 129 [1927].

[10] Hale *v.* Iowa State Board of Assessment, 302 U. S. 95 [1937].

The sale of a charter under foreclosure proceedings does not pass the personal privilege of exemption from taxation.[1] The fact that 1,000 acres of land held by a college is exempt from taxation under its charter does not prevent the State from assessing against lessees of part of such land a tax on their interest therein.[2] However, it has been held that the leasehold interests of a lessee railroad company under leases encouraged by State legislation may not be taxed when the charter of the lessor companies exempts their property from all taxation other than a specified percentage of annual income.[3]

[1] Mercantile Bank *v.* Tennessee, 161 U. S. 161, 171 [1896]; St. Louis & S. F. R. Co. *v.* Gill, 156 U. S. 649 [1895].

[2] Jetton *v.* University of the South, 208 U. S. 489 [1908].

[3] Central of Georgia *v.* Wright, 248 U. S. 525 [1919].

A lawful tax on a new subject or an increased tax on an old one impairs no contract obligation, even though it impose additional bur-

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dens upon one class and lessen those of another.[1] A franchise to build and run a street railway does not exempt the corporation from payment of future license taxes.[2] And the fact that certain property is itself exempt from taxation will not prevent the State from levying a succession or inheritance or gift tax on the privilege of transferring such property.[3]

[1] North Missouri R. Co. v. Maguire, 20 Wall. 46, 61 [1874].

[2] New Orleans City & L. R. Co. v. New Orleans, 143 U. S. 192, 195 [1892]; St. Louis v. United Rys. Co., 210 U. S. 266 [1908]; Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, 627 [1934].

[3] Orr v. Gilman, 183 U. S. 278, 289 [1902]; Chanler v. Kelsey, 205 U. S. 466 [1907].

A statute imposing a tax on royalties received from ore mines does not impair a contract obligation between lessees and lessors since titles to all lands and leases are obtained subject to the State's power of taxation.[1] Nor does a tax on the distributing agent of a foreign packing house impair a contract between the agent and his employer; the power to tax overrides any agreement of the employee to serve for a specified sum.[2]

[1] Lake Superior Consolidated Iron Mines v. Lord, 271 U. S. 577 [1926].

[2] Kehrer v. Stewart, 197 U. S. 60 [1905].

An exemption from State taxation which is a mere gratuity or privilege may be withdrawn at the pleasure of the legislature.[1] A spontaneous provision that the property of a hospital shall be exempt from taxation, granted without condition that the hospital perform further services or duties of value to the State, is a *priviligium favorabile* which may be recalled by a subsequent legislature.[2] A statute exempting from taxation for 10 years property actually employed for manufacturing purposes is a bounty law which may be repealed at any time,[3] even though the recipients have incurred expenses upon the faith of such offer.[4]

[1] West Wisconsin R. Co. v. Trempealeau County, 93 U. S. 595 [1876]. *See also* Tucker v. Ferguson, 22 Wall. 527 [1875]; Union Pass. R. Co. v. Philadelphia, 101 U. S. 528 [1880].

[2] Christ Church v. Philadelphia County, 24 How. 300 [1861].

[3] Welch v. Cook, 97 U. S. 541 [1879]. *See also* East Saginaw Salt Mfg. Co. v. East Saginaw, 13 Wall. 373 [1872]; Wisconsin & Mich. R. Co. v. Powers, 191 U. S. 379 [1903].

[4] Grand Lodge, F. & A. M. v. New Orleans, 166 U. S. 143 [1897].

A State may in matters of proprietary rights exclude itself from the right to regulate rates.[1] It may also authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation or a natural person for a definite term, not grossly unreasonable in point of time.[2] Such exemptions in the charter are equally inviolate with its other stipulations.[3] But such contracts are strictly construed. Generally the right to modify rates is reserved. The mere grant of a charter or franchise does not deprive the State or city of the right to fix maximum rates

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in the public interest, provided such rates are not confiscatory. Nor does a grant to railroad directors of the right to make needful rules touching rates and their collection deprive the State of its general authority to regulate such rates in the future.[4] Where a railroad is authorized to charge reasonable rates, the power of declaring what shall be deemed reasonable has not thereby been surrendered by the State. The legislature may establish commissions to fix such rates.[5] The establishing of reasonable maximum rates to be charged by public utilities is constitutional.[6] It is no doubt within the power of government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly.[7] An ordinance authorizing a water company to make "needful rules and regulations" does not prevent the city, under its statutory power, to fix rates to be charged the consumers.[8]

[1] Vicksburg *v.* Vicksburg Waterworks Co., 206 U. S. 496 [1907].

[2] Home Telep. & Teleg. Co. *v.* Los Angeles, 211 U. S. 265 [1908].

[3] Minot *v.* Philadelphia, W. & B. R. Co. (Delaware Railroad Tax), 18 Wall. 206, 255 [1874]. *See also* Wright *v.* Georgia R. & Bkg. Co., 216 U. S. 420 [1910]; Pacific R. Co. *v.* Maguire, 20 Wall. 36, 43 [1875]; Humphrey *v.* Pegues, 16 Wall. 244, 249 [1873]; Home of the Friendless *v.* Rouse, 8 Wall. 430, 438 [1870]; Jefferson Branch Bank *v.* Skelly, 1 Black 436, 448 [1862]; Wilmington & W. R. Co. *v.* Reid, 13 Wall. 264, 268 [1872]; Mobile & O. R. Co. *v.* Tennessee, 153 U. S. 486, 487 [1894]; Powers *v.* Detroit, G. H. & M. R. Co. 201 U. S. 543 [1906]; Northwestern University *v.* Illinois ex rel. Miller, 99 U. S. 309, 319 [1879]; Gordon *v.* Appeal Tax Court, 3 How. 133 [1845]; New Orleans *v.* Houston, 119 U. S. 265 [1886].

[4] Chicago, M. & St. P. R. Co. *v.* Minnesota ex rel. Railroad & W. Commission, 134 U. S. 418, 455 [1890].

[5] Stone *v.* Farmers' Loan & T. Co. (Railroad Commission Cases), 116 U. S. 307, 325 [1886].

[6] *Cf.* Ruggles *v.* Illinois, 108 U. S. 526 [1883]; Illinois C. R. Co. *v.* Illinois, 108 U. S. 541 [1883].

[7] Spring Valley Waterworks *v.* Schottler, 110 U. S. 347, 354 [1884].

[8] Owensboro *v.* Owensboro Waterworks Co., 191 U. S. 358 [1903].

Private contracts between the public utility and its customers will not prevent the State or municipality from exercising its power to regulate rates, or to supersede rates previously established.[1] For example, a contract between a water company and its consumers is made subject to the power of the city to modify water rates.[2] Similarly a contract of a lighting company to furnish private consumers with power and light at a certain rate for a definite time does not prevent the company from increasing such rates if authorized by the public service commission having power to regulate rates.[3]

[1] Midland Realty Co. *v.* Kansas City Power & Light Co., 300 U. S. 109, 113 [1937]; Union Dry Goods Co. *v.* Georgia Pub. Service Corp., 248 U. S. 372 [1919]; Producers Transp. Co. *v.* Railroad Commission, 251 U. S. 228, 232 [1920]; Kansas City Bolt & Nut Co. *v.* Kansas City Light & P. Co., 252 U. S. 571 [1920]; Sutter Butte Canal Co. *v.* Railroad Commission, 279 U. S. 125, 137–138 [1929].

[2] Knoxville Water Co. *v.* Knoxville, 189 U. S. 434 [1903].

[3] Union Dry Goods Co. *v.* Georgia Public Service Corp., 248 U. S. 372 [1919].

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Eminent Domain.*

The exercise of the power of eminent domain does not interfere with the inviolability of contracts.[1] The obligation of a contract is not impaired when it is appropriated for a public use, and compensation made therefor; every contract is entered into subject to this right of the State.[2] The rights and franchises which have become vested upon the faith of contracts granting exclusive privileges to corporations can be taken by the public upon just compensation to the company, under the State's power of eminent domain.[3] For example, where a State has granted an exclusive 100-year franchise to a bridge company to construct a bridge and charge tolls for its use, the State may under its power of eminent domain, convert said structure into a free public bridge as a part of the State highway system.[4] Similarly a city, despite a long-term contract with a private water company, may condemn the property of said company to public uses.[5] A State may even authorize a lessee company owning three-fourths of the capital stock of a railroad to condemn the stock of those who object to the making of improvements in said road.[6]

[1] Richmond, F. & P. R. Co. *v.* Louisa R. Co., 13 How. 71 [1851].
[2] Cincinnati *v.* Louisville & N. R. Co., 223 U. S. 390 [1912].
[3] New Orleans Gaslight Co. *v.* Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650, 673 [1885]; Milnor *v.* New Jersey R. & Transp. Co., 3 Wall. 782 [1866].
[4] West River Bridge Co. *v.* Dix., 6 How. 507, 530 [1848].
[5] Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 691 [1897].
[6] Offield *v.* New York, N. H. & H. R. Co., 203 U. S. 372 [1906].

The power of eminent domain cannot be contracted away, and a contract of that kind is not within the protection of the contract clause.[1] The State by eminent domain may acquire land for opening a street through hospital grounds, even though the State had previously contracted with the hospital not to open streets through such grounds without its consent; the power of eminent domain is so inherently governmental and so essential to the public welfare that it cannot be abridged by agreement.[2] A grant of land in fee simple is not impaired by the exercise of the right of eminent domain under sanction of a State statute.[3]

[1] Galveston Wharf Co. *v.* Galveston, 260 U. S. 473 [1923].
[2] Pennsylvania Hospital *v.* Philadelphia, 245 U. S. 20 [1917].
[3] Mills *v.* St. Clair County, 8 How. 569 [1850].

Where a State law gives to a municipality the right to purchase or condemn waterworks of a suburb within 2 years after annexation, the water company cannot complain because the legislature subsequently extends the time during which such right may be exercised.[1]

[1] Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685 [1897].

* *See also* p. 820.

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CURATIVE STATUTES.

A State statute which gives validity to a void or defective contract is not repugnant to the contract clause of the Federal Constitution.[1] A subsequent statute, for example, may validate acknowledgments taken by an officer who was then without authority,[2] or it may make effective a deed executed under a power of attorney given by a *feme covert* at a time when a married woman could not in said manner pass an interest in realty.[3] Where the parties attempted in good faith to enter into a contract which is invalid only because of some legal impediment, the legislature may subsequently supply a legal remedy and give validity to the obligation the parties intended to create.[4] Such legislation confirms rather than impairs the obligation of the contract.[5] The contract clause does not prevent a State from passing legislation validating certain contracts which the State courts had previously held to be invalid.[6] A subsequent law permitting a corporation irregularly or invalidly organized to become a corporation de jure impairs no contract obligation.[6] A law which removes the taint of illegality from a usurious contract, thereby rendering it enforceable, is valid.[7]

[1] Satterlee *v.* Matthewson, 2 Pet. 380 [1829]; Wilkinson *v.* Leland, 2 Pet. 627 [1829]; St. Joseph Twp. *v.* Rogers, 16 Wall. 641 [1873]; New Orleans *v.* Clark, 95 U. S. 644 [1877]; Gross *v.* United States Mortg. Co., 108 U. S. 477 [1883]. *See also* McNair *v.* Knott, 302 U. S. 369 [1937].

[2] Carpenter *v.* Dexter, 8 Wall. 513 [1869].

[3] Randall *v.* Krieger, 23 Wall. 137 [1875]; Watson *v.* Mercer, 8 Pet. 88 [1834].

[4] National Surety Co. *v.* Architectural Decorating Co., 226 U. S. 376 [1912]; Ewell *v.* Daggs, 108 U. S. 143 [1883].

[5] Satterlee *v.* Matthewson, 2 Pet. 380 [1829].

[6] Deitch *v.* Staub, 115 Fed. 309 [1902].

[7] Ewell *v.* Daggs, 108 U. S. 143, 151 [1883].

Where a State repeals a law which had denied to insurance companies the defence of suicide to a suit on the policy, a provision in a policy issued prior to such repeal, relieving the company from liability in cases of suicide, becomes effective; but a second act again denying to those companies said defence impairs no contract obligation, since all that the latter act does is to reinstate the parties in their original rights prior to the repealing act (which rights had not been affected by anything done during the interval between the two statutes).[1] However, where a contract is valid, the State cannot enact legislation restoring the parties to the *status quo ante* without their consent. For example, property cannot be taken from the grantee and restored to the grantor without impairing the obligation of contracts.[2]

[1] Knights Templars & M. L. Indemnity Co., *v.* Jarman, 187 U. S. 197 [1902].

[2] Tippecanoe County *v.* Lucas, 93 U. S. 108 [1876].

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CHANGES IN THE REMEDY.

Generally.

The means for the enforcement of a contract which exist at the time of its creation form a part of its obligation which a State cannot substantially destroy without violating the contract clause of the Federal Constitution.[1] The laws which exist at the time and place of the making of a contract and where it is to be performed enter into and form a part of it. This embraces those laws which affect its validity, construction, discharge, and enforcement.[2] In fact, the Supreme Court looks to the laws in force at making of contract to determine the obligation of the contract.[3] For example, the remedies for the collection of a debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to creditors.[4] A statute taking away the judicial power to issue a writ of mandamus to compel a city to levy taxes to satisfy valid judgments has been held invalid.[5] A subsequent law substantially impairing a statutory remedy which existed when the contract was entered into may amount to an impairment of the contract.[6]

[1] Gunn *v.* Barry, 15 Wall. 610 [1873]. *See also* United States ex rel. Von Hoffman *v.* Quincy, 4 Wall. 535 [1867]; Louisiana *v.* St. Martin's Parish, 111 U. S. 716 [1884]; White *v.* Hart, 13 Wall. 646 [1872]; Barnitz *v.* Beverly, 163 U. S. 122 [1896]; McGahey *v.* Virginia, 135 U. S. 662, 693 [1890]; Edwards *v.* Kearzey, 96 U. S. 607 [1878]; Walker *v.* Whitehead, 16 Wall. 314 [1873]; Butz *v.* Muscatine, 8 Wall. 583 [1869]; Planters' Bank *v.* Sharp, 6 How. 330 [1848].

[2] Walker *v.* Whitehead, 16 Wall. 314 [1873].

[3] W. B. Worthen Co. *v.* Kavanaugh, 295 U. S. 56 [1935].

[4] Rees *v.* Watertown, 19 Wall. 107 [1874].

[5] Louisiana ex rel. Ranger *v.* New Orleans, 102 U. S. 203 [1880].

[6] Butz *v.* Muscatine, 8 Wall. 575 [1870].

While in this general sense the remedial laws in force at the time the contract is made enter into its obligation, the parties have no vested right in the particular remedies or modes of procedure then existing.[1] The contract clause of the Federal Constitution is qualified by the control which the State retains over remedial processes.[2] It is to be assumed that the parties made their contracts with reference to the existence of the State's power to change mere methods of procedure.[3] A change in the remedy to enforce a contract may be made without impairing its obligation [4] (a remedial statute being one relating to the course and mode of procedure to enforce or defend a substantive right[5]).

[1] Oshkosh Waterworks *v.* Oshkosh, 187 U. S. 437 [1903]. *Cf.* Memphis *v.* United States, 97 U. S. 293 [1878].

[2] Home Building and Loan Assoc. *v.* Blaisdell, 290 U. S. 398 [1934].

[3] Henley *v.* Meyers, 215 U. S. 373 [1910].

[4] Wilson *v.* Standefer, 184 U. S. 415 [1902]; Pittsburg Steel Co. *v.* Baltimore Equitable Society, 226 U. S. 455 [1913]; Bernheimer *v.* Converse, 206 U. S. 516 [1907].

[5] Ettor *v.* Tacoma, 228 U. S. 148 [1913].

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There is a distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation.[1] In placing the obligation of contracts under the protection of the Federal Constitution the framers looked to the essentials of the contract more than to the forms and modes of proceedings in their enforcement; the States may prescribe and shape the remedy to enforce the obligation so long as the obligation is not impaired.[2] Remedies for the enforcement of rights are always subject to the will of the legislature.[3] The State may regulate at pleasure the modes of proceeding in its courts, in relation to past as well as future contracts;[4] and the judicial tribunal (where it is vested with full power to regulate its practice[5]) may change the mere form of a remedy provided that no substantial rights secured by the contract are thereby impaired[6] or injuriously affected.[7] Even where the obligation is of statutory origin, the remedy and mode of procedure may be changed.[8]

[1] Sturges *v.* Crowninshield, 4 Wheat. 122, 200 [1819]. *See also* United States ex. rel. Von Hoffman *v.* Quincy, 4 Wall. 535, 553 [1867]; Home Building and Loan Assoc. *v.* Blaisdell, 290 U. S. 398, 430 [1934].

[2] McCracken *v.* Hayward, 2 How. 618 [1844].

[3] Bank of Columbia *v.* Okely, 4 Wheat. 235 [1819]. *See also* Sturges *v.* Crowninshield, 4 Wheat. 122 [1819]; Hill *v.* Merchants' Mut. Ins. Co., 134 U. S. 515 [1890].

[4] Bronson *v.* Kinzie, 1 How. 311 [1843].

[5] Fullerton *v.* Bank of United States, 1 Pet. 604 [1829].

[6] United States ex rel. Von Hoffman *v.* Quincy, 4 Wall. 535 [1867]. *See also* Walker *v.* Whitehead, 16 Wall. 314 [1873]; South Carolina *v.* Gaillard, 101 U. S. 433 [1880].

[7] Cairo and F. R. Co. *v.* Hecht, 95 U. S. 168 [1877].

[8] National Surety Co. *v.* Architectural Decorating Co., 226 U. S. 276 [1912].

A State legislature may modify existing remedies and even substitute others without impairing contract obligations if a sufficient remedy be left or another sufficient one be provided.[1] The mere showing that the new remedy is less convenient or that it will render the recovery of debts more tardy and difficult will not invalidate remedial legislation.[2] A statute extending the period of redemption from foreclosure sales during an economic emergency impairs no contract obligations, provided the statute in question safeguards the interests of the mortgagee-purchaser by conditions imposed on the extension.[3] But a statute extending the time for various steps in a proceeding to enforce payment from 2 months to more than 2 years with no right to possession of premises in the interim impairs the obligation of contract.[4] Debtor stay laws, inasmuch as they change the terms of the contract by postponing the time of payment, are void.[5]

[1] Memphis *v.* United States, 97 U. S. 293 [1879]. *See also* Tennessee *v.* Sneed, 96 U. S. 69 [1877]; Antoni *v.* Greenhow, 107 U. S. 769 [1883];

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Waggoner *v.* Flack, 188 U. S. 595 [1903]; New Orleans & L. R. Co. *v.* Louisiana, 157 U. S. 219 [1895].

[2] Bronson *v.* Kinzie, 1 How. 316 [1843].

[3] Home Building and Loan Assoc. *v.* Blaisdell, 290 U. S. 398, 431 [1934].

[4] W. B. Worthen Co. *v.* Kavanaugh, 295 U. S. 56 [1935]. *Cf.* to the same effect Green *v.* Biddle, 8 Wheat. 1 [1823]; Bronson *v.* Kinzie, 1. How. 311 [1843]; McCracken *v.* Hayward, 2 How. 608 [1845]; Gantly *v.* Ewing, 3 How. 707 [1845]; Howard *v.* Bugbee, 24 How. 461 [1861]; Louisiana ex rel. Ranger *v.* New Orleans, 102 U. S. 203, 207 [1880]; Barnitz *v.* Beverly, 163 U. S. 118 [1896]; Kring *v.* Missouri, 107 U. S. 221 [1883].

[5] Edwards *v.* Kearzey, 96 U. S. 601 [1878]. *See also* Daniels *v.* Tearney, 102 U. S. 419 [1880].

The contract clause preserves only such remedies as are needed to enforce the contract.[1] It has been repeatedly held that a State may abolish imprisonment for debt as a remedy for the enforcement of a contract of indebtedness.[2] The right to imprison constitutes no part of the contract, and a discharge of the person of the debtor from imprisonment does not impair the obligation of the contract.[3] But if the substituted remedy is incomplete, if it fails to secure the substantial rights of the parties, the contract is thereby impaired.[4] Any law which so affects the remedy as to substantially impair and lessen the value of the contract is unconstitutional.[5] Furthermore, a State cannot under the guise of changing the remedy impair the obligation itself.[6] If the remedy is so impaired as to affect the obligation, the change is invalid.[7] A sufficient and efficacious remedy, not so embarrassed with conditions as to seriously impair its value, must be reserved;[8] or a substantial equivalent must be provided.[9]

[1] Memphis, & C. R. Co. *v.* Tennessee, 101 U. S. 337 [1880].

[2] Penniman's Case, 103 U. S. 714 [1881]. *See also* Sturges *v.* Crowninshield, 4 Wheat. 122 [1819]; United States ex rel. Von Hoffman *v.* Quincy, 4 Wall. 553 [1867]; Mason *v.* Haile, 12 Wheat. 370 [1827].

[3] Beers *v.* Haughton, 9 Pet. 329 [1835].

[4] Brine *v.* Hartford F. Ins. Co., 96 U. S. 627 [1878]. *See also* Greene *v.* Biddle, 8 Wheat. 1 [1823].

[5] Bronson *v.* Kinzie, 1 How. 311 [1843]. *See also* Edwards *v.* Kearzey, 96 U. S. 595 [1878]; Seibert *v.* Lewis, 122 U. S. 284 [1887]; Planters' Bank *v.* Sharp, 6 How. 301 [1848]; Hawthorne *v.* Calef, 2 Wall. 10 [1865].

[6] Planters' Bank *v.* Sharp, 6 How. 301 [1848]. *See also* Bronson *v.* Kinzie, 1 How. 411 [1843]; Gantly *v.* Ewing, 3 How. 707 [1845].

[7] Tennessee *v.* Sneed, 96 U. S. 69 [1877].

[8] Penniman's Case, 103 U. S. 714 [1881].

[9] Mobile *v.* Watson, 116 U. S. 289 [1886].

The legislature may modify, limit, or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right.[1] The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the

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enforcement of the obligation remains or is substituted for the one taken away.[2]

[1] Worthen Co. *v.* Kavanaugh, 295 U. S. 56 [1935]; Richmond Corporation *v.* Wachavia Bank, 300 U. S. 124, 128 [1937].
[2] Home Bldg. and Loan Assoc. *v.* Blaisdell, 290 U. S. 398, 434 [1934].

A State is free to regulate the procedure in its courts, even with reference to contracts already made, but the remedy left must not be reduced to a shadow.[1] The remedy which is protected by the contract clause is something more than the privilege of having a claim adjudicated; mere judicial inquiry into the rights of the parties is not enough. There must be in addition the power to enforce the results of such judicial inquiry.[2]

[1] Worthen Co. *v.* Kavanaugh, 295 U. S. 56 [1935].
[2] Memphis & C. R. Co. *v.* Tennessee, 101 U. S. 339 [1880].

A statute giving an additional or more efficacious remedy, if it impairs no substantial right given by the contract, is valid.[1] For instance, a statute providing for collection against a stockholder personally of assessments to restore impaired bank stock by a special statutory proceeding, where such stockholder was already liable in a common law action of debt, impairs no obligation of contract.[2] There is a broad distinction between laws impairing contract obligations and those which undertake to give a more efficient remedy to enforce a contract already made.[3] For example, a State may authorize foreign corporations to acquire title to realty within the State as security for money previously lent, even though the public policy of the State at the time of the loan forbade such a corporation from taking a mortgage upon real property in that State to secure the loan of money.[4]

[1] New Orleans & L. R. Co. *v.* Louisiana, 157 U. S. 224 [1895].
[2] Shriver *v.* Woodbine Savings Bank, 285 U. S. 467 [1932].
[3] Bernheimer *v.* Converse, 206 U. S. 516 [1907].
[4] Gross *v.* U. S. Mortgage Co., 108 U. S. 488 [1883].

Changes in the Rules of Evidence.

The constitutional power of the legislature to change or modify the rules of evidence is well settled.[1] Mere rules of evidence do not form a part of contracts entered into while they are in force; it is competent for the legislature to change such rules even as to existing causes. For example, a legislature may make a tax deed previously issued *prima facie* evidence of the regularity of proceedings and validity of purchaser's title, but could not make it conclusive evidence of title.[2]

[1] Per Washington, J., Ogden *v.* Saunders, 12 Wheat. 213 [1827].
[2] Marx *v.* Hanthorn, 148 U. S. 172 [1893].

A statute requiring the Secretary of State to be notified of subsequent transfers of all corporate stock, as a condition to its legal or

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binding transfer, does not impair the obligation of the stockholder's contract by changing the law as to the legal evidence of transfer of stock from that existing when he purchased it.[1] However, a subsequent Virginia law requiring the production of a bond in order to establish the genuineness of coupons, and excluding expert testimony to prove their genuineness, impaired contract obligations.[2]

[1] Henley *v.* Myers, 215 U. S. 373 [1910].
[2] McGahey *v.* Virginia, 135 U. S. 662 [1890].

Changes in Proceedings and in Forms of Action.

The legislature may change forms of action or modes of remedy at its discretion provided it leaves an adequate means of enforcing a right.[1] For example, a State statute authorizing a joint action against the indorsers of a promissory note, but securing to each every privilege of pleading or defense formerly available when severally sued, impairs no contract obligation even as to notes indorsed prior to the enactment of said law.[2] An Alabama statute allowing a bank to sue in its own name on notes given to the cashier of the bank affects the remedy only, and does not impair the obligation of the contract in respect to notes made before the act; it merely carries out the contract according to its original intendment.[3] A statute making the liabilities of stockholders in an insolvent bank an asset of the bank to be collected by the receiver, instead of, as formerly, a direct liability to creditors themselves, does not infringe the rights of the stockholders.[4]

[1] Terry *v.* Anderson, 95 U. S. 628 [1877]; McCullough *v.* Virginia, 172 U. S. 102 [1898].
[2] Fullerton *v.* Bank of United States, 1 Pet. 604 [1829].
[3] Crawford *v.* Branch Bank of Alabama, 7 How. 279 [1849].
[4] Stockholders of the Peoples Banking Co. *v.* Sterling, 300 U. S. 175 [1937].

A statute giving a municipality an additional remedy of mandamus for the more summary enforcement of contracts relating to the pavement and improvement of its streets impairs no contract obligations.[1] Conversely, a statute taking away the right of a taxpayer to compel a tax collector, by mandamus, to receive State bank notes in payment of taxes impairs no contract obligation when the law gives him the right to pay under protest and to sue within 30 days for recovery of sums paid, said judgment to have preference to other claims on the treasury.[2] But one who has tendered tax-receivable coupons on payment of taxes stands upon the same footing as though he had tendered gold coin, and a statute modifying the taxpayer's remedy by mandamus, authorizing distraint on his property

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to pay the tax and denying to the taxpayer the right to sue the collecting officer in trespass for levying upon the property, is invalid.[3]

[1] New Orleans & L. R. Co. v. Louisiana, 157 U. S. 219 [1895].
[2] Tennessee v. Sneed, 96 U. S. 69 [1877]. *Cf.* South Carolina v. Gaillard, 101 U. S. 433 [1880].
[3] Poindexter v. Greenhow, 114 U. S. 270 [1885].

A State may make a civil cause of action a matter of equitable cognizance.[1] But a State cannot provide a remedy in *quasi* contract on an express contract. For example, statutes authorizing juries, in suits on Civil War contracts, to disregard the express values stipulated in the contract and to determine the fair value thereof in present currency were invalid.[2]

[1] Bank of Kentucky v. Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.), 180, 223 [1846].
[2] Wilmington & W. R. Co. v. King, 91 U. S. 3 [1875]; Effinger v. Kenney, 115 U. S. 566 [1885].

A change in the place and mode of trial is valid.[1] A State may grant new trials, and establish new tribunals of review to detect and annul fraudulent grants or judgments without impairing contract obligations.[2] It may also prescribe a new mode of service of process, even as to a railroad company whose charter provided for a different manner of service.[3]

[1] Antoni v. Greenhow, 107 U. S. 778 [1883].
[2] League v. De Young, 11 How. 185 [1851].
[3] Cairo & F. R. Co. v. Hecht, 95 U. S. 168 [1877].

A State statute requiring a claim against a municipality to be presented to the common council and to be disallowed before the city can be subjected to a suit thereon, and making the disallowance conclusive unless an appeal be taken to the circuit court within a prescribed time, does not impair the obligation of contracts entered into prior to its enactment.[1]

[1] Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 443 [1903].

Change in Statute of Limitations.

The passage of a new statute of limitations, allowing a shorter time for the bringing of actions than existed before, even as applied to actions which had accrued, does not necessarily impair the obligation of contract, provided the time so allowed is reasonable.[1]

[1] In re Brown, 135 U. S. 662, 705 [1890]. *See also* Koshkonong v. Burton, 104 U. S. 675 [1882]; Sturges v. Crowninshield, 4 Wheat. 122 [1819]; Gilfillan v. Union Canal Co., 109 U. S. 401 [1883]. *See also* Hawkins v. Barney, 5 Pet. 457 [1831]; Wheeler v. Jackson, 137 U. S. 245 [1890]; Turner v. New York, 168 U. S. 90 [1897]; Canadian Northern R. Co. v. Eggen, 252 U. S. 553 [1920].

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Statutes of limitation which are not so unreasonable as to amount to a denial of a right under the contract do not impair its obligation.[1] What is a reasonable time will depend on the nature of the case;[2] a law operating as an absolute and immediate bar to an action under the former statute is, of course, invalid.[3] In establishing a statutory period in which to bring actions to recover land, for example, a reasonable period will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which led to the enactment.[4]

[1] McCracken *v.* Hayward, 2 How. 608 [1844]. *See also* Phalen *v.* Virginia, 8 How. 163 [1850]; Christmas *v.* Russell, 5 Wall. 290 [1866].
[2] *Cf.* Turner *v.* New York, 168 U. S. 90 [1897].
[3] Sohn *v.* Waterson, 17 Wall. 599 [1873].
[4] Hart *v.* Lamphire, 3 Pet. 280 [1830].

More specifically, a statute prescribing a 6 years' limitation for suits to annul State patents to land is valid, even when used to defeat a suit by an assignee who claims under a grant antedating such patents.[1] A statute requiring a purchaser under a tax deed to take actual possession or bring suit for possession within 5 years does not violate the contract rights of the purchaser at tax sale.[2] A Georgia statute, allowing more than 9 months in which to sue upon a cause of action which had already been running for nearly 4 years, was held not so short or unreasonable as to make it unconstitutional.[3] A limitation of 6 months after the passage of a statute within which actions for lands sold for taxes may be brought is not repugnant to the contract clause.[4] In fact, bondholders have been required to signify their dissent from a compromise of claims within 3 months.[5]

[1] Atchafalaya Land Co. *v.* Williams (F. B.) Cypress Co., 258 U. S. 190 [1922].
[2] Barrett *v.* Holmes, 102 U. S. 651 [1881]. *Cf.* Wilson *v.* Iseminger, 185 U. S. 62 [1902].
[3] Terry *v.* Anderson, 95 U. S. 628 [1877]. *See also* Mills *v.* Scott, 99 U. S. 27 [1879]; Vance *v.* Vance, 108 U. S. 514 [1883].
[4] Turner *v.* New York, 168 U. S. 90 [1897]. *Cf.* Wheeler *v.* Jackson, 137 U. S. 245 [1890].
[5] Gilfillan *v.* Union Canal Co., 109 U. S. 406 [1883].

If the period fixed by the statute is unreasonably short, and designed to defeat the obligation of pre-existing contracts, it is void.[1] By way of illustration, a Virginia law requiring the holders of coupons detached from State bonds to commence suit within 1 year to ascertain their genuineness is unreasonably short, when the State had already refused to redeem the coupons in money and would only accept them in payment of taxes.[2]

[1] Edwards *v.* Kearzey, 96 U. S. 595 [1878].
[2] McGahey *v.* Virginia, 135 U. S. 705 [1890].

On the other hand, a State may extend the time within which suits may be brought in its own courts, and it may entertain in its courts a suit which is barred in the jurisdiction where the right was

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created. When, however, the parties have expressly agreed in their contract that any claim for loss must be brought within 1 year, a statute which invalidates the agreement and directs enforcement of the contract after the time has expired increases their obligation and imposes a burden not contracted for.[1]

[1] Home Ins. Co. v. Dick, 281 U. S. 397, 409 [1930].

Changes in Exemption Laws.

State statutes limiting the right of the creditor to enforce his claims against property of his debtor in existence at the time the contract is made, do not, of course, impair the obligation of the contract.[1] There being no universal principle of law that every part of the debtor's property is liable to be seized for payment of a judgment against him, the validity of a subsequent exemption law turns on the question whether there remains a substantial and reasonable mode of enforcing the judgment.[2] Statutes exempting from sale under execution the necessary implements of agriculture, the tools of a mechanic, and necessary household furniture are considered in every civilized community as properly belonging to the remedy, to be exercised by every sovereignty according to its own view of policy and humanity.[3] A statute exempting stock purchased by a municipality (out of funds from the sale of its waterworks) from liability for its debts, just as the waterworks property was exempt, does not impair the obligation of existing contracts.[4] A constitutional provision of a State forbidding the sale of property to satisfy judgments founded on torts committed during the Rebellion in accordance with the usages of civilized warfare does not violate the due process or contract clauses of the Constitution.[5]

[1] Denny v. Bennett, 128 U. S. 489 [1888]. *See also* Bronson v. Kinzie, 1 How. 321 [1843].
[2] Per Hunt, J. in Edwards v. Kearzey, 96 U. S. 595 [1878].
[3] United States ex rel. Von Hoffman v. Quincy, 4 Wall. 535 [1867].
[4] New Orleans v. Morris, 105 U. S. 600 [1882].
[5] Freeland v. Williams, 131 U. S. 405 [1889].

But a constitutional provision and statute of a State which largely increase the amount of exempted property is void as to judgments previously recovered.[1] A provision exempting homesteads not exceeding $1,000 in value is invalid as to prior contracts.[2] A statute exempting the proceeds of an insurance policy, payable to the estate of the insured, from liability for his debts is invalid as to antecedent obligations,[3] notwithstanding a legislative declaration of emergency which contains no limitation as to time, amount, circumstances, or need.[4]

[1] Gunn v. Barry, 15 Wall. 610 [1873].
[2] Edwards v. Kearzey, 96 U. S. 595 [1878]. *Cf.* Kener v. La Grange Mills, 231 U. S. 215 [1914].
[3] Bank of Minden v. Clement, 256 U. S. 126 [1921].
[4] Worthen (W. B.) Co. v. Thomas, 292 U. S. 426 [1934].

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Enactment of Insolvency Laws.*

A State insolvency law attempting to discharge a contract made previously is void as impairing the obligation of contract.[1] A statute releasing future acquisitions of a debtor from liability for debts previously contracted deprives creditors of a fund based upon the debtor's industry, talents, and integrity, to which they have a right.[2] A State insolvency law, so far as it authorizes a discharge to be pleaded in bar of a contract made in another State, even though passed before the contract was made, is unconstitutional.[3] A State cannot discharge one of its own citizens from his contracts with citizens of other States, though made after the passage of the law, unless they voluntarily become parties to proceedings in insolvency.[4]

[1] Sturges *v.* Crowninshield, 4 Wheat. 122 [1819]. *See also* Farmers & M. Bank *v.* Smith, 6 Wheat. 131 [1821]; Ogden *v.* Saunders, 12 Wheat. 213 [1827]; Planter's Bank *v.* Sharp, 6 How. 301 [1848].

[2] Sturges *v.* Crowninshield, 4 Wheat. 122 [1819].

[3] McMillan *v.* McNeill, 4 Wheat. 209 [1819].

[4] Brown *v.* Smart, 145 U. S. 457 [1892]. *See also* Baldwin *v.* Hale, 1 Wall. 223 [1864]; Ogden *v.* Saunders, 12 Wheat. 358 [1827]; Gilman *v.* Lockwood, 4 Wall. 409 [1867]; Denny *v.* Bennett, 128 U. S. 493 [1888].

A State bankruptcy or insolvency law which discharges both the person of the debtor and his future acquisitions of property is perfectly valid as to subsequently contracted debts.[1] A person claiming property under a preferential assignment from an insolvent cannot complain of a deprivation thereof, when the law in force at the time declared such assignments to be void.[2]

[1] Boyle *v.* Zacharie, 6 Pet. 348 [1832]. *See also* Ogden *v.* Saunders, 12 Wheat. 213 [1827]; Baldwin *v.* Hale, 1 Wall. 223 [1863]; Cook *v.* Moffat, 5 How. 309 [1847]; Boyle *v.* Zacharie, 6 Pet. 635 [1832].

[2] Brown *v.* Smart, 145 U. S. 454 [1892].

A statute changing the method of liquidation of insolvent banks, authorizing their reorganization and reopening under carefully prescribed conditions, does not impair the contract rights of a few nonconsenting creditors. And an error of judgment on the compromise of liabilities is not an unconstitutional impairment of their contract.[1]

[1] Doty *v.* Love, 295 U. S. 64 [1935].

Changes in the Laws Relating to Mortgages.

The statutory remedy for the foreclosure of mortgages, existing at the time a mortgage is executed, becomes a part of the contract; any subsequent change which substantially affects the rights of the mortgagee impairs his contract.[1] For example, a subsequent statute preventing foreclosure sales unless the premises bring two-thirds of

* *See*, p. 222 for provisions relating to bankruptcy.

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their appraised value is invalid when applied to antecedent mortgage contracts.[2] A change in the remedy pressed so far as to cut down the security of a mortgagee without moderation or reason is invalid. A statute encumbering the various steps requisite to foreclosure with procedural delays which inevitably require more than 2 years to conclude, without adequate protection of the mortgagee's interests during the interval, impairs his rights under the contract.[3]

[1] Clark v. Rayburn, 8 Wall. 318 [1869].
[2] Bronson v. Kinzie, 1 How. 311 [1843]. *Cf.* McCracken v. Hayward, 2 How. 608 [1844]; Gantly v. Ewing, 3 How. 707 [1845].
[3] Worthen (W. B.) Co. v. Kavanaugh, 295 U. S. 56 [1935].

A statute affording the lienholder an additional remedy is, of course, not invalid.[1] Nor is a statute which requires the mortgagee to set forth by affidavit facts relating to the foreclosure unconstitutional; compliance with these conditions involves no delay, no difficulty, and no impairment of substantial remedies.[2]

[1] Red River Valley Nat. Bank v. Craig, 181 U. S. 548 [1901].
[2] Conley v. Barton, 260 U. S. 677 [1923]; but *cf.* Bradley v. Lightcap, 195 U. S. 1 [1904]. *Cf.* Honeyman v. Hanan, 302 U. S. 375 [1937].

A statute which authorizes the mortgagor to redeem property sold under foreclosure proceedings, where no right of redemption previously existed,[1] or a statute extending the period beyond that formerly allowed is invalid when applied to foreclosure sales executed before its passage.[2] Equally invalid is a retroactive statute authorizing a judgment creditor of the mortgagor to redeem property at any time within 2 years after a sale under the mortgage.[3] However, an independent purchaser at a foreclosure sale cannot complain of a change in the State laws respecting foreclosures and redemptions which were passed between the time the mortgage was made and the property was sold.[4] A law reducing the rate of interest which the mortgagor must pay in order to redeem his property is valid.[5]

[1] Bronson v. Kinzie, 1 How. 311 [1843].
[2] Barnitz v. Beverly, 163 U. S. 118 [1896].
[3] Howard v. Bugbee, 24 How. 461 [1861].
[4] Hooker v. Burr, 194 U. S. 415 [1904].
[5] Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51 [1883].

Recording Acts.

It is within the undoubted power of a State to pass recording acts, protecting the title of the first grantee who records his deed. Though the effect of such a law is to render a prior deed void against a subsequent purchaser, it is not a law impairing the obligation of the contract.[1] A statute requiring the owner of a tacit or statutory mortgage to record such fact for the protection of innocent persons

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dealing with the obligor is valid.[2] Similarly a State may require judgments on municipal bonds to be registered before payment.[3]

[1] Jackson *v.* Lamphire, 3 Pet. 289 [1830]. *See also* Phalen *v.* Virginia, 8 How. 167 [1850].
[2] Vance *v.* Vance, 108 U. S. 518 [1883].
[3] Louisiana ex rel. Ranger *v.* New Orleans, 102 U. S. 204 [1880].

Determination of Question of Impairment.

When the jurisdiction of the United States Supreme Court is invoked because of the asserted impairment of contract rights arising from the effect given to subsequent legislation, it is the duty of the Court to exercise independent judgment as to the nature and scope of the contract.[1] While the Supreme Court generally accepts the construction placed by the courts of a State upon its statutes and constitution, there is an exception to this rule in the matter of contracts alleged to have been impaired.[2] Where a State constitution necessarily becomes a part of a contract made by a State legislature which is said to be impaired by subsequent legislation, the Supreme Court will determine for itself the nature and extent of the constitutional limitation of the contract independently of the construction placed upon it by the State courts.[3] The Supreme Court is not bound by the decision of a State court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but when a statute is claimed to create a contractual right the Supreme Court gives weight to the construction of the statute by the courts of the State.[4]

[1] Board of Liquidation *v.* Louisiana, 179 U. S. 622 [1901].
[2] McCullough *v.* Virginia, 172 U. S. 109 [1898]; Piqua Branch of State Bank *v.* Knoop, 16 How. 391 [1854]; Wright *v.* Nagle, 101 U. S. 791 [1880].
[3] Northwestern University *v.* Illinois ex rel. Miller, 99 U. S. 323 [1879].
[4] Phelps *v.* Board of Education, 300 U. S. 319 [1937]; Freeport Water Co. *v.* Freeport, 180 U. S. 587, 595 [1901]; Tampa Waterworks *v.* Tampa, 199 U. S. 241 [1905]; Milwaukee Elec. R. & Light Co. *v.* Railroad Commission, 238 U. S. 174, 184 [1915]; Seton Hall College *v.* South Orange, 242 U. S. 100, 103 [1916]; Milwaukee Elec. R. & Light Co. *v.* Wisconsin, 252 U. S. 100 [1920]; Coombes *v.* Getz, 285 U. S. 434, 441 [1932]; Dodge *v.* Board of Education of Chicago, 302 U. S. 74 [1937]; Hale *v.* Iowa State Board of Assessment, 302 U. S. 95 [1937].

It is the duty of a Federal court to determine for itself the extent, construction, and validity of the alleged contract, and also to determine whether as so construed it has been impaired by any subsequent legislation to which effect has been given by the State court.[1] When the Supreme Court is called upon in the exercise of its jurisdiction to decide whether State legislation impairs the obligation of a contract, the Supreme Court exercises its independent judgment upon these questions: (1) Was there a contract? (2) If so, what obligation arose from it? (3) Has that obligation been impaired by subsequent

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legislation?[2] The Supreme Court can examine the alleged contract to determine the obligations which inhere in it.[3] The Court will determine for itself the meaning and effect of the contract,[4] and whether the obligation has been impaired.[5]

[1] Houston & T. C. R. Co. v. Texas, 177 U. S. 77 [1900]; Seton Hall College v. South Orange, 242 U. S. 100 [1916]; Atlantic Coast Line R. Co. v. Goldsborough, 232 U. S. 548 [1914]; Great Northern R. Co. v. Minnesota, 216 U. S. 206 [1910]; Civil Rights Cases, 109 U. S. 12 [1883]; Woodruff v. Mississippi, 162 U. S. 291 [1896].

[2] Detroit United R. Co. v. Michigan, 242 U. S. 238 [1916]; Georgia R. & Power Co. v. Decatur, 262 U. S. 432 [1923].

[3] Schenebeck v. McCrary et al., 298 U. S. 36 [1936]; Hoadley's Administrator v. San Francisco, 124 U. S. 639 [1888].

[4] Violet Trapping Co. v. Grace, 297 U. S. 119 [1936].

[5] United States Mortg. Co. v. Matthews, 293 U. S. 232 [1934]; Ingraham v. Hanson, 297 U. S. 378 [1936].

Nevertheless, when the contract, which is alleged to have been impaired, arises from a State statute, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with State courts, if the question is balanced with doubt.[1]

[1] Board of Liquidation v. Louisiana, 179 U. S. 622 [1901].

In determining the meaning of the contract and whether its obligation has been impaired by State legislation, the Supreme Court must reach its conclusion independently of the judgment of the State court construing the State legislation involved, though the State's judgment is very persuasive as to the meaning of the statute.[1]

[1] Larson v. South Dakota, 278 U. S. 429 [1929]. *See also* Moore-Mansfield Constr. Co. v. Electrical Installation Co., 234 U. S. 619, 625 [1914].

The jurisdiction of the Supreme Court under the contract clause does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the State court of last resort, and this irrespective of the process of reasoning by which the decision is reached or the precise extent to which reliance is placed upon subsequent legislation.[1] Where a State court has given effect to a subsequent law, the Supreme Court decides whether the effect so given by the State court violates the Federal Constitution.[2] In deciding whether effect has been given to a later statute, the Supreme Court is not limited to the mere consideration of the language of the opinion of the State court.[3]

[1] Detroit United R. Co. v. Michigan, 242 U. S. 238 [1916].

[2] Northern Cent. R. Co. v. Maryland, 187 U. S. 266 [1902].

[3] Louisiana R. & Nav. Co. v. Behrman, 235 U. S. 164 [1914].

Grant any Title of Nobility.

There have been no cases of importance decided under this portion of article 1, section 10, clause 1.

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Article I. Sec. 10. Powers denied to the States. Cl. 2. Not to lay imposts or duties.

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 it's 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 Controul of the Congress.*

Purpose of Clause.

The object of the prohibition is to protect both vessel and cargo from State taxation while in transit, and it cannot be evaded and the same result effected by calling the tax one on the passenger or on the master.[1] The purpose and validity of a statute must be determined by its natural and reasonable effect.[2] The prohibition is general and reaches a tax on the sale of the article imported [3] and on the occupation of the importer.[4]

[1] Smith v. Turner (Passenger Cases), 7 How. 283 [1849]; Henderson v. New York, 92 U. S. 259 [1876].
[2] Henderson v. New York, 92 U. S. 259, 268 [1876].
[3] Low v. Austin, 13 Wall. 29 [1872].
[4] Brown v. Maryland, 12 Wheat. 419 [1827].

The prohibition of this clause is applicable to property only, and not to passengers arriving in the United States [1] nor to the remains of deceased persons being shipped out.[2]

[1] New York v. Compagnie Général Transatlantique, 107 U. S. 59, 61 [1883]; Crandall v. Nevada, 6 Wall. 35, 40 [1868].
[2] In re Wong Yung Quy, 2 Fed. 624 [1880].

Definitions.

"Duties" are defined to be things due and recoverable by law. Applied in its widest signification, the term is hardly less comprehensive than "taxes", and in its most restricted meaning as to customs it is almost the synonym of "imposts".[1] The prohibition contained in this clause is therefore a limitation on the power of the State to levy taxes.[2] The words "imports" and "exports" apply only to articles imported from or exported to foreign countries,[3] and do not embrace goods brought from other States; and a tax on such goods is not invalidated by this clause.[4] Yet when such imposts or duties are laid on imports or exports from one State to another, it cannot be doubted that such an imposition would be a regulation

* *See also* p. 366.

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of commerce among the States, and, therefore, void as an invasion of the exclusive power of Congress.[5]

[1] Pacific Ins. Co. *v.* Soule, 7 Wall. 433, 445 [1869].

[2] Gibbons *v.* Ogden, 9 Wheat. 1, 201 [1824]; Hamilton Mfg. Co. *v.* Massachusetts, 6 Wall. 632, 639 [1868].

[3] Patapsco Guano Co. *v.* Board of Agriculture, 171 U. S. 345, 350 [1898]. *See also* Pittsburgh & S. Coal Co. *v.* Louisiana, 156 U. S. 590 [1895].

[4] Woodruff *v.* Parham, 8 Wall. 123 [1869]; Philadelphia & R. R. Co. *v.* Pennsylvania (State Tax on Railway Gross Receipts), 15 Wall. 284 [1873]; American Steel & Wire Co. *v.* Speed, 192 U. S. 500 [1904]. In arriving at this conclusion the court repudiated the dictum of Chief Justice Marshall in Brown *v.* Maryland that the "tax on import" clause applied equally to importations from a sister State.

[5] Coe *v.* Errol, 116 U. S. 517, 526 [1886].

Where goods in the lower harbor of Mobile were bought so as to remain at the risk of the vendor, and were entered and the duty secured before trans-shipment, they were held to have been imported before purchase, and a tax upon the purchaser did not constitute a tax on imports;[1] but a statute taxing imports as imports on their way to become incorporated with the general mass of property is unconstitutional.[2]

[1] Waring *v.* Mobile, 8 Wall. 110, 118 [1869].

[2] Brown *v.* Maryland, 12 Wheat. 419 [1827]. *See also* Thurlow *v.* Massachusetts (Licenses Cases), 5 How. 504 [1847]; Hinson *v.* Lott, 8 Wall. 148 [1869]; Philadelphia & R. R. Co. *v.* Pennsylvania (Case of State Freight Tax), 15 Wall. 232 [1873]; Guy *v.* Baltimore, 100 U. S. 434 [1880]; Brown *v.* Houston, 114 U. S. 622, 628 [1885]; Pittsburgh & S. Coal Co. *v.* Louisiana, 156 U. S. 590, 600 [1895]; New Mexico ex rel. McLean (E. J.) & Co. *v.* Denver & R. G. R. Co., 203 U. S. 38, 49 [1906].

The Original Package.*

The original package doctrine had its inception in the case of Brown *v.* Maryland,[1] where an act of the State legislature which prescribed a license tax of $50 on all importers of foreign goods was held to constitute a duty on imports (as well as an invalid regulation under the commerce clause) and therefore to be in violation of the Constitution. The court said further: "* * * when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the Constitution."

[1] 12 Wheat. 419, 441 [1827].

A box, case, or bale in which separate parcels or bundles of imported goods have been placed by the foreign seller, manufacturer, or packer, should be regarded as the original package, and upon

* *See also* pp. 146, 210 for limitations on State taxing powers.

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opening of such box, bale, or case for the purpose of using or exposing to sale such separate parcels or bundles, each parcel or bundle loses its distinctive character as an import and becomes a part of the general mass of property in the State, and subject to local taxation.[1]

[1] May (F.) & Co. *v.* New Orleans, 178 U. S. 496, 502 [1900], citing Brown *v.* Maryland, 12 Wheat. 419 [1827].

Power of State to Tax Generally.

Before an article becomes an export or after it ceases to be an import by being mingled with other property in the State, it is subject to taxation by the State.[1]

[1] Nathan *v.* Louisiana, 8 How. 73, 81 [1850].

States cannot lay imposts or duties on imports except what may be absolutely necessary to execute their inspection laws, not because Congress may lay and collect taxes, duties, imposts, and excises, but because the Constitution expressly provides that no State shall exercise that power without the consent of Congress.[1]

[1] Hamilton Mfg. Co. *v.* Massachusetts, 6 Wall. 632, 639 [1868].

Tax on Sales.

Sale is the object of importation and is an essential ingredient of that intercourse of which importation constitutes a part, and by payment of duty, the importer purchases the right to dispose of his goods as well as to bring them into the country. The payment of duties includes the authority to sell without the necessity of a State license, so a State law requiring importers to take out a license to sell imported goods is an indirect tax on imports.[1] A tax on sales of imported merchandise in original packages by brokers [2] and auctioneers [3] is unconstitutional, but a tax on the gross sales of a purchaser from the importer is not a tax on imports.[4]

[1] Brown *v.* Maryland, 12 Wheat. 419, 447 [1827].
[2] Low *v.* Austin, 13 Wall. 29, 33 [1872].
[3] Cook *v.* Pennsylvania, 97 U. S. 566, 573 [1878].
[4] Waring *v.* Mobile, 8 Wall. 110, 122 [1869]. *See also* Pervear *v.* Massachusetts, 5 Wall. 475, 478 [1867]; Gibbons *v.* Ogden, 9 Wheat 1, 212 [1824]; Schollenberger *v.* Pennsylvania, 171 U. S. 1, 24 [1898].

The taxation of credits and bills receivable resulting from the sale by a resident of goods brought from without the State,[1] or the money in hand and the notes payable to a foreign corporation engaged in the business of importing merchandise, the proceeds of the sale of imported goods in the original packages,[2] is not a violation of this section.

[1] Krauss Bros. Lumber Co. *v.* Board of Assessors, 148 La. 1057 [1921], writ of error dismissed, 257 U. S. 618 [1922].
[2] New York ex rel. Burke *v.* Wells, 208 U. S. 14 [1908].

Similarly, if the capital of one who was employed in the business of purchasing cotton for exportation from the United States to foreign

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countries, through the customs department, was in fact in money on the date he was assessed on his personal property, he could not escape a subsequent assessment of that money upon the ground that, at the time the assessment was made, it was invested in cotton for exportation to foreign countries.[1]

[1] New York ex rel. Haneman v. Comrs. of Taxes and Assessment, 104 U. S. 466, 467 [1881].

Franchise Tax on Foreign Corporations.

A State statute purporting to impose a franchise tax on foreign corporations for selling in original packages nitrate imported by them was held a violation of this clause (as well as of the commerce clause).[1]

[1] Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218 [1933].

Stamp Tax on Bills of Lading.

A State tax on bills of lading for the transportation from any point in that State to any point outside, of gold and silver, is a tax on exports within the prohibition of this section.[1]

[1] Almy v. California, 24 How. 169, 174 [1861]. In Woodruff v. Parham, 8 Wall. 123, 128, 137 [1869] the court stated that the Almy case was rightly decided but should have gone on the ground that the tax constituted a burden on domestic commerce, rather than a duty on an export. *See also* Philadelphia & R. R. Co. v. Pennsylvania (Case of State Freight Tax), 15 Wall. 232, 280 [1873].

Stamp Tax on Bills of Exchange.

A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder when it becomes payable.[1]

[1] Nathan v. Louisiana, 8 How. 73, 81 [1850].

Tax on Foreign Warehouse Receipts.

A tax on German warehouse receipts for whiskey exported to that country, as a tax on the property represented by the receipts, is invalid.[1]

[1] Selliger v. Kentucky, 213 U. S. 200 [1909].

Tax on Wholesalers and Retailers of Merchandise.

A State tax on the business of selling merchandise, providing for an annual license fee and a tax of one-half mill additional on each dollar of the gross business transacted, is, as applied to the sale of goods in foreign commerce, both an impost or duty on exports and a regulation of foreign commerce.[1]

[1] Crew Levick Co. v. Pennsylvania, 245 U. S. 292 [1917].

Tax on Legacy Payable to a Nonresident.

A State statute providing that every person not domiciled within the State, and not being a citizen of any State or Territory in the

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Union, who shall be entitled as heir, legatee, or donee to the whole or any part of the succession of a person deceased, shall pay a tax to the State of 10 percent of the value thereof, is not invalid as an attempted imposition of a tax on the exportation of property; but it is merely a condition imposed on the right of an alien to take and hold property within the State.[1]

[1] Mager v. Grima, 8 How. 490 [1850].

Wharfage and Other Port Charges.

A State statute imposing one-half pilotage fee (for indigent pilots' fund) where no pilot is received does not impose an impost or duty within the meaning of this clause.[1] City ordinances authorizing the collection of wharfage on municipally-owned wharves does not conflict with this clause.[2] But public wharfage charges exempting vessels carrying products of the State imposing same are a violation of this clause.[3]

[1] Cooley v. Board of Port Wardens, 12 How. 299, 313 [1851].
[2] Northwestern Union Packet Co. v. St. Louis, 100 U. S. 423 [1880].
[3] Guy v. Baltimore, 100 U. S. 434, 437 [1880].

Inspection Laws.

The object of State inspection laws is to improve the quality of articles produced and fit them for articles of commerce, and they are upheld as necessary to promote the interests of commerce.[1]

[1] Bowman v. Chicago & N. W. R. Co., 125 U. S. 465, 488 [1888].

An inspection law may require every hogshead of tobacco included for export to be brought to a State warehouse to be inspected and branded and to pay charges for storage and inspection.[1] A State law providing for the inspection of imported liquors, to be valid, must not substantially hamper the constitutional right to make or receive shipments.[2]

[1] Savage v. Jones, 225 U. S. 501 [1912]; Standard Stock Food Co. v. Wright, 225 U. S. 540 [1912].
[2] Vance v. Vandercook (W. A.) Co., 170 U. S. 438, 456 [1898].

A State license tax upon dealing in fish, regulated according to the weight at time of sale, is not unconstitutional in respect to imported fish which, when the tax attaches, have lost their distinctive character as imports and have become, through processing, handling and sale, a part of the common property of the State.[1]

[1] Gulf Fisheries Co. v. MacInerney, 276 U. S. 124 [1928].

Judicial Review of State Inspection Laws.

Even if an inspection law is held to be excessive as to imports, it is not subject to judicial review, but must stand till Congress shall see fit to alter it.[1]

[1] Missouri v. Bixman, 162 Mo. 39 [1901], citing Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345 [1898].

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Article I.
Sec. 10. Powers denied to the States.
Cl. 3. Not to lay tonnage taxes, make compacts, or go to war.

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.

Tonnage Duties.

IN GENERAL.

A tonnage duty is a charge on a vessel, according to its internal cubical capacity, for entering or leaving a port. The object of this prohibition was to protect the freedom of commerce, and it should be so construed.[1] The prohibition is general, withdrawing the power from the States except by the consent of Congress. The power to levy tonnage duties resides solely in Congress, and its consent is necessary to the exercise of any such power by the States.[2]

[1] Inman Steamship Co. v. Tinker, 94 U. S. 238, 245 [1877]; Huse v. Glover, 119 U. S. 543, 549 [1886].

[2] Cox v. Lott (State Tonnage Tax Cases), 12 Wall. 204, 214 [1871]; Gibbons v. Ogden, 9 Wheat. 1, 201 [1824].

"Duty" means a custom or toll, and as here used is not less comprehensive than the broad term "tax",[1] and any duty, whether a fixed sum upon the whole tonnage of a vessel or to be ascertained by comparing tonnage with rate of duty, comes within the prohibition.[2] "Hence the prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port."[3] But it does not include charges made by State authority, graduated according to tonnage, for services rendered to and enjoyed by the vessel, such as pilotages, or wharfage; tonnage duties are distinct from fees or charges by authority of a State for services facilitating commerce, such as pilotage, towage, charges for loading or unloading cargoes, wharfage, storage, and the like.[4]

[1] Pacific Ins. Co. v. Soule, 7 Wall. 433, 455 [1869].

[2] Cannon v. New Orleans, 20 Wall. 577, 581 [1874]; Wheeling, P. & C. Transportation Co. v. Wheeling, 99 U. S. 273, 283 [1879].

[3] Clyde Mallory Lines v. Alabama ex rel. State Docks Commission, 296 U. S. 261, 265 [1935].

[4] Cooley v. Board of Port Wardens, 12 How. 299, 314 [1851]; Ex parte McNeil, 13 Wall. 236 [1872]; Inman Steamship Co. v. Tinker, 94 U. S. 238, 243 [1877].

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A State license fee for ferrying on a navigable river is not a tonnage tax, but is a proper exercise of the police power, and the fact that a vessel is enrolled under Federal laws does not exempt it.[1]

[1] Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365 [1883]. *See also* Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 212 [1885]; Philadelphia & S. Mail Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 338 [1887]; Osborne *v.* Mobile, 16 Wall. 479, 481 [1873].

A State cannot impose a tonnage tax or duty to defray the expense of its quarantine system,[1] but a fixed fee for examination imposed on all vessels passing quarantine is valid.[2]

[1] Peete *v.* Morgan, 19 Wall. 581 [1874].

[2] Morgan's L. & T. R. & S. S. Co. *v.* Board of Health, 118 U. S. 455, 462 [1886].

WHARFAGE AND OTHER PORT CHARGES.

Wharfage is the charge made for the use of a wharf by the owner thereof by way of rent or compensation; a duty of tonnage is a tax or duty charged for the privilege of entering, loading, or lying in a port or harbor and can only be imposed by Congress.[1]

[1] Marine Lighterage Corp. *v.* Luckenbach S. S. Co., 248 N. Y. Supp. 71 [1931].

Where a State, or city by authority of a State, has improved its rivers and harbors by erecting docks and wharves, it may regulate their use and charge tolls therefor.[1] Wharfage charged to vessels for the use of a wharf is not a tonnage duty, notwithstanding it is graduated according to the size of the vessels, computed on their tonnage.[2] For the purposes of regulating the compensation to be paid, it is immaterial whether the wharf were built by the State, a municipal corporation, or an individual; and where a wharf is owned by a city the fact that the city realized a profit beyond the amount expended does not render the toll objectionable.[3]

[1] Southern S. S. Co. *v.* Masters & Wardens, of Port of Philadelphia (Steamship Co. *v.* Portwardens) 6 Wall. 31 [1867]; Cox *v.* Lott (State Tonnage Tax Cases) 12 Wall. 204 [1871]; Keokuk Northern Line Packet Co. *v.* Keokuk, 95 U. S. 80 [1877]; Northwestern Union Packet Co. *v.* St. Louis, 100 U. S. 423 [1880]; Vicksburg *v.* Tobin, 100 U. S. 430 [1880]; Cincinnati, P. B. S. & P. Packet Co. *v.* Cattletsburg, 105 U. S. 559 [1882]. *Cf.* Cannon *v.* New Orleans, 20 Wall. 577 [1874].

[2] Keokuk Northern Line Packet Co. *v.* Keokuk, 95 U. S. 80 [1877]; Parkersburg & O. River Transportation Co. *v.* Parkersburg, 107 U. S. 691 [1883]; Ouachita & M. Packet Co. *v.* Aiken, 121 U. S. 444 [1887].

[3] Huse *v.* Glover, 119 U. S. 543, 549 [1886].

Services of harbor masters for which fees are allowed must be actually rendered, and a law allowing harbor masters or port wardens to impose a fee in all cases is void;[1] however, a State statute which authorized harbor master to assess a minimum fee of $10 against each vessel was held not to impose a duty on tonnage as applied to corporation schooners engaged in foreign and coastwise trading and requiring no services from harbor master other than general services in enforcing

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measures concerning health, fire and safe navigation, and services in keeping open lanes for travel to corporation's private wharves.[2]

[1] Southern S. S. Co. v. Masters & Wardens of Port of Philadelphia (Steamship Co. v. Portwardens), 6 Wall. 31 [1867].
[2] Vincent v. Foss & Crabtree, 118 Fla. 717 [1934].

An ordinance requiring every vessel to land at the municipality's wharves, or permitting them, upon paying same charge, to land at some other wharf was held to levy a "duty on tonnage" within the prohibition of this clause and of the State constitution.[1]

[1] City of Oakland v. E. K. Wood Lumber Co., 211 Calif. 16 [1930].

Keeping of Troops.

One State cannot, without the consent of Congress, levy war, or make peace, or enter into a compact with any other State.[1] The organization and maintenance of an active State militia is not a keeping of troops in time of peace within the prohibition of this clause.[2] This clause contemplates the use of the State's military power to put down an armed insurrection too strong to be controlled by civil authority, and the State concerned must determine what degree of force the crisis demands.[3]

[1] New Hampshire v. Louisiana, 108 U. S. 76 [1883].
[2] Presser v. Illinois, 116 U. S. 252 [1886].
[3] Luther v. Borden, 7 How. 1, 45 [1849]. *See also* Alabama Great S. R. Co. v. United States, 49 Ct. Cl. 522 [1914].

Agreement or Compact.

IN GENERAL.

The terms "compact" and "agreement" as used in this section 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, but 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]

[1] Virginia v. Tennessee, 148 U. S. 503, 518 [1893].

The terms cover all stipulations affecting the conduct or claims of States, whether verbal or written, formal or informal, positive or implied, with each other or with foreign powers.[1] Any agreement or compact which tends to the increase of the political power of the States [2] or which may conflict with the powers delegated to the General Government, as on the question of boundary between the States or the surrender of fugitives, cannot encroach upon or interfere with the supremacy of the Federal Government, and so far as inconsistent with the Constitution will be superseded by it.[3]

[1] Virginia v. Tennessee, 148 U. S. 503, 518 [1893].
[2] Union Br. R. Co. v. East Tennessee & Ga. R. R. Co., 14 Ga., 327 [1853].
[3] Wilson v. Mason, 1 Cr. 45, 92 [1801]; Rhode Island v. Massachusetts, 12 Pet. 657 [1838]; Missouri v. Iowa, 7 How. 660, 667 [1849]; Virginia v.

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West Virginia, 11 Wall. 39, 60 [1871]; Virginia *v.* Tennessee, 148 U. S. 503 [1893]; Wharton *v.* Wise, 153 U. S. 155, 165, 167 [1894]. *See also* Holmes *v.* Jennison, 14 Pet. 540 [1840]; Pennsylvania *v.* Wheeling & B. Bridge Co., 18 How. 421, 433 [1856]; New Hampshire *v.* Louisiana, 108 U. S. 76 [1883].

Further, as was said in Holmes *v.* Jennison:[1] "The words 'agreement' or 'compact' could not have been idly or superfluously used by the framers of the Constitution; they cannot be said to mean the same thing with the word 'treaty.' They evidently mean something more, and were designed to make the prohibition more comprehensive."

[1] 14 Pet. 540, 571 [1840].

As respects their local government, the States are sovereign within their own limits and foreign to each other.[1] This sovereignty of the States in their relations with each other is qualified[2] in that they have surrendered their treaty-making powers to the General Government,[3] and it is the right and duty of the General Government to protect the interests of the several States in their relations with each other.[4]

[1] Buckner *v.* Finley, 2 Pet. 586, 591 [1829]; Bank of United States *v.* Daniel 12 Pet. 32, 54 [1838].
[2] Mahon *v.* Justice, 127 U. S. 700, 705 [1888].
[3] Holmes *v.* Jennison, 14 Pet. 540, 571 [1840].
[4] Florida *v.* Georgia, 17 How. 478, 494 [1854]. *See also* United States *v.* Rauscher, 119 U. S. 407, 412 [1886].

If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the General Government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution.[1]

[1] Barron use of Tierwan *v.* Baltimore, 7 Pet. 243, 249 [1833].

Controversies between the several States arising out of public relations and intercourse cannot be settled either by war or diplomacy, though, with the consent of Congress, they may be composed by agreement.[1]

[1] Louisiana *v.* Texas, 176 U. S. 1, 17 [1900].

BOUNDARY LINES.

A compact or agreement between two States as to a boundary line will be within the prohibition of the Constitution, or without it, according to whether the establishment of the boundary line may or may not lead to the increase of the political power or influence of the States affected, and thus encroach, or not, upon the full and free exercise of Federal authority. If the boundary established is so run as to cut off an important and valuable portion of a State, the political power of the State enlarged would be affected by the settlement of the boundary; and to an agreement of such boundary, or rather its adoption afterwards, the consent of Congress may well be required. But if the running of a boundary may have no effect upon the political influence of either State, and may simply serve to mark and define that which actually existed before but was indefinite and unmarked,

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an agreement for the running of the line or its actual survey would in no respect displace the relation of either of the States to the General Government.[1]

[1] Virginia *v.* Tennessee, 148 U. S. 503, 520 [1893]. *See also* Poole *v.* Fleeger, 11 Pet. 185 [1837]; Rhode Island *v.* Massachusetts, 12 Pet. 657, 724 [1838]; Florida *v.* Georgia, 17 How. 478, 491 [1854]; North Carolina *v.* Tennessee, 235 U. S. 1 [1914].

GRANTS OF FRANCHISE TO CORPORATION BY TWO STATES.

It is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State. Such legislation on the part of two or more States is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States.[1]

[1] St. Louis & S. F. R. Co. *v.* James, 161 U. S. 545, 562 [1896].

Consent of Congress.

The Constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law and of right reason.[1] In many cases the consent will usually precede the compact or agreement, as where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war. But where the agreement relates to a matter which could not be well considered until its nature is fully developed it is not perceived why the consent may not be subsequently given.[2]

[1] Green *v.* Biddle, 8 Wheat. 1, 85 [1823].
[2] Virginia *v.* Tennessee, 148 U. S. 503 [1893].

Thus it has been held that the consent the Constitution required as to valid agreements under this clause is not necessarily to be an expressed consent but may be inferred from circumstances;[1] it is sufficiently indicated (when not necessary to be made in advance) by the adoption or approval of proceedings taken under it.[2]

[1] Virginia *v.* West Virginia, 11 Wall. 39 [1871].
[2] Wharton *v.* Wise, 153 U. S. 155, 173 [1894].

In giving its consent to compacts between States, "it can hardly be doubted that * * * Congress may impose conditions."[1] "Normally, where governmental consent is essential, the consent may be granted upon terms appropriate to the subject and transgressing no constitutional limitation."[1]

[1] James *v.* Dravo Contracting Co., 302 U. S. 134 [1937]. *See also* Arizona *v.* California, 292 U. S. 341, 345 [1934].

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ARTICLE II

EXECUTIVE DEPARTMENT

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ARTICLE II

SECTION 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Article II. Executive Department.
Sec. 1. The President.
Cl. 1. Powers and term of the President and Vice President.

Grant of Executive Power to President.

In Myers *v.* United States, the Court had before it the question of the executive power of removal, and since the Constitution is silent on the subject (with the exception of removal upon impeachment), it necessarily had to consider the extent of the executive power in general. It was therefore brought to examine clause 1 of section 1 of article II. After citing the argument of Mr. Webster in 1835, wherein he denied that the vesting of the executive power in the President was a grant of power, but amounted to no more than merely naming the department, the Court stated: "Our conclusion on the merits * * * is that article II grants to the President the executive power of the Government, i. e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed * * *."[1]

[1] 272 U. S. 52, 163 [1926].

Action Through Heads of Departments.

The President in the exercise of his executive power under the Constitution may act through the head of the appropriate executive department.[1] The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts.[2] But no one may exercise for the President a power which from the nature of the case requires the personal judgment of the President.[3]

[1] Williams *v.* United States, 1 How. 290 [1843].

[2] Wilcox *v.* Jackson ex dem. M'Connel, 13 Pet. 498 [1839]; Runkle *v.* United States, 122 U. S. 543, 557 [1887] and United States *v.* Fletcher, 148 U. S. 84, 86 [1893] (Secretary of War); United States *v.* Jones, 18 How. 92, 95 [1856] (Secretary of Navy); Jones *v.* United States, 137 U. S. 202 [1890] (Secretary of State). *See also* Marbury *v.* Madison, 1 Cr. 137, 165 [1803]; United States *v.* Eliason, 16 Pet. 291 [1842]; United States *v.* Clarke, 20 Wall. 92 [1874]; United States *v.* Farden, 99 U. S. 10 [1879]; Wolsey *v.* Chapman, 101 U. S. 755 [1880].

[3] Ex parte Field, 9 Fed. Cas. No. 4761 [1862]; Runkle *v.* United States, 122 U. S. 543 [1887], reversing on this ground the decision in 19 Ct. Cl. 396 [1884].

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Distinction Between Political and Ministerial Matters.*

"Executive power" is something more than ministerial; the terms are by no means equivalent in import.[1] A distinction is to be made between those acts which involve the exercise of judgment or discretion, and those in which the duty is merely ministerial. In the performance of any act involving the exercise of discretion, the Executive is exempt from mandamus [2] or injunction; [3] nor is he subject, in the performance of a "purely national" act, to interference by writ of habeas corpus.[4] "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation." [5]

[1] Mississippi *v.* Johnson, 4 Wall. 475, 498 [1867].

[2] Marbury *v.* Madison, 1 Cr. 137 [1803], refusing to issue mandamus to the Secretary of State to deliver a certain commission as justice of the peace, but on the ground it would be an act of original jurisdiction not warranted by the Constitution; United States ex rel. Carrick *v.* Lamar, 116 U. S. 423, 426 [1886], citing Decatur *v.* Paulding, 14 Pet. 497, 499 [1840]; United States ex rel. Goodrich *v.* Guthrie, 17 How. 284 [1855]; United States ex rel. McConnell *v.* Edmunds, 5 Wall. 563 [1867]; Litchfield *v.* Richards, 9 Wall. 575, 577 [1870]. *See also* Kendall *v.* United States, 12 Pet. 524 [1838]; Bartlett *v.* Kane, 16 How. 263, 272 [1854]; United States ex rel. Redfield *v.* Windom, 137 U. S. 636, 644 [1891]; United States ex rel. Boynton *v.* Blaine, 139 U. S. 306 [1891]; United States *v.* Bashaw, 152 U. S. 436 [1894]. For a case authorizing mandamus for performance of merely ministerial duty, *see* United States ex rel. Dunlap *v.* Black, 128 U. S. 40, 48 [1888].

[3] Mississippi *v.* Johnson, 4 Wall. 475 [1867], refusing an injunction to prevent enforcement of an act alleged to be unconstitutional—whether the President may, in any case, be required to perform a purely ministerial act by process from the Supreme Court, was not decided. *See also* Georgia *v.* Stanton, 6 Wall. 50 [1868].

[4] In re Kaine, 14 How. 103, 119 [1853], refusing habeas corpus in case of a fugitive about to be surrendered up to the British authorities.

[5] Marbury *v.* Madison, 1 Cr. 137, 170 [1803].

Further examples of questions which have been held to be of a political or discretionary nature are: recognition of the existence of an Indian tribe,[1] the public character of a person claiming to be a foreign minister; [2] the fixing of the date when foreign jurisdiction over acquired territory ceases; [3] whether or not a State constitution or an amendment thereof has been ratified by the people; [4] whether military authority has been established; [5] how long military occupation of territory shall be necessary; [6] the question as to the existence of a treaty; [7] the recognition of sovereignty of foreign States; [8] the determination of disputed boundaries between the United States and

**See also* pp. 101, 387, 418, 421, 424 on the matter of separation of powers.

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a foreign nation;[9] the regulation of the admission of foreigners;[10] determination of right to pension;[11] payment of arrears of pay, including ascertaining of rate, apportionment of funds among eligibles, etc.;[12] determination of which of the public printers (House or Senate) was entitled to print a particular document;[13] determination of whether an assignee is entitled to a reissue patent;[14] issue[15] or cancellation[16] of a land entry; reissue of pension certificate, under statute increasing rates;[17] audit of a claim, involving construction of a statute;[18] issue of a warrant to a Government contractor, where by reason of claims of materialmen, etc., there was question both of law and fact as to the amount actually due the contractor himself.[19]

[1] United States v. Holliday, 3 Wall. 407 [1866].
[2] Ex parte Bain, 135 U. S. 403 [1890].
[3] More v. Steinbach, 127 U. S. 70, 80 [1888].
[4] Luther v. Borden, 7 How. 1, 39 [1849].
[5] Keely v. Sanders, 99 U. S. 441, 446 [1879].
[6] Neely v. Henkel, 180 U. S. 109, 124 [1901].
[7] Terlinden v. Ames, 184 U. S. 270, 288 [1902].
[8] United States v. Palmer, 3 Wheat. 610, 634 [1818].
[9] De la Croix v. Chamberlain, 12 Wheat. 599, 600 [1827].
[10] Nishimura Ekiu v. United States, 142 U. S. 651, 660 [1892].
[11] Decatur v. Paulding, 14 Pet. 497, 516 [1840].
[12] Brashear v. Mason, 6 How. 92 [1848].
[13] United States ex rel. Tucker v. Seaman, 17 How. 225 [1855].
[14] Holloway v. Whiteley, 4 Wall. 522, 534 [1867].
[15] Cox v. United States ex rel. McGarrahan, 9 Wall. 298 [1870].
[16] Gaines v. Thompson, 7 Wall. 347 [1869].
[17] United States ex rel. Dunlap v. Black, 128 U. S. 40 [1888].
[18] United States ex rel. Lisle v. Lynch, 137 U. S. 280 [1890].
[19] United States ex rel. Redfield v. Windom, 137 U. S. 636 [1891].
See also Foster v. Neilson, 2 Pet. 253, 307 [1829]; Craig v. Missouri, 4 Pet. 410, 438 [1830]; Ex parte Cooper, 143 U. S. 472, 503 [1892]; The "Divina Pastora", 4 Wheat. 52, 63 [1819]; The "Santissima Trinidad", 7 Wheat. 283 [1822]; Williams v. Suffolk Insurance Co., 13 Pet. 415, 420 [1839]; Kennett v. Chambers, 14 How. 38, 50 [1853]; United States v. Yorba, 1 Wall. 412, 423 [1864]; Phillips v. Payne, 92 U. S. 130, 132 [1876]; Jones v. United States, 137 U. S. 202, 212 [1890]; Garcia v. Lee, 12 Pet. 511, 516 [1838]; United States v. Reynes, 9 How. 127, 154 [1850].

Article II.
Sec. 1. The President.
Cl. 2. Electors of President and Vice President and their qualifications.

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.

Powers of States.

Presidential electors, although they are appointed and act under and pursuant to the Constitution, are no more officers or agents of

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the United States than are the members of State legislatures when acting as electors of Federal Senators, or the people of the States when acting as electors of Representatives in Congress.[1]

[1] Fitzgerald *v.* Green, 134 U. S. 377, 379 [1890], holding that a State court had jurisdiction of an indictment for illegal voting for Presidential electors, and a person sentenced thereunder cannot be discharged on habeas corpus although the indictment includes illegal voting for a representative in Congress—an offense covered by Federal law, R. S. 5511, 5514. Followed in Burroughs *v.* United States, 290 U. S. 534 [1934].

Reviewing the precedents, the Court in McPherson *v.* Blacker,[1] summarized them as follows: "* * * it is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors." A Michigan law, accordingly, which provided for election by districts was held not inconsistent with this clause requiring election by "each State", and unaffected by the Fourteenth and Fifteenth Amendments.

[1] 146 U. S. 1, 35 [1892].

A State law directing the appointment of presidential electors has authority solely from the Constitution of the United States.[1]

[1] Electoral College Case, 8 Fed. Cas. No. 4336 [1876].

The manner of appointment being left by the Constitution to the State legislatures, there can be no constitutional objection to a provision of State law permitting absentee voting.[1]

[1] In re Opinion of Justices, 80 N. H. 595 [1921].

Disqualification of Persons Holding Office Under United States.

A member of the United States Centennial Commission (for the Philadelphia Exposition, 1876) held an office of trust under the United States within the meaning of this clause, and was disqualified for the office of presidential elector. The duties of the commissioners were not merely subordinate and provisional, "but in the highest degree authoritative, discretionary, and final in their character." Their office was created by act of Congress, in the interest of all the States, and while the United States originally had no pecuniary interest in the exposition, "it would be a narrow, and we think an improper interpretation, to hold that an office is an office of trust only when the officer has the handling of public money or property, or the care and oversight of some pecuniary interest of the Government." [1]

[1] In re Corliss, 11 R. I. 638, 640–642 [1876].

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Article II. Sec. 1. The President. Cl. 3. Meeting of the electors and transmission and count of their votes. Election of President and Vice President by the House and Senate.

[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 chuse 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 chuse the President. But in chusing 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 chuse from them by Ballot the Vice President.]*

Article II. Sec. 1. The President. Cl. 4. Time of choosing electors and time at which their votes are given

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

The time for choosing the electors was fixed by act of March 1, 1792 (R. S. 131; U. S. C. 3:1), viz, the Tuesday next after the first Monday in November in the fourth year succeeding election of a President. By the same act of March 1, 1792 (carried into R. S. 135;

* This clause was superseded by Amendment 12.

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U. S. C. 3:5), Congress provided that the electors should give their vote on the first Wednesday in December following their appointment; by act of February 3, 1887 (24 Stat. 373), the date was changed to the second Monday in January; and by act of May 29, 1928 (45 Stat. 945), to the first Wednesday in January following appointment. In view of the provisions of the Twentieth Amendment to the Constitution, advancing the date for the inauguration of the President from March 4 to January 20, Congress by act of June 5, 1934 (48 Stat. 879; U. S. C. 3:5a) provided that the electors shall give their vote on the first Monday after the second Wednesday in December.

Article II. Sec. 1. The President. Cl. 5. Qualifications of President of the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

There have been no cases of importance decided under this clause.

Article II. Sec. 1. The President. Cl. 6. Succession in case of removal, death, resignation, or disability of President and Vice President.

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.

Performance of the duties of the office of President in case of the removal, death, resignation, or inability both of the President and Vice President was devolved by the act of January 19, 1886 (24 Stat. 1; U. S. C. 3:22), upon the following officers in succession: the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Attorney General, the Postmaster General, the Secretary of the Navy, and the Secretary of the Interior. In 1886, there were only the seven executive departments thus represented.

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Article II. Sec. 1. The President. Cl. 7. Compensation of President.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased 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.

A provision of the Revenue Act of 1918 (40 Stat. 1065, sec. 213), including in gross income for tax purposes the compensation of the President and judges, was held unconstitutional as applied to a judge, in Evans *v.* Gore,[1] in view of the similar provision against diminution of salary of judges found in article III, section 1.

[1] 253 U. S. 245 [1920].

The Revenue Act of 1934 (48 Stat. 686, sec. 22), similarly includes the compensation of the President and judges (taking office after June 6, 1932) in gross income, and further declares the permanent salary of the position amended accordingly.

Article II. Sec. 1. The President. Cl. 8. Oath of the President.

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."

There have been no cases of importance decided under this clause.

Article II. Sec. 2. Powers and duties of the President. Cl. 1. Commander in Chief, written opinions from heads of departments, and pardons for offenses against the United States.

SECTION. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer 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.

Commander in Chief of the Army and Navy.

IN GENERAL.

The object of this provision is to vest in the President the supreme command over all the military forces, such supreme and undivided

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command as would be necessary to the prosecution of a successful war.[1]

[1] United States v. Sweeny, 157 U. S. 281 [1895].

The President is commander in chief of the Army and Navy of the United States at all times, and of the militia of the several States only when called into the actual service of the United States.[1]

[1] Johnson v. Sayre, 158 U. S. 109, 115 [1895].

As commander in chief he is authorized to direct the movements of the land and naval forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States.[1]

[1] Fleming v. Page, 9 How. 603, 615 [1850].

"Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander in chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions. The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authority essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President."[1]

[1] Ex parte Milligan, 4 Wall. 2, 139 [1866]; Swaim v. United States, 28 Ct. Cl. 173, 221 [1893], affirmed 165 U. S. 553 [1897].

The President's name is to be understood as written in every statute which confers upon a military officer military authority.[1]

[1] Swaim v. United States, 28 Ct. Cl. 173, 224 [1893], affirmed 165 U. S. 553 [1897].

The power of the Executive to establish rules and regulations for the government of the Army is undoubted.[1] The Army Regulations derive their force from the power of the President as commander in chief, and are binding upon all within the sphere of his legal and constitutional authority.[2] But the power of the President as commander in chief must be exercised in accordance with the laws

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and usages of nations, and in conformity with acts of Congress, where the legislature possesses regulatory powers; otherwise his orders will afford no protection to an officer acting under them.[3]

[1] United States v. Eliason, 16 Pet. 291 [1842]; Ex parte Reed, 100 U. S. 13 [1879].

[2] Kurtz v. Moffitt, 115 U. S. 487, 503 [1885]; United States v. Freeman, 3 How. 556 [1845]. *See also* Gratiot v. United States, 4 How. 80 [1846]; 6 Op. Atty. Gen. 10 [1853], distinguishing orders within the range of purely executive or administrative action from those of a legislative character.

[3] Little v. Barreme, 2 Cr. 170 [1804].

The authority of the President as commander in chief of the Army and Navy and the authority of Congress extends to all territories wherever the Army and Navy may go.[1] But the provision in article 38 of the Navy regulations (adopted in 1862) that no commander of a fleet or squadron "in the waters of the United States" shall convene a general court martial without express authority from the President, will be construed as intending to apply to waters within the continental limits of the United States, and not to waters in the territory beyond seas (specifically, the Philippine Islands) acquired since the passage of that act, and the acquisition whereof was not contemplated at that time.[2]

[1] Ex parte Milligan, 4 Wall. 2 [1866].

[2] United States v. Smith, 197 U. S. 386 [1905].

As commander in chief the President has the power validly to convene a court martial which when assembled will exercise certain powers conferred upon them by the Articles of War.[1]

[1] Swaim v. United States, 165 U. S. 553, 556 [1897], approving on this point Runkle's Case, 19 Ct. Cl. 396, 409 [1884].

Under the law authorizing certain officers of the Army to convene courts martial when empowered by the President, *held* that a general order of the President lodging this power in the commanders of designated military camps is judicially noticed as part of the law of the land, and the legality of a court martial established under it is not affected by omission to refer to it in the order convening the court martial.[1]

[1] Givens v. Zerbst, 255 U. S. 11 [1921], affirming Ex parte Givens, 262 Fed. 702 [1920].

The President of the United States, as commander in chief of its armies, has authority to employ secret agents to enter the lines of the enemy and obtain information respecting its strength, resources, and movements.[1]

[1] Totten v. United States, 92 U. S. 105 [1876].

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INCIDENTAL POWERS.

The President, as commander in chief, has authority to establish civil courts in insurgent territory occupied by the national forces [e. g., during the Civil War];[1] to establish a provisional government in insurgent territory;[2] to legally exact duties upon imports from the United States to Puerto Rico;[3] to govern ceded and conquered territory until Congress acts;[4] to accord to those engaged in civil war the character of belligerents[5]—and his decision will govern the courts.[6] But the President cannot establish a prize court whose judgments would be conclusive on other admiralty courts or confer power to condemn prizes upon any inferior officer, civil or military.[7]

[1] Mechanics' & Traders' Bank v. Union Bank, 22 Wall. 276, 295 [1875]; New Orleans v. New York Mail S. S. Co., 20 Wall. 387 [1874]; Lewis v. Cocks, 23 Wall. 466 [1874].

[2] The "Grapeshot" v. Wallerstein, 9 Wall. 129 [1870]. *Cf.* Texas v. White, 7 Wall. 700 [1869].

[3] Dooley v. United States, 182 U. S. 234 [1901].

[4] Santiago v. Nogueras, 214 U. S. 260 [1909]; Myers v. United States, 272 U. S. 52, 134 [1926]; Leitendorfer v. Webb, 20 How. 176 [1858]; Cross v. Harrison, 16 How. 164 [1853].

[5] The brig "Amy Warwick", 2 Black 670 [1863].

[6] Matthews v. McStea, 91 U. S. 7 [1875].

[7] Jecker v. Montgomery, 13 How. 515 [1852].

There is no doubt that, with the concurrent authority of Congress, the President may permit commercial intercourse with a public enemy.[1]

[1] Hamilton v. Dillin, 21 Wall. 73, 87 [1875].

Written Opinions From Heads of Departments.

The word "department" as used in this clause means the same as in article II, section 2, clause 2 (relating to the vesting of appointments in the heads of departments); and "principal officer" here is the equivalent of head of department.[1]

[1] United States v. Germaine, 99 U. S. 508, 511 [1879].

Pardons for Offenses Against the United States.

DEFINITION AND NATURE OF PARDON.

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed, from the punishment the law inflicts for a crime he has committed [1]—which releases the offender from the consequences of his offense so far as such release is practicable and within the control of the pardoning power.[2]

[1] United States v. Wilson, 7 Pet. 150, 160 [1833].

[2] Knote v. United States, 95 U. S. 149, 153 [1877].

Pardon includes amnesty.[1] The Constitution does not use the word "amnesty"; and, except that the term is generally employed when pardon is extended to whole classes or communities, instead of

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individuals, the distinction between them is one rather of philological interest than of legal importance.[3]

[1] United States *v.* Klein, 13 Wall. 128, 147 [1872].
[2] Knote *v.* United States, 95 U. S. 149, 152 [1877].

Amnesty is an act of sovereign power granting general pardon for a past offense; it is rarely, if ever, exercised in favor of single individuals, but is usually extended in behalf of certain classes of persons who are subject to trial, but who have not been convicted. The President has power, akin to his power to reprieve and pardon, to issue public proclamation of amnesty; and such proclamation has the force of public law, of which the courts must take notice, whether especially called to their attention or not;[1] and such proclamation may be made without legislative authority or sanction.[2]

[1] Armstrong *v.* United States, 13 Wall. 154 [1872]; Pargoud *v.* United States, 13 Wall. 156 [1872]; Jenkins *v.* Collard, 145 U. S. 546, 561 [1892].
[2] United States *v.* Padelford, 9 Wall. 531, 542 [1870].

A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.[1]

[1] United States *v.* Wilson, 7 Pet. 150, 161 [1833]. *See also* Ex parte Garland, 4 Wall 333, 380 [1867]; Burdick *v.* United States, 236 U. S. 79 [1915].

CONDITIONAL PARDON.

As a pardon is an act of grace, limitations upon its operation should be strictly construed.[1] It is competent for the President to annex to his offer of pardon any conditions or qualifications he may see fit; but after those conditions and qualifications have been satisfied, the pardon and its connected promises take full effect.[2] A pardon may be conditional; and the condition may be more objectionable than the punishment inflicted by the judgment.[3] A conditional pardon accepted by a convict is deemed to be accepted voluntarily, and not under duress *per minas*.[4]

[1] Osborn *v.* United States 91 U. S. 474, 478 [1876].
[2] United States *v.* Klein, 13 Wall. 128, 142 [1872]; Semmes *v.* United States, 91 U. S. 21, 27 [1875].
[3] United States *v.* Wilson, 7 Pet. 150, 161 [1833].
[4] Ex parte Wells, 18 How. 307, 315 [1856]. *See also* Bradford *v.* United States, 228 U. S. 446 [1913].

SCOPE OF PARDONING POWER.*

It was stated in United States *v.* Wilson,[1] that, since the power to pardon "had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours have a close resemblance; we adopt their principles

**See also* p. 102.

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respecting the operation and effect of a pardon"; and again, in Ex parte Wells,[2] that the meaning of the word is to be the same as prevailed in England at the time of the adoption of the Constitution.

[1] 7 Pet. 150, 160 [1833].
[2] 18 How. 307, 311 [1856].

The President's pardoning power embraces all offenses against the United States, except cases of impeachment, and includes the power to remit fines, penalties, and forfeitures.[1] His power, in the matter of remission of penalties, was held not to be exclusive so as to invalidate (as being an encroachment thereon) a remission by the Secretary of Treasury, in accordance with long-continued practice.[2] The language of the Court in that case thus adverted to the question of pardon in case of contempt: "It may be conceded that, except in cases of impeachment and where fines are imposed by a coordinate department of the government for contempt of its authority, the President, under the general, unqualified grant of power to pardon offenses against the United States, may remit fines, penalties, and forfeitures * * *."

[1] United States *v.* Harris, 26 Fed. Cas. No. 15312 [1866].
[2] The "Laura", 114 U. S. 411, 413 [1885].

The scope of the term "offenses against the United States" was considered in Ex parte Grossman,[1] and held to include criminal contempts. The phrase was not in the clause as introduced in the Constitutional Convention but was added by the Committee on Style, and "it cannot be supposed" that the Committee by adding them or the convention by accepting them, "intended *sub silentio* to narrow the scope of a pardon from one at common law or to confer any different power in this regard on our Executive from that which the members of the Convention had seen exercised before the Revolution"—which included pardon for contempt. "Offense" is a larger term than "crime", and a criminal contempt (the punishment of which is in the public interest) as opposed to a civil contempt (the punishment of which is remedial and for the benefit of the complainant) is within the ordinary meaning of the word, and has been so construed for nearly a century, during which time "no abuses developed sufficiently to invoke a test in the Federal courts" of the validity of a pardon.[2]

[1] 267 U. S. 87, 113 [1925].
[2] Followed on this point in United States *v.* Goldman, 277 U. S. 229, 235 [1928].

The constitutional prerogative of the President includes the power to commute punishments;[1] and the substitution of life imprisonment for a death sentence is in common understanding a commutation of the penalty, and effective without convict's consent.[2] The courts, at common law, exercised a discretion temporarily to suspend imposition or execution of sentence so as to facilitate action by the pardoning power,[3] but the indefinite suspension of a sentence has been held a condonation of the offense and an exercise of pardoning power beyond

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the power of a court.[4] Amendment of sentence (within the same term of court) by shortening the term of imprisonment, although defendant had already been committed, is a judicial act and no infringement of the pardoning power.[5]

[1] Ex parte Harlan, 180 Fed. 119 [1909], decree affirmed, Harlan v. McGourin, 218 U. S. 442 [1910].
[2] Biddle v. Perovich, 274 U. S. 480 [1927].
[3] Ex parte United States, 242 U. S. 27 [1916].
[4] United States v. Wilson, 46 Fed. 748 [1891].
[5] United States v. Benz, 282 U. S. 304 [1931].

EFFECT OF PARDON.

It has been repeatedly affirmed by the Supreme Court that pardon and amnesty in legal contemplation not merely release offenders from the punishment prescribed for their offenses, but obliterate the offenses themselves.[1] In Ex parte Garland the Court said: "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he has never committed the offence." [2] In the light of other decisions it is probable that this language is too broad. It is doubtful if a pardon entirely blots out the fact that the individual was once convicted. Pardon and amnesty cannot and do "not change the actual facts of previous disloyalty." [3] For example, in the case of Carlesi v. New York,[4] the defendant had some years before been convicted of committing a Federal offense. In the instant case the prisoner was being tried for a subsequent offense committed in New York. He was convicted as a second offender, although the President had pardoned him for the earlier Federal offense. In other words, the fact of prior conviction by a Federal court was considered in determining the punishment for a subsequent State offense. This conviction and sentence was upheld by the Supreme Court. While this case involved offenses against different sovereignties, the Court said by way of dicta that its decision "must not be understood as in the slightest degree intimating that a pardon would operate to limit the power of the United States in punishing crimes against its authority to provide for taking into consideration past offenses committed by the accused as a circumstance of aggravation even although for such past offenses there had been a pardon granted." [5]

[1] Carlisle v. United States, 16 Wall. 147, 151 [1873]; Jenkins v. Collard, 145 U. S. 546, 556 [1892].
[2] Ex parte Garland, 4 Wall. 333, 380 [1867].
[3] Jenkins v. Collard, 145 U. S. 546, 556 [1892].
[4] 233 U. S. 51 [1914].
[5] Carlesi v. New York, 233 U. S. 51, 59 [1914]

It is of the very essence of a pardon that it releases the offender from the consequences of his guilt. It was accordingly held that a pardon operates to remit a forfeiture of property so far as the right

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accrues to the United States,[1] and insofar as no rights therein had by judicial process, become vested in other persons.[2]

[1] Armstrong's Foundry v. United States, 6 Wall. 766 [1868].
[2] Osborn v. United States, 91 U. S. 474, 477 [1876].

An unconditional pardon of a person convicted of a felony effects a complete restoration of competency as a witness, notwithstanding that it was sought by the district attorney and given for such purpose expressly.[1]

[1] Boyd v. United States, 142 U. S. 450 [1892].

A pardon does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the Government any obligation to give it. So held, that one taking advantage of the amnesty proclamation of December 25, 1868, was not entitled to the proceeds of his property sold under the confiscation act, after such proceeds had been paid into the Treasury;[1] nor did a pardon for treason restore rights to property so condemned and sold in the exercise of belligerent rights, as against a purchaser in good faith and for value.[2] But it did restore to the person whose life interest was confiscated, the right to dispose of the fee.[3]

[1] Wallach v. Van Riswick, 92 U. S. 202 [1876]; Knote v. United States, 95 U. S. 149, 154 [1877].
[2] Semmes v. United States, 91 U. S. 21 [1875].
[3] Illinois Central R. R. Co. v. Bosworth, 133 U. S. 92 [1890].

The right of one to receive payment from the United States for a debt due prior to the Civil War, but which right was forfeited by reason of his enemy status during the war, was not restored by a pardon, and so the subsequent resolution of Congress forbidding payment of such debts was no interference with the pardoning power.[1]

[1] Hart v. United States, 118 U. S. 62 [1886].

POWER OF CONGRESS.

Although the pardoning power is vested in the Executive, yet it is competent for Congress to provide that a witness who is required to give testimony tending to incriminate himself shall never be prosecuted for the offense to which the testimony relates.[1]

[1] Brown v. Walker, 161 U. S. 591, 601 [1896].

The power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders.[1]

[1] Ex parte Garland, 4 Wall. 333 [1867], in which the act of Congress of January 24, 1865, prohibiting all persons from practice before the Federal courts without taking a specified test oath as to participation in the Rebellion, was held unconstitutional in part as an interference with the pardoning power.

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An act of Congress allowed those persons whose property had been taken as captured and abandoned and sold, and the proceeds thereof turned into the Treasury, to claim the money and recover it by proceedings in the Court of Claims, on proof that claimants had been loyal citizens during the Civil War. The Supreme Court decided that a pardon made proof of loyalty unnecessary. To offset the effect of this decision Congress passed the act of July 12, 1870 (16 Stat. 235), making proof of loyalty necessary to recovery "notwithstanding any Executive proclamation, pardon, amnesty, or other act of condonation or oblivion." But the Supreme Court held this act unconstitutional, Justices Miller and Bradley dissenting. In the opinion Chief Justice Chase said: "* * * the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end." [1]

[1] United States v. Klein, 13 Wall. 128, 148 [1872].

Article II. Sec. 2. Powers and duties of the President. Cl. 2. Treaties and appointment of officers.

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.

Treaties.*

IN GENERAL.

A treaty is in its nature, a contract, not a legislative act. It is equivalent to an act of the legislature whenever it operates without the aid of any legislative provision.[1]

[1] Foster v. Neilson, 2 Pet. 253 [1829].

**See also* pp. 294, 455, 575.

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A treaty made with a sovereign as such inures to his successors in the government of the country.[1]

[1] The "Sapphire", 11 Wall. 168 [1871], holding that the deposition of the Emperor Napoleon did not abate a suit brought in the civil courts of the United States for damages to a French ship of war.

The doctrine that a war between the parties to a treaty puts an end to that treaty, and consequently, to civil rights derived under it, unless revived and preserved by subsequent treaty, is not universally true. There may be treaties which contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, where to hold such rights extinguished by the event of war would be against every principle of just interpretation. Such treaties do not cease on the occurrence of war, but are, at most, only suspended while it lasts. Accordingly, it was held that property rights protected by article IX of the Jay treaty were not affected by the War of 1812;[1] but the privilege of freely passing the international boundary, under article III, is one created by the treaty, having no obligatory existence apart from that instrument, dictated by considerations of mutual trust and confidence, and resting upon the presumption that the privilege will not be exercised to unneighborly ends. It necessarily ceases to operate in a state of war. Acquiescence, therefore, in the continuance of the privilege after the War of 1812 is not to be presumed a recognition of a revival of the treaty obligation, but a manifestation of the policy of the United States in the matter of admission of foreigners. In view of the progressive policy of restriction evinced since 1916, it cannot be supposed that Congress intended, by admitting aliens temporarily for business (as was done by sec. 3 (2) of the Immigration Act of 1924, 43 Stat. 153), to permit their coming to labor for hire in competition with American workmen, whose protection it was one of the main purposes of the legislation to secure.[2]

[1] Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464, 494 [1823], considering the effect of the War of 1812.
[2] Karnuth *v.* United States ex rel. Albro, 279 U. S. 231 [1929].

ADVICE AND CONSENT OF THE SENATE.

A treaty must contain the whole contract between the parties, and the power of the Senate is limited to a ratification of such terms as have already been agreed upon between the President, acting for the United States, and the commissioners of the other contracting power. The Senate may refuse its ratification or make it conditional upon the adoption of amendments to the treaty.[1]

[1] Fourteen Diamond Rings *v.* United States, 183 U. S. 176, 183 [1901] (concurring opinion of Brown, J.). *See also* New York Indians *v.* United States, 170 U. S. 1, 23 [1898].

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EXTENT OF TREATY-MAKING POWER.

The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it, and, consequently, it was designed to include all those subjects which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty, and which are consistent with the nature of our institutions and the distribution of powers between the General and State Governments. And without attempting to define the exact limits of this treaty-making power or to enumerate the subjects intended to be included in it, it may safely be assumed that the recognition and enforcement of the principles of public law, being one of the ordinary subjects of treaties, were necessarily included in the power conferred on the General Government. And as the rights and duties of nations toward one another in relation to fugitives from justice are a part of the law of nations, and have always been treated as such by the writers upon public law, it follows that the treaty-making power must have authority to decide how far the right of a foreign nation in this respect, will be recognized and enforced when it demands the surrender of anyone charged with offenses against it.[1]

[1] Holmes *v* Jennison, 14 Pet. 540, 569 [1840].

Extradition proceedings need not be conducted with the formalities observed in a criminal trial at common law. While a fugitive is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form, according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he be tried, good faith to the demanding government requires his surrender. We are bound by the existence of an extradition treaty to assume that the trial will be fair.[1]

[1] Glucksman *v.* Henkel, 221 U. S. 508 [1911]. *See also* Grin v. Shine, 187 U. S. 181 [1902]; Pierce *v.* Creecy, 208 U. S. 616 [1908].

When a person has been surrendered by a foreign country, he cannot be proceeded against for an offense for which he was not extradited and for which under the treaty his surrender could not have been demanded.[1] But without giving a person an opportunity to return to the country of his asylum, he may be prosecuted for another offense committed after his surrender.[2]

[1] United States *v.* Rauscher, 119 U. S. 407 [1886].

[2] Collins *v.* Johnston, 237 U. S. 502 [1915]. *See also* Collins *v.* O'Neil, 214 U. S. 113 [1909].

The treaty power of the United States extends to all proper subjects of negotiation between this Government and those of other nations, and to protecting the ownership, transfer, and inheritance of property which citizens of one country may have in another. It is unlimited under the Constitution, except as to restraints found in

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that instrument, and except those which arise from the nature of the Government itself and as to those of the States.[1]

[1] De Geofroy *v.* Riggs, 133 U. S. 258, 267 [1890], holding that the treaty power extended to the protection to be afforded to citizens of a foreign country owning property in this country and to the manner in which that property may be transferred, devised, or inherited. *See also* United States *v.* Lariviere, 93 U. S. 188, 197 [1876]; Chirac *v.* Chirac, 2 Wheat. 259 [1817]; Hauenstein *v.* Lynham, 100 U. S. 483 [1880]; Sullivan *v.* Kidd, 254 U. S. 433 [1921].

The power to make treaties with the Indian tribes is coextensive with the power to make treaties with foreign nations.[1]

[1] United States *v.* Lariviere, 93 U. S. 188, 197 [1876]. *See also* Dick *v.* United States, 208 U. S. 340 [1908]; Holden *v.* Joy, 17 Wall. 211, 242 [1872]; Ex parte Kang-Gi-Shun-Ca, 109 U. S. 556, 567 [1883]; Lone Wolf *v.* Hitchcock, 187 U. S. 553 [1903]; Conley *v.* Ballinger, 216 U. S. 84 [1910]; Lattimer *v.* Poteet, 14 Pet. 4 [1840].

It is well settled that a good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of Congress, or any patent from the executive authority of the United States.[1]

[1] Jones *v.* Meehan, 175 U. S. 1 [1899], citing Johnson *v.* McIntosh, 8 Wheat. 543 [1823]; Mitchel *v.* United States, 9 Pet. 711, 748 [1835]; Doe ex dem. Godfrey *v.* Beardsley, 2 McLean 412, 417, 418 [1841]; United States *v.* Brooks, 10 How. 442 [1851]; Doe ex dem. Mann *v.* Wilson, 23 How. 457, 463 [1860]; Crews *v.* Burcham, 1 Black 352, 356 [1862]; Holden *v.* Joy, 17 Wall. 211, 247 [1874]; Best *v.* Doe ex dem. Polk, 18 Wall. 112, 116 [1873]; New York Indians *v.* United States, 170 U. S. 1 [1898]. *See also* Francis *v.* Francis, 203 U. S. 233 [1906].

Under the treaty power, territory may be acquired and provisions made for its government and the terms fixed upon which the inhabitants of such territory will be received into the United States.[1] The Federal Government may also provide under the treaty power for the establishment of judicial tribunals in foreign countries for the benefit of its own citizens.[2]

[1] Downes *v.* Bidwell, 182 U. S. 244, 279 [1901]; Dorr *v.* United States, 195 U. S. 138, 140 [1904].

[2] In re Ross, 140 U. S. 453, 463 [1891]. *See also* American Ins. Co. *v.* Canter, 1 Pet. 511 [1828]; Pollard *v.* Kibbe, 14 Pet. 353, 392 [1840]; Wilson *v.* Shaw, 204 U. S. 24 [1907]; De Lima *v.* Bidwell, 182 U. S. 1 [1901]; Goetze *v.* United States, 103 Fed. 72 [1900], judgment reversed in 182 U. S. 221 [1901].

The treaty of 1819 between the United States and Spain was the basis for the adjudication of the disputed boundary of Greer County (claimed by Texas and by the United States) in 1895.[1]

[1] United States *v.* Texas, 162 U. S. 1 [1896].

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By treaty of August 16, 1916, with Great Britain, provision was made for the protection of migratory birds; and such treaty was held within the treaty-making power, and an act for enforcement thereof valid, although a prior act for the same purpose, without benefit of treaty, had been held unconstitutional in the lower courts.[1]

[1] Missouri v. Holland, 252 U. S. 416 [1920].

Nomination and Appointment.

IN GENERAL.

"He shall nominate" means to recommend in writing; in this form the advice of the Senate is asked. "Nominating" and "appointing" are distinct acts from commissioning; when the appointing power has done everything to be performed by him the appointment is complete. Officers whose duties are extended by Congress need not be again nominated and appointed. The President cannot make a temporary appointment during a recess, if the Senate was in session when or since the vacancy occurred.[1]

[1] Marbury v. Madison, 1 Cr. 137, 154 [1803]; Shoemaker v. United States, 147 U. S. 282, 301 [1893]; Case of District Attorney, 16 Am. Law. Reg. 786 [1868]; Seaman v. Northwestern Mut. Life Ins. Co., 86 Fed. 493, 497 [1898]; United States v. Kirkpatrick, 9 Wheat. 720, 734 [1824].

The delivery of the commission is not necessary to complete an appointment; the commission is merely evidence of the appointee's title and not necessary to its vestiture. Once issued, the commission is conclusive evidence of appointment as against the appointing power. When the appointment to an office is complete, it is irrevocable whether the commission has been delivered or not.[1]

[1] Marbury v. Madison, 1 Cr. 137, 154–162 [1803].

The fitness of the appointee must be determined by the appointing power; it is one of those acts over which the courts have no general supervising power.[1]

[1] Keim v. United States, 177 U. S. 290, 293 [1900].

ADVICE AND CONSENT OF THE SENATE.

The Senate cannot originate an appointment. Its constitutional action is confined to the simple affirmation or rejection of the President's nominations, and such nominations fail whenever it rejects them. The Senate may suggest conditions and limitations to the President, but it cannot vary those submitted by him, for no appointment can be made except on his nomination, agreed to without qualification or alteration.[1]

[1] Power of Senate Respecting Nominations to Office, 3 Op. Atty. Gen. 188 [1837].

When the Senate has confirmed a nomination and by unanimous consent caused the President to be notified, within the time during

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which by the rules of the Senate a reconsideration may be moved, whereupon the President has proceeded to commission the nominee and he has taken the oath and entered upon the discharge of his duties, the Senate has not then the power to reconsider and reject the nomination.[1]

[1] United States v. Smith, 286 U. S. 6 [1932].

Dismissal of an Army officer by the President creates a vacancy which can be filled only by an appointment with the consent of the Senate.[1] But where the President is authorized by law to reinstate a discharged officer, he may do so without the advice and consent of the Senate.[2]

[1] United States v. Corson, 114 U. S. 619 [1885].
[2] Collins's Case, 15 Ct. Cl. 22 [1879], reaffirming 14 Ct. Cl. 568 [1878].

AMBASSADORS, PUBLIC MINISTERS, AND CONSULS.

The President's power to appoint diplomatic agents [1] and consuls [2] is a constitutional function not derived from Congress, and requiring only the ultimate concurrence of the Senate. But the requirement of the consent of the Senate is not to be extended to the case of inferior consular officers even where such inferior is charged with temporarily performing the duties of consul.[3]

[1] 7 Op. Atty. Gen. 186 [1855].
[2] 7 Op. Atty. Gen. 242 [1855].
[3] United States v. Eaton, 169 U. S. 331, 343 [1898].

OFFICERS OF THE UNITED STATES—INFERIOR OFFICERS.

Unless a person in the service of the Government holds his place by virtue of an appointment by the President or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.[1]

[1] United States v. Mouat, 124 U. S. 307 [1888]; United States v. Smith, 124 U. S. 525, 532 [1888]; Lamar v. United States, 240 U. S. 60 [1916].

The word officer is frequently used in a broader sense than the technical one fixed by the constitutional method of appointment, and that use of it is occasionally found in statutes, in opinions of the Supreme and other courts, and in the regulations and orders of the Navy Department.[1] A Member of Congress is an officer within the meaning of section 32 of the Criminal Code.[2]

[1] Hendee v. United States, 22 Ct. Cl. 140 [1887].
[2] Lamar v. United States, 241 U. S. 103 [1916].

It has been held that the term "officer" did not include persons of the following classes: Surgeons appointed by the Commissioner of Pensions,[1] merchant appraisers selected by the collector of customs

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on demand for a reappraisal,[2] and clerks appointed by a collector of customs.[3]

[1] United States *v.* Germaine, 99 U. S. 508, 512 [1879].
[2] Auffmordt *v.* Hedden, 137 U. S. 310, 326 [1890].
[3] United States *v.* Smith, 124 U. S. 525, 532 [1888].

The word "inferior" is not here used in the sense of petty or unimportant, but it means subordinate or inferior to those officers in whom respectively the power of appointment may be vested—the President, the courts of law, and the heads of departments.[1]

[1] Collins's Case, 14 Ct. Cl. 568 [1878]; United States *v.* Germaine, 99 U. S. 508, 510 [1879].

POWERS OF CONGRESS.

From this section the Constitution must be understood to declare that all offices of the United States, except in cases where the Constitution itself may otherwise provide, shall be established by law.[1] But Congress cannot by law designate the person to fill an office.[2] It was held by the Attorney General that where an act of Congress confirmed certain appointments made by the President before the offices were authorized by law, it was not necessary that they should be again nominated to the Senate.[3] And it is settled that Congress may increase the duties of an existing office,[4] or retire an officer or change his rank,[5] without conflicting with this clause.

[1] United States *v.* Maurice, 26 Fed. Cas. No. 15747 [1823].
[2] United States *v.* Ferreira, 13 How. 40, 51 [1852].
[3] 10 Op. Atty. Gen. 449 [1863].
[4] Shoemaker *v.* United States, 147 U. S. 282, 301 [1893].
[5] Wood *v.* United States, 107 U. S. 414 [1882].

Further, while the power of appointment to office is essentially an executive function, Congress has power to prescribe conditions to the complete investiture of an office,[1] and qualifications for office, provided scope is left for the judgment and will of the appointing authority.[2] And it may control appointments through the control of appropriations for salaries.[3] This control may take effect in the refusal of appropriations; or it may create a liability for services antedating issue of commission, and allow back pay for any cause which Congress shall deem sufficient.[4]

[1] United States *v.* LeBaron, 19 How. 73, 78 [1856], filing of bond and taking oath of office.
[2] 13 Op. Atty. Gen. 516, 524 [1871]; In re Miller 5 Mackey (D. C.), 507 [1887], writ of error dismissed, 140 U. S. 690 [1891], upholding the civil service laws.
[3] *See* Foote *v.* United States, 23 Ct. Cl. 443 [1888]; 7 Op. Atty. Gen. 215 [1855].
[4] Bennet *v.* United States, 19 Ct. Cl. 379 [1884].

An officer appointed for a definite time or during good behavior has not any vested interest or contract right in his office of which Congress cannot deprive him. Whatever the form of the statute,

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the officer under it does not hold by contract, but enjoys a privilege revocable by the sovereignty at will; and one legislature cannot deprive its successor of the power of revocation.[1]

[1] Crenshaw *v.* United States, 134 U. S. 99, 104 [1890].

VESTING OF APPOINTMENTS IN THE PRESIDENT, COURTS, OR HEADS OF DEPARTMENTS.

It is no doubt usual and proper to vest the appointment of inferior officers in that department of the Government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged.[1]

[1] Ex parte Siebold, 100 U. S. 371, 397 [1880], upholding the Enforcement Act of 1870 (which imposed on the circuit courts the appointment of election supervisors) against the contention that it was a delegation of a nonjudicial duty; Ex parte Hennen, 13 Pet. 225, 230, 258 [1839]. *See also* United States *v.* Germaine, 99 U. S. 508, 511 [1879]; United States *v.* Hartwell, 6 Wall. 385, 393 [1868].

The power to vest appointments in the courts of law was held sufficient basis for Revised Statutes 627, authorizing judges of circuit courts to appoint commissioners, with authority (under R. S. 727) "to hold to security of the peace and for good behavior in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States."[1]

[1] Rice *v.* Ames, 180 U. S. 371, 378 [1901].

Appointments are made by the head of a department within the meaning of this clause where an Assistant Treasurer appoints clerks with the approbation of the Secretary of the Treasury;[1] but not where a surgeon is appointed by the Commissioner of Pensions.[2]

[1] United States *v.* Hartwell, 6 Wall. 385, 393 [1868].
[2] United States *v.* Germaine, 99 U. S. 508, 511 [1879].

REMOVAL OF OFFICERS.

Removal may be made by a notification, on order of the President, and is then effective upon receipt of notice; or it may be by a new appointment, operating as a revocation of the commission of the incumbent, and effective upon the performance of certain acts by the new appointee.[1] The President, by and with the advice and consent of the Senate, has the power to displace an officer by the appointment of another in his place.[2]

[1] United States *v.* Arkansas Bank, 24 Fed. Cas. No. 14515 [1846].
[2] Blake *v.* United States, 103 U. S. 227 [1881]; Quackenbush *v.* United States, 177 U. S. 20, 25 [1900]. *See also* Wallace *v.* United States, 257 U. S. 541 [1922].

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The power to remove is, in the absence of statutory provision to the contrary, an incident of the power to appoint (Burnap *v.* United States, 252 U. S. 512, 515 [1920]) and the power of suspension is an incident of the power of removal. The principle has been upheld in various circumstances, as follows:

(1) Clerk of district court, appointed by the district judge.[1]

(2) Army chaplain, appointed by the President with the consent of the Senate.[2]

(3) Commissioner of a circuit court appointed by the court; express authority to revoke appointments, given in the original act of 1793, had been omitted in the Revised Statutes.[3]

(4) Civil-service employee appointed by the Secretary of the Interior.[4]

(5) Commissioners of the United States Court in Indian Territory, appointed by the court.[5]

(6) General appraiser of merchandise appointed by the President with consent of the Senate. The case assumed without deciding that Congress had power in establishing such office to restrict the President's power of removal; but held that no such restriction was to be raised by implication beyond the express language of the act.[6]

[1] Ex parte Hennen, 13 Pet. 225, 230, 259, 260 [1839].
[2] Blake *v.* United States, 103 U. S. 227, 231 [1881].
[3] United States *v.* Allred, 155 U. S. 591, 594 [1895].
[4] Keim *v.* United States, 177 U. S. 290, 293, 294 [1900].
[5] Reagan *v.* United States, 182 U. S. 419, 426 [1901].
[6] Shurtleff *v.* United States, 189 U. S. 311, 316 [1903].

Removal of a customs inspector by an Assistant Secretary of the Treasury was presumed to have been within the scope of his authority and upheld, where such removal was reduced to writing and became part of the archives of the Department and there was nothing to show that the action did not have the full sanction and approval of the Secretary.[1]

[1] Norris *v.* United States, 257 U. S. 77 [1921].

When Congress by law vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto.[1]

[1] United States *v.* Perkins, 116 U. S. 483 [1886], involving a cadet engineer in the Navy, appointed under statute by the Secretary of the Navy. The case specifically left undecided the question whether or not Congress could constitutionally restrict the power of removal of officers appointed by the President with the consent of the Senate (p. 484). *See also* Eberlein *v.* United States, 257 U. S. 82 [1921].

The question was considered at length in Parsons *v.* United States,[1] involving the removal of a district attorney before the expira-

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tion of a specific 4-year term. The act passed by the First Congress providing for the office of district attorney (1789—1 Stat. 73, 92) fixed no term of office and made no provision with respect to removal: "in the view held by that Congress [the legislative decision of 1789] as to the power of the President to remove, it was unnecessary." In 1820, however, Congress provided that all district attorneys, among other officers, should be appointed for a term of 4 years and should be removable from office at pleasure. This the Court in the Parsons case held to be an act of limitation and not of grant; and the reference to removal simply a recognition of the constant and uniform practice in that regard. Revised Statutes, section 769, incorporating the act of 1820 as to district attorneys, omitted its affirmative recognition of the power of removal. "The reason for the omission plainly was because the insertion of language in the section which in so many words recognized a right of removal would have conflicted with the succeeding sections, embodying the terms of the tenure of office act, which prohibited removals. Section 769 was so drawn that in effect it permitted removals within the term, and it was left to the succeeding sections to make provisions that should limit the right of removal otherwise existing by virtue of the language of that section." Accordingly, it was held that the President had power to remove a district attorney within the term of 4 years, and with the consent of the Senate appoint a successor.

[1] 167 U. S. 324 [1897].

In Myers *v.* United States [1] the specific question was raised, whether a postmaster of the first class, appointed with the consent of the Senate under a statute (19 Stat. 80, sec. 6) which provided that such postmasters "shall be appointed and may be removed by the President with the advice and consent of the Senate, and shall hold their offices for 4 years unless sooner removed or suspended according to law" could constitutionally be removed before the expiration of 4 years by the President alone. And it was held that he could, that the restrictions on removals in the act of 1876 were unconstitutional, and "* * * that article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of article II, which blend action by the legislative branch, or by part of it, in the work of the Executive, are limitations to be strictly construed and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments;

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and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed."

[1] 272 U. S. 52, 164 [1926].

The authority of Congress to condition the President's power of removal by fixing a definite term and restricting removal except for cause depends upon the character of the office. Where an office is predominantly quasi-judicial and quasi-legislative rather than executive, the President has no constitutional power to remove for reasons other than those specified by law. So held, that the President had no power to remove without cause a Federal Trade Commissioner, when the act establishing the Commission (38 Stat. 717) provides for removals for inefficiency, neglect of duty, or malfeasance only.[1]

[1] Humphrey *v.* United States, 295 U. S. 602 [1935].

Article II. Sec. 2. Powers and duties of the President. Cl. 3. Recess appointments.

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.

In view of the practical importance of this clause, and for want of Supreme Court decisions, there are here noted several of the more significant decisions of the Court of Claims and of the Attorney General.

There Must Be a Vacancy.

An appointment cannot be made under this clause unless there is an actual vacancy existing; and that equally implies existence of an office. A law authorizing the advancement by and with the advice and consent of the Senate of Navy officers for eminent and conspicuous conduct in battle, is simply an authorization to the President with the consent of the Senate to create an office; there is no vacancy existing. Therefore, a recess promotion by the President alone was itself invalid, and did not create vacancies along the line to which regular appointments could be made.[1]

[1] Peck *v.* United States, 39 Ct. Cl. 125 [1904].

It was early held by the Attorney General, however, that the President had constitutional power to appoint by temporary commission a diplomatic officer to meet an emergency arising in the recess of the Senate.[1]

[1] 7 Op. Atty. Gen. 186 [1855].

The vacancy apparently need not actually happen during the recess; it may be one which "happens to exist" during a recess, by expiration of a commission during a previous session,[1] or even by

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expiration of a prior temporary commission, where the Senate at the ensuing session rejected or failed to act on a nomination.[3]

[1] 1 Op. Atty. Gen. 631 [1823]; 12 Op. Atty. Gen. 449 [1866]; 16 Op. Atty. Gen. 522 [1880]; 19 Op. Atty. Gen. 261 [1896]. *See also* Matter of Farrow, 3 Fed. 112, 115 [1880]; In re Yancey, 28 Fed. 445 [1886].

[2] 4 Op. Atty. Gen. 523 [1846]; 12 Op. Atty. Gen. 32 [1866]; Matter of Farrow, 3 Fed. 112 [1880].

It may be noted that the Attorney General held in 1845 that where offices (of judges, etc., for newly admitted States) were created and took effect during the session, but no nominations were sent to the Senate, the President could not make temporary appointments during the ensuing recess.[1] And in 1869 it was held to the same effect by a circuit court in Arkansas, where an office was similarly created and a subsequent session passed without such office being filled.[2]

[1] 4 Op. Atty. Gen. 361 [1845].

[2] Schenck *v.* Peay, 1 Dill. 267 [1871].

During the Recess.

This means the period after final adjournment and until the next session begins, and does not include temporary adjournments, such as are customary over holidays.[1]

[1] 23 Op. Atty. Gen. 599 [1901].

A recess appointment, limited to the end of the next session of the Senate, is terminated by nomination and appointment of the same party for an indefinite term. The new commission is not merely a confirmation of the recess appointment, and the two cannot be considered as one continuing appointment.[1]

[1] United States *v.* Kirkpatrick, 9 Wheat. 720, 734 [1824].

Article II. Sec. 3. Miscellaneous powers and duties of the President.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of 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.

Shall Receive Ambassadors and Public Ministers.

The construction of the words "ambassadors, other public ministers and consuls," used in the clause defining the power of appoint-

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ments, as including all the contents of the class, is confirmed by the use of the same words in this clause, meaning all possible diplomatic agents which any foreign power may accredit to the United States.[1]

[1] Ambassadors and Other Public Ministers of United States, 7 Op. Atty. Gen. 209 [1855].

Shall Take Care That the Laws Be Faithfully Executed.

The President is not authorized to execute the laws himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that the laws be faithfully carried into execution as they are expounded and adjudged by the co-ordinate branch of the Government to which that duty is assigned by the Constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.[1]

[1] Ex parte Merryman, 17 Fed. Cas. No. 9487 [1861].

This duty of the President is not limited to the enforcement of acts of Congress or of statutes of the United States according to their expressed terms, but includes the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution.[1]

[1] In re Neagle, 135 U. S. 1 [1890], holding that it is within the power of the President to take measures for the protection of a Federal judge who while in the discharge of the duties of his office is threatened with a personal attack which may probably result in his death, and where this protection is to be afforded through civil power the department of justice is the proper one to set in motion the necessary means of protection.

It by no means follows from the vesting of executive power in the President "that every officer in every branch of an executive department is under the exclusive direction of the President. * * * There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case where the duty enjoined is of a mere ministerial character. * * * [Such a doctrine] cannot receive the sanction of this Court. It would be vesting in the President a dispensing power which has not countenance for its support in any part of the Constitution; and is asserting a principle which, if carried out in its results, to all cases falling within

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it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice. To contend, that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible." [1]

[1] Kendall *v.* United States ex rel. Stokes, 12 Pet. 524, 610–613 [1838].

The duty of the President in the exercise of the power to see that the laws are faithfully executed is executive, not ministerial, and an injunction will not lie to restrain or compel performance of such duties.[1]

[1] Mississippi *v.* Johnson, 4 Wall. 475 [1867].

This clause refers primarily to the laws of the United States, and to those of a State or Territory only in the contingency when the case of insurrection therein is presented according to the Constitution and to acts of Congress.[1]

[1] Insurrection in a State, 8 Op. Atty. Gen. 11 [1856].

The obligation "to take care that the laws be faithfully executed", confirms the conclusion that removal of inferior executive officials from office is in its nature an executive function.[1]

[1] Myers *v.* United States, 272 U. S. 52, 53, 161, 163 [1926]. *See also* Shurtleff *v.* United States, 189 U. S. 311, 317 [1903].

Shall Commission All the Officers.

When a commission has been signed by the President the appointment is made and the commission is complete when the seal of the United States has been affixed to it by the Secretary of State;[1] the subsequent death of the President, by whom nothing remained to be done, can have no effect on that completed act. It is of no importance that the person commissioned must give bond and take an oath, before he possesses the office under the commission; nor that it is the duty of a third person to transmit the commission to the officer when he shall have done so.[2]

[1] Marbury *v.* Madison, 1 Cr. 137, 162 [1803].
[2] United States *v.* Le Baron, 19 How. 73, 79 [1856]

The President has, after appointment of an officer, discretion to withhold commission, or the delivery of the commission to the officer.[1] It has been held that he may (following current practice of the time) spread on the records the action of the Senate confirming a reappointment of an Army officer, and delay delivery of commission,[2] which when issued is evidence and confirmation of the previous action.

[1] 12 Op. Atty. Gen. 306 [1867].
[2] Bennett *v.* United States, 19 Ct. Cl. 380 [1884].

In 1803 it was objected that the justices of the Supreme Court had no right to hold circuit courts without having distinct commissions

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Sec. 4.—Impeachment

for that purpose; but it was held that the practice of several years to the contrary, uniformly acquiesced in, afforded an irresistible answer, and fixed the construction.[1]

[1] Stuart *v.* Laird, 1 Cr. 299 [1803].

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*

Article II. Sec. 4. Impeachment.

Impeachment.

A member of Congress is not a civil officer within the meaning of this section; nor is a private citizen subject to impeachment; [1] but resignation of an officer does not give immunity from impeachment for acts committed while in office.[2]

[1] 17 Op. Atty. Gen. 419 [1882]. *See also* Hinds' Precedents, vol. 3, secs. 2315–2318.

[2] The Belknap case, Hinds' Precedents, vol 3, sec. 2445.

By the Customs Administration Act of 1890, Congress established the position of General Appraiser, to be filled by the President, with the consent of the Senate, and subject to removal by the President for inefficiency, neglect of duty, or malfeasance. An appraiser, having been removed without cause stated, argued that the President was limited to a removal for one of the causes named in the statute. But it was held that his removal was effective, under the general power of the President, in the absence of constitutional or statutory restrictions, to remove civil officers—assuming, without deciding, the power of Congress to make such restrictions, they are not to be inferred or implied in the absence of express language. "No one has ever supposed that the effect of this section [of the Constitution] was to prevent [the removal of civil officers] for other causes deemed sufficient by the President." [1]

[1] Shurtleff *v.* United States, 189 U. S. 311, 317 [1903].

* Other provisions relating to impeachment are to be found in art. I, sec. 2, clause 5; art. I, sec. 3, clauses 6 and 7; art. II, sec. 2, clause 1; art. III, sec. 2, clause 3; and art. III, sec. 3, clause 1. For precedents in the matter of what are impeachable offenses, and especially what is intended by the phrase "high crimes and misdemeanors", *see* Hinds' Precedents, vol. 3, secs. 2009–2024. The term "treason" is defined by the Constitution, art. III, sec. 3, clause 1,

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ARTICLE III

THE JUDICIAL DEPARTMENT

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JUDICIAL DEPARTMENT

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article III. Judicial department.
Sec. 1. The judicial power, courts, judges.

The Judicial Power.*

DEFINITION IN GENERAL.

The framers of the Constitution ordained and established a judiciary as a necessary department, and used in it the phrase judicial power as one well understood and not needing definition in the instrument itself.[1]

[1] Bouvier's Law Dictionary (3d rev.) "Judicial Power", p. 1744.

Justice Miller, however, in his treatise on the Constitution (p.314) says: "It will not do to answer that it is the power exercised by the courts, because one of the very things to be determined is what power they may exercise. It is, indeed, very difficult to find any exact definition made to hand. * * * It is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." This definition was quoted with approval in Muskrat *v.* United States, 219 U. S. 346, 356 [1911]. Justice Sutherland, in Adkins *v.* Childrens' Hospital, 261 U. S. 525, 544 [1923], speaks of judicial power as "that power vested in courts to enable them to administer justice according to law." [1]

[1] *See also* Ex parte Milligan, 4 Wall. 2, 121 [1866].

By the term "judicial power" is meant that power with which the courts are to be clothed for the purpose of the trial and determining of causes.[1]

[1] Ex parte Gist, 26 Ala. 156, 162 [1855].

*Many of the cases under art. III dealing with the character and grant of judicial power cite both sec. 1 and sec. 2, and are not specifically grounded upon either section separately. For compactness and clarity of presentation, they are gathered at this point.

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Sec. 1.—Judicial Power, Courts, Judges

In Robertson *v.* Baldwin,[1] the Court said: "The better opinion is that the second section was intended as a constitutional definition of the judicial power, Chisholm *v.* Georgia, 2 Dall. 419, 475 [1793], which the Constitution intended to confine to courts created by Congress; in other words, that such power extends only to the trial and determination of 'cases' in courts of record, and that Congress is still at liberty to authorize the judicial officers of the several States to exercise such power as is ordinarily given to officers of courts not of record."

[1] 165 U. S. 275, 279 [1897].

From a negative standpoint, a power is not judicial within the meaning of this article unless it is exercised by judges appointed by the President with the consent of the Senate, holding their offices during good behavior, and receiving fixed salaries.[1]

[1] Re Kaine, 14 How. 103, 120 [1853].

The judicial department has no will, in any case. "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. * * * Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." [1]

[1] Osborn *v.* Bank of United States, 9 Wheat. 738, 866 [1824].

JUDICIAL POWER AND JURISDICTION.

A distinction between the two terms "judicial power" and "jurisdiction" is adverted to in a footnote by the court in Williams *v.* United States,[1] as follows: "The lack of authority in Congress to devolve any part of the judicial power defined by article III upon courts other than those created by itself must not be confused with its authority to vest jurisdiction in respect of some cases in courts whose judicial power is otherwise derived."

[1] 289 U. S. 553, 566 [1933].

In an early case, Kendall *v.* United States ex rel. Stokes,[1] the distinction was argued as a basis for construction of the statute there involved: "Some criticisms have been made at the bar, between the use of the terms 'power' and 'cognisance', as employed in those sections. It is not perceived how such distinction, if any exists, can affect the construction of this law. That there is a distinction, in some respects, cannot be doubted; and, generally speaking, the word power is used in reference to the means employed in carrying jurisdiction into execution. But it may well be doubted, whether any marked distinction is observed and kept up in our laws; so as in any measure to affect the construction of those laws. Power must include jurisdiction, which is generally used in reference to the exercise of that power in courts of justice. But power, as used in the Constitution, would seem to embrace both. Thus, all legislative power shall be vested in Congress. The executive power shall be vested in a President.

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Sec. 1.—Judicial Power, Courts, Judges

The judicial power shall be vested in one Supreme Court, and in such inferior courts as Congress shall, from time to time, ordain and establish: and this 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, etc. This power must certainly embrace jurisdiction, so far as that term is applicable to the exercise of legislative or executive power. And as relates to judicial power, the term 'jurisdiction' is not used, until the distribution of those powers among the several courts, is pointed out and defined."

[1] 12 Pet. 524, 622 [1838].

How nearly interchangeable are the two terms may be gathered from the statement in Re Yerger,[1] where the court was speaking of the issue of the writ of habeas corpus under an act of Congress: "To this end the act of 1789 provided that every court of the United States should have power to issue the writ. The jurisdiction thus given in law to the circuit and district courts is original; that given by the Constitution and the law to this court is appellate."

[1] 8 Wall. 85, 101 [1869].

JURISDICTION DEFINED.

The power to hear and determine a cause is jurisdiction [1]—the power to hear and determine the subject matter in controversy between the parties to a suit, and to render a judgment or decree.[2] The term has reference to the court's power over the parties;[3] over the subject matter; over the property in contest;[4] and to its authority to render judgment. An affirmative description of jurisdiction implies a negative on the exercise of power not comprehended within it.[5] How jurisdiction shall be acquired, whether original or appellate, and the mode of procedure are left to the wisdom of the legislature;[6] so, Congress may give the Federal courts original jurisdiction in any case to which appellate jurisdiction extends,[7] and may invest inferior Federal courts with jurisdiction over matters in which the Supreme Court has original, but not exclusive jurisdiction,[8] and may lawfully provide for suits,[9] at the option of the parties, on all controversies between citizens of different States.[10]

[1] United States *v.* De La Masa Arredondo, 6 Pet. 691, 709 [1832].
[2] Rhode Island *v.* Massachusetts, 12 Pet. 657, 718 [1838].
[3] Grignon *v.* Astor, 2 How. 319, 338 [1844].
[4] Cooper *v.* Reynolds, 10 Wall. 308, 316 [1870]; Windsor *v.* McVeigh, 93 U. S. 274 [1876]; Overby *v.* Gordon, 177 U. S. 214, 220 [1900].
[5] Durousseau *v.* United States, 6 Cr. 307, 314 [1810]; National Exch. Bank *v.* Peters, 144 U. S. 570, 573 [1892]; Marbury *v.* Madison, 1 Cr. 137, 174 [1803].
[6] Ex parte McCardle, 7 Wall. 506, 514 [1869].
[7] Marbury *v.* Madison, 1 Cr. 137, 174 [1803].
[8] Ames *v.* Kansas ex rel. Johnston, 111 U. S. 449, 469 [1884].
[9] Nashville *v.* Cooper, 6 Wall. 247, 252 [1868].
[10] Gaines *v.* Fuentes, 92 U. S. 10, 18 [1876].

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Where the Supreme Court had, without protest, assumed original jurisdiction of a suit by New Jersey against the City of New York, for an injunction to prevent the dumping of garbage at sea, which by washing up upon the New Jersey beaches constituted a nuisance in that State, it was objected that the Court was without jurisdiction to grant an injunction because the acts complained of were not within the waters of the United States. To this the Court stated, that defendant being before the Court, and the property injured within the territorial jurisdiction, the situs of the acts creating the nuisance was of no importance—the Court had "jurisdiction."[1]

[1] New Jersey *v.* New York, 283 U. S. 473 [1931].

ILLUSTRATIONS OF JUDICIAL POWER.

Admission and Disbarment of Attorneys.

While the legislature may undoubtedly prescribe qualifications for the office of attorney before the Federal courts, the actual admission or exclusion of individuals is an exercise of judicial power.[1] The power to disbar an attorney is possessed by all courts which have authority to admit attorneys to practice. But it can be exercised only for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded.[2] It stands on very different ground from punishment for contempt.[3]

[1] Ex parte Garland, 4 Wall. 333, 378 [1867], citing Ex parte Secombe, 19 How. 9 [1857].
[2] Ex parte Robinson, 19 Wall. 505 [1874], citing Ex parte Garland, 4 Wall. 333 [1867].
[3] Ex parte Bradley, 7 Wall. 364, 373 [1869].

Injunctions.

In Levering & Garrigues Co. *v.* Morrin,[1] it was argued that the provisions of the Anti-injunction Act (29 U. S. C. 101–115) which prohibited issue of injunctions by a district court in any case not involving interstate commerce and not based on diversity of citizenship, amounted in effect to a grant of jurisdiction "with a concurrent withholding of the power to properly administer the causes over which the jurisdiction has been granted, and therefore unconstitutional" under the rule enunciated in Michaelson *v.* United States ex rel. Chicago, St. P., M. & O. R. Co.,[2] namely, that the attributes which inhere in the judicial power cannot be rendered practically inoperative by Congress. The Court, however, sustained the statute, holding that Congress might give either whole or restricted jurisdiction, and "Congress has the power to regulate the power which it grants."

[1] 71 F. (2d) 284 [1934], certiorari denied, 293 U. S. 595 [1935].
[2] 266 U. S. 42, 66 [1924].

Stay of Proceedings.

"The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its

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docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." [1]

[1] Landis v. North American Co., 299 U. S. 248, 254 [1936], holding that where the district court, in a suit in the District of Columbia by holding companies to restrain enforcement of the Holding Company Act, stayed proceedings until decision of a suit brought by Securities Exchange Commission in district court for New York, and determination by the Supreme Court of any appeal therefrom, it was an abuse of discretion.

Punishment for Contempt.

The power to punish for contempt is inherent in all courts; this may be regarded as settled law. The courts of the United States become possessed of the power immediately upon being called into existence and vested with jurisdiction over any subject. So far as the inferior courts are concerned, the power is doubtless, within limits not precisely defined, subject to regulation by Congress, but the attributes which inhere in the power and are inseparable from it can neither be abrogated nor rendered practically inoperative.[1] Legislation vesting Federal courts with power to fine and imprison for contempt can only be considered as an instance of abundant caution or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.[2] "To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common-law cases, we are of opinion, is not within their implied powers." [3]

[1] Michaelson v. United States ex rel. Chicago, St. P., M. & O. R. Co., 266 U. S. 42, 65 [1924], sustaining provisions of the Clayton Act (38 Stat. 738, secs. 21, 22) providing for jury trial of contempts where the acts complained of constitute also a criminal offense, and which do not interfere with the power to deal summarily with contempts committed in presence of court, or so near as to obstruct the administration of justice, and do not purport to extend to a failure to comply with decrees requiring affirmative action. *See also* Ex parte Robinson, 19 Wall. 505 [1874]; Bessette v. Conkey (W. B.) Co., 194 U. S. 324 [1904]; Myers v. United States, 264 U. S. 95 [1924].

[2] Anderson v. Dunn, 6 Wheat. 204, 227 [1821].

[3] United States v. Hudson, 7 Cr. 32, 34 [1812]. *See also* United States v. Coolidge, 1 Wheat. 415 [1816]; Ex parte Terry, 128 U. S. 289 [1888]; Eilenbecker v. District Court, 134 U. S. 31 [1890].

A proceeding by a circuit court to enforce obedience to its injunction against obstruction of interstate commerce is not in execution of the criminal law. The power of a court to make an order carries with it the equal power to punish for a disobedience of that order,

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and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court.[1] And this is irrespective of the fact that the act which constitutes the contempt may be punishable by law as a statutory offense.[2] But this necessary power of a court to protect itself and its usefulness by the punishment of contemnors, being exercised without the restraint of a jury and with the possibility of mistake, undue prejudice or needless severity, it is no infringement of the constitutional independence of the judiciary to hold that the President has power to pardon for contempt.[3]

[1] Re Debs, 158 U. S. 564, 594 [1895].
[2] Jurney v. McCracken, 294 U. S. 125, 151 [1935].
[3] Ex parte Grossman, 267 U. S. 87, 122 [1925].

Mandamus.

It was intimated in McIntire v. Wood [1] that where Congress delegates the whole judicial power of the United States the power to issue mandamus to officers of the United States would follow from such vesting, as incident to the judicial power. Thus, it was held that under the act of February 27, 1801 (2 Stat. 103), the Circuit Court for the District of Columbia had power to issue writs of mandamus to enforce performance of a ministerial duty by an executive officer although the writ as used in courts of the United States, generally, cannot in any just sense be said to be a prerogative writ according to the principles of the common law.[2] That would by analogy require the issue to be restricted to the Supreme Court as the highest court of original jurisdiction—which in case of an original writ cannot be done. An act authorizing such action is unconstitutional; to enable the Supreme Court to issue mandamus it must be shown to be an exercise of appellate jurisdiction or to be necessary to enable the Court to exercise appellate jurisdiction.[3]

[1] 7 Cr. 504 [1813].
[2] Kendall v. United States ex rel. Stokes, 12 Pet. 524, 621 [1838]; McIntire v. Wood, 7 Cr. 504 [1813].
[3] Marbury v. Madison, 1 Cr. 137, 175 [1803].

"It is elementary law that mandamus will only lie to enforce a ministerial duty, as contra-distinguished from a duty which is merely discretionary." [1]

[1] United States ex rel. International Contracting Co. v. Lamont, 155 U. S. 303, 308 [1894], citing Marbury v. Madison, 1 Cr. 137 [1803]; Kendall v. Stokes, 3 How. 87 [1845]; Brashear v. Mason, 6 How. 92 [1848]; Reeside v. Walker, 11 How. 272 [1851]; Holloway v. Whiteley, 4 Wall. 522 [1867]; United States ex rel. Tucker v. Seamen, 17 How. 225, 231 [1855]; United States ex rel. Goodrich v. Guthrie, 17 How. 284 [1855]; United States ex rel. McConnell v. Edmunds, 5 Wall. 563 [1867]; Gaines v. Thompson, 7 Wall. 347 [1869]; Cox v. United States ex rel. McGarrahan, 9 Wall. 298 [1870]; United States ex rel. McBride v. Schurz, 102 U. S. 378 [1880]; Butterworth v. United States ex rel. Hoe, 112 U. S. 50 [1884]; United States ex rel. Dunlap v. Black, 128 U. S. 40 [1888]; Comrs. of Taxing District v. Loague, 129 U. S. 493 [1889]; Noble v. Union River Logging Railroad, 147 U. S. 165 [1893].

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Sec. 1.—Judicial Power, Courts, Judges

Congress undoubtedly has power to authorize a circuit court to issue a mandamus in an original proceeding, but until so authorized, a circuit court has no jurisdiction to award mandamus even where the relief sought concerns an alleged constitutional right.[1] But mandamus is a remedy to be enforced only under exceptional circumstances and under special grants of power. And a grant of power to issue this writ is not to be inferred from a general grant of power to enforce a given act.[2] No court has the power to command the withdrawal of money from the Federal treasury to pay any individual claim, however just.[3]

[1] Covington, & C. Bridge Company *v.* Hager, 203 U. S. 109 [1906]; Smith *v.* Alabama, 124 U. S. 465, 478 [1888].
[2] United States ex rel. Knapp *v.* Lake Shore & M. S. R. Co., 197 U. S. 536 [1905].
[3] United States ex rel. Goodrich *v.* Guthrie, 17 How. 284 [1855].

Issue of the writ of mandamus, though in 1821 not vested by law in the courts of the General Government, is within the scope of the judicial power. This power was not questioned in the earlier cases of Marbury *v.* Madison[1] or McIntire *v.* Wood,[2] deciding against the exercise of the power in particular instances.[3]

[1] 1 Cr. 137 [1803].
[2] 7 Cr. 504 [1813].
[3] McClung *v.* Silliman, 6 Wheat. 598, 604 [1821].

Where a mandamus was issued by a district court directing assessment of property in a county at full value, until a certain judgment against the county was paid, it constituted no interference with the judicial power under this section that the State court held an assessment purporting to be made in compliance therewith (and assessing at full value for county purposes but at 50 percent for other purposes) to be invalid for repugnancy to the State constitution.[1]

[1] Arkansas ex rel. Utley *v.* St. Louis-San Francisco R. Co., 269 U. S. 172 [1925]. *See also* Knox County *v.* Aspinwall, 24 How. 376 [1861].

Mandamus will not lie summarily to compel the Board of Tax Appeals to enroll an applicant for admission to practice before it as an attorney or accountant, when such applicant has not applied to the Board for a hearing on the charges which caused denial of his application.[1]

[1] Goldsmith *v.* United States Board of Tax Appeals, 270 U. S. 117, 123 [1926].

Habeas Corpus.*

The power to award the writ of habeas corpus by any of the courts of the United States (other than in exercise of power over its own officers or to protect themselves and their members in the exercise of their judicial functions) must be given by written law. Where

**See also* pp. 275, 500.

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the Supreme Court was asked to release one from custody under a commitment of a circuit court, the nature of the jurisdiction was held to be appellate—the revision of a judicial decision committing the prisoner—and was accordingly allowed.[1] So also, where the detainer was by virtue of the writ of *capias ad satisfaciendum* issued by the Circuit Court for the District of Columbia.[2]

[1] Re Bollman, 4 Cr. 75, 94 [1807].
[2] Ex parte Watkins, 7 Pet. 568, 572 [1833].

In 1868, it was assumed by the Court that under the acts of Congress to date, giving jurisdiction in cases of habeas corpus, the Supreme Court "may, in the exercise of its appelate power, revise the decisions of inferior courts of the United States and relieve from unlawful imprisonment authorized by them, except in cases within some limitations of the jurisdiction by Congress."[1] By 1873, it was held that the power of the Court, under the Constitution and Judiciary Act, to issue the writ and examine the proceedings in the inferior court, "so far as may be necessary to ascertain whether that court has exceeded its authority, is no longer open to question."[2] But, such appellate power cannot be exercised in any other form, or by any other mode of proceeding than that which the law prescribes; and thus, where the subject matter involved was the custody of a minor child, it was held not possible to be reduced to a money value, and hence not to be within the act of Congress giving an appeal to the Supreme Court from judgments of a circuit court, and writ of habeas corpus was refused.[3] In the absence of specific statutory authorization, it was held that habeas corpus was the appropriate remedy for the release of persons held in custody by State authorities for doing acts which they were required to do by the Constitution and laws of the United States.[4]

[1] Re Yerger, 8 Wall. 85, 98 [1869]; Coleman *v.* Tennessee, 97 U. S. 509, 519. [1879.]
[2] Ex parte Lange, 18 Wall. 163, 166 [1874].
[3] Barry *v.* Mercein, 5 How. 103 [1847].
[4] Re Neagle, 135 U. S. 1 [1890]; Ohio *v.* Thomas, 173 U. S. 276 [1899].

Interpretation of Laws.*

The Constitution imposes upon the judicial department the solemn duty of interpreting the laws; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender or to waive it.[1]

[1] United States *v.* Dickson, 15 Pet. 141, 162 [1841]; Muskrat *v.* United States, 219 U. S. 346 [1911]; United States *v.* Freund, 290 Fed. 411 [1923].

* For a list of the instances in which the Court has, in the course of judicial interpretation, decided that acts passed by Congress were in excess of constitutional authority, *see* post. p. 1065. There are set out at this point some typical statements by the Court indicating briefly its attitude as to the strictly judicial character of the function thus exercised. *See also* pp. 101, 376, 387, 421, 424 for other discussions involving the separation of powers between the three departments of Government.

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Sec. 1.—Judicial Power, Courts, Judges

It is the duty of the courts only to judge.[1] It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.[2]

[1] Chisholm *v.* Georgia, 2 Dall. 419, 433 [1793].

[2] Marbury *v.* Madison, 1 Cr. 137, 177 [1803]; Ex parte McCardle, 7 Wall. 506, 514 [1869]; Cohen *v.* Virginia, 6 Wheat. 264, 447 [1821].

The Supreme Court has the power to declare an act of Congress to be repugnant to the Constitution, and therefore invalid. But, the duty is one of great delicacy and only to be performed where the repugnancy is clear and the conflict irreconcilable. Every doubt is to be resolved in favor of the constitutionality of the law.[1] Acts will be construed, if possible, so as to avoid grave doubts of the constitutionality;[2] they will be presumed constitutional until the contrary is clearly established.[3]

[1] Nashville *v.* Cooper, 6 Wall. 247, 251 [1868]. *See also* Hylton *v.* United States, 3 Dall. 171, 175 [1796]; United States *v.* Harris, 106 U. S. 629, 635 [1883]; Hooper *v.* California, 155 U. S. 648, 657 [1895]; Mugler *v.* Kansas, 123 U. S. 623, 661 [1887]; Sweet *v.* Rechel, 159 U. S. 380, 392 [1895]; Halter *v.* Nebraska, 205 U. S. 34 [1907]; Adkins *v.* Children's Hospital, 261 U. S. 525, 544 [1923]; Blodgett *v.* Holden, 275 U. S. 142, 147 [1927].

[2] United States ex rel. Atty. Gen. *v.* Delaware & Hudson Co., 213 U. S. 366 [1909]; United States *v.* Jin Fuey Moy, 241 U. S. 394 [1916]; Texas *v.* Eastern Tex. R. Co., 258 U. S. 204 [1922]; Bratton *v.* Chandler, 260 U. S. 110 [1922]; Arkansas Natural Gas Co. *v.* Arkansas R. Comm., 261 U. S. 379 [1923]; Addy Co. *v.* United States, 264 U. S. 239, 245 [1924]; Lewellyn *v.* Frick, 268 U. S. 238 [1925]; United States *v.* Shreveport Grain & Elevator Co. 287 U. S. 77, 82 [1932].

[3] United States *v.* Harris, 106 U. S. 629, 635 [1883]; Close *v.* Glenwood Cemetery, 107 U. S. 466, 475 [1883]; Adkins *v.* Children's Hospital, 261 U. S. 525, 544 [1923].

If two laws conflict with each other, the courts must decide on the operation of each. "So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply." [1] The authority and duty of the Court to declare the supreme law and reject an act of legislation transcending the Constitution is not an exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the Court, to the determination of which must be brought the test and measure of the law.[2]

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Sec. 1.—Judicial Power, Courts, Judges

The constitutionality of an act is not involved in a case where the plaintiff is not affected by the provisions of the act.[3]

[1] Marbury *v.* Madison, 1 Cr. 137, 178 [1803]; Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 554 [1895]; Fairbank *v.* United States, 181 U. S. 283 [1901]. *Cf.* Van Horne *v.* Dorance, 2 Dall. 304 [1795].

[2] Adkins *v.* Childrens' Hospital, 261 U. S. 525, 544 [1923]. *See also* Muskrat *v.* United States, 219 U. S. 346 [1911]; Howat *v.* Kansas, 258 U. S. 181 [1922].

[3] Chicago Board of Trade *v.* Olsen, 262 U. S. 1 [1923].

It is an established rule that the Federal courts will not pass on the constitutionality of statutes unless absolutely necessary for the decision of the particular case before them.[1] It is a familiar rule that the Court will not anticipate the decision of a constitutional question upon a record which does not appropriately present it.[2]

[1] Burton *v.* United States, 196 U. S. 283, 295 [1905]; United States *v.* Alaska S. S. Co., 253 U. S. 113, 116 [1920]; Myers *v.* United States, 272 U. S. 52, 108, 176, 219 [1926].

[2] Tennessee Pub. Co. *v.* American Nat. Bank, 299 U. S. 18, 22 [1936], citing Cincinnati *v* Vester, 281 U. S. 439, 448, 449 [1930]; Arizona *v.* California, 283 U. S. 423, 463, 464 [1931].

The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers or be an assumption of power beyond the grants in the Constitution.[1]

[1] Ableman *v.* Booth, 21 How. 506, 520 [1859]. *See also* Hylton *v.* United States, 3 Dall. 171, 175 [1796]; Cooper *v.* Telfair, 4 Dall. 14 [1800]; United States *v.* Steffens (Trade-mark Cases), 100 U. S. 82, 96 [1880]; United States *v.* Harris, 106 U. S. 629, 635 [1883]; Close *v.* Glenwood Cemetery, 107 U. S. 466, 475 [1883]; Gordon *v.* United States, 117 U. S. 697 [1886]; Powell *v.* Pennsylvania, 127 U. S. 678, 686 [1888]; Chicago & G. T. R. Co. *v.* Wellman, 143 U. S. 339, 345 [1892].

The courts cannot inquire as to the motive prompting the acts of the other departments of Government; their knowledge and good faith are not open to question. Nor can the expediency or wisdom of those acts be questioned by the courts.[1]

[1] Fletcher *v.* Peck, 6 Cr. 87, 131 [1810]; Wilkes *v.* Dinsman, 7 How. 89, 127 [1849]; United States *v.* Des Moines, Nav. & R. Co., 142 U. S. 510, 544 [1892]; Northern Securities Co. *v.* United States, 193 U. S. 197, 350 [1904]; McCray *v.* United States, 195 U. S. 27, 53 [1904]. *See also* Scott *v.* Sandford, 19 How. 393, 405 [1857]; Ex parte McCardle, 7 Wall. 506, 514 [1869]; United States *v.* Union P. R. Co., 91 U. S. 72, 91 [1875]; Livingston County *v.* Darlington, 101 U. S. 407, 416 [1880]; Soon Hing *v.* Crowley, 113 U. S. 703, 710 [1885]; Angle *v.* Chicago, St. P., M. & O. R. Co., 151 U. S. 1, 18 [1894]; Brass *v.* North Dakato ex rel. Stoeser, 153 U. S. 391, 403 [1894]; Li Sing *v.* United States, 180 U. S. 486, 495 [1901]; Treat *v.* White, 181 U. S. 264, 269 [1901]; Louisville & N. R. Co. *v.* Kentucky, 183 U. S. 503, 512 [1902]; Champion *v.* Ames (Lottery Case), 188 U. S. 363 [1903]; United States *v.* Atchison, T. & S. F. R. Co., 234 U. S. 476 [1914].

It is an elementary principle that the right to pass on the constitutional power of Congress draws to it the authority also to decide

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all the essential incidents, even though otherwise there might not be a right to consider them.[1]

[1] Heald *v.* District of Columbia, 254 U. S. 20, 23 [1920], disposing of an argument that the express authority given by sec. 250, par. 3 of the Judicial Code, to review judgments in cases involving constitutionality of laws of the United States, was to be limited by par. 6 of the same section, authorizing review in case of the construction of laws (which had been held to apply only to laws of general application).

The Supreme Court of the United States has no jurisdiction to determine that any State law is void as being contrary to the State constitution.[1]

[1] Calder *v.* Bull, 3 Dall. 386, 392 [1798].

JUDICIAL POWER AS DISTINGUISHED FROM POLITICAL OR EXECUTIVE FUNCTIONS.*

The courts have no general supervising power over the proceedings and action of the various administrative departments of Government.[1] The Court has stated its position very strongly: "The interference of the courts with the performance of the ordinary duties of the executive departments of the Government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them".[2]

[1] Keim *v.* United States, 177 U. S. 290, 293 [1900]; Georgia *v.* Stanton, 6 Wall. 50, 71 [1868]. *See also* Interstate Commerce Commission *v.* Illinois Central R. Co., 215 U. S. 452 [1910].

[2] Decatur *v.* Paulding, 14 Pet. 497, 516 [1840].

The judiciary cannot properly interfere with executive action when the executive officer is authorized to exercise his judgment or discretion; it is only in cases where the executive officer has to perform a purely ministerial act that the courts, either by a proceeding in mandamus or injunction, can direct or control the performance of such ministerial act.[1] They cannot, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order of the Interstate Commerce Commission upon their own conception of whether the administrative power has been wisely exercised.[2] Nor has a Federal court, in the absence of legislation, the power to suspend a sentence imposed by law; the pardoning power is vested in the Executive and not the judiciary.[3]

[1] Gaines *v.* Thompson, 7 Wall. 347 [1869]; Dudley *v.* James, 83 Fed. 345 [1897].

[2] Interstate Commerce Commission *v.* Illinois C. R. Co., 215 U. S. 452 [1910].

[3] Ex parte United States, 242 U. S. 27 [1916]; Frad *v.* Kelly, 302 U. S. 312 [1937].

The President cannot be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional.[1]

[1] Mississippi *v.* Johnson, 4 Wall. 475 [1867]; New Orleans *v.* Paine, 147 U. S. 261 [1893].

**See also* pp. 101, 376, 387, 418, 424.

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Sec. 1.—Judicial Power, Courts, Judges

The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the Executive, can never be made in the Supreme Court.[1] The courts cannot of their own motion inquire as to the validity of action taken by other departments of the Government;[2] the question must arise in a case involving the rights of actual litigants.[3]

[1] Marbury *v.* Madison, 1 Cr. 137, 170 [1803], holding that where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, the individual has a right to resort to the laws of his country for a remedy. *See also* United States ex rel. Boynton *v.* Blaine, 139 U. S. 306, 326 [1891]; Ex parte Cooper, 143 U. S. 472, 503 [1892].
[2] Quackenbush *v.* United States, 177 U. S. 20, 25 [1900].
[3] Clough *v.* Curtis, 134 U. S. 361, 372 [1890].

This principle has been applied in the following instances and the determination of the executive or legislative branch accepted by the court as conclusive—the question being not of a judicial but a political nature:

(1) What is the established government in a State,[1] or whether a government ceases to be republican in form upon adoption of the initiative and referendum.[2]

(2) Who is the sovereign, *de jure* or *de facto*, of a territory?[3]

(3) Existence of tribal relations among the Indians.[4]

(4) The extent of territory ceded to the United States by the treaties of St. Ildefonso and Paris.[5]

(5) Date of the "Suppression of the rebellion,"[6] or completion of the conquest of California.[7]

(6) Public character of a person claiming to be a foreign minister.[8]

(7) Admission or exclusion of aliens.[9]

(8) Whether occupation of a tract of land (Fort Leavenworth Reservation) by the Government is for military purposes.[10]

(9) Whether a treaty with Prussia was still in existence after the establishment of the German Empire, and whether there remained power in a contracting State to carry out its treaty obligations.[11]

(10) Disputed boundary between United States and Spain (i. e., between Florida as claimed by Spain, and Louisiana as claimed by the United States).[12]

(11) Whether a particular claim is one which Congress can and ought to recognize as a debt payable by the United States upon considerations of justice and honor.[13]

[1] Luther *v.* Borden, 7 How., 42 [1849].
[2] Pacific States Telph. & Teleg. Co. *v.* Oregon, 223 U. S. 118 [1912].
[3] Jones *v.* United States, 137 U. S. 202, 212 [1890]. *See also* Oetjen *v.* Central Leather Co., 246 U. S. 297 [1918]—Carranza government in

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Mexico; United States v. Palmer, 3 Wheat. 610, 634 [1818]; The "Santissima Trinidad", 7 Wheat. 283, 337 [1822].

[4] United States v. Holliday, 3 Wall. 407, 419 [1866].

[5] United States v. Reynes, 9 How. 127 [1850]. *Cf.* Foster v. Neilson, 2 Pet. 253 [1829]; Garcia v. Lee, 12 Pet. 511 [1838].

[6] United States v. Anderson, 9 Wall. 56 [1870].

[7] United States v. Yorba, 1 Wall. 412 [1864].

[8] Ex parte Baiz, 135 U. S. 403 [1890].

[9] Nishimura Ekiu v. United States, 142 U. S. 651, 660 [1892]; Fong Yue Ting v. United States, 149 U. S. 698 [1893].

[10] Benson v. United States, 146 U. S. 325 [1892].

[11] Terlinden v. Ames, 184 U. S. 270, 286, 288 [1902].

[12] De la Croix v. Chamberlain, 12 Wheat. 599 [1827].

[13] United States v. Realty Co., 163 U. S. 427 [1896].

A naked contention by a State that Congress has usurped the reserved powers of the States by the mere enactment of a statute, though nothing is to be done under it without their consent, presents a question political and not judicial in character, and therefore not a matter which admits of the exercise of the judicial power.[1]

[1] Massachusetts v. Mellon, 262 U. S. 447, 483 [1923].

The Court took jurisdiction in Rhode Island v. Massachusetts,[1] on the ground that the question there involved was one of property, appropriate for judicial cognizance, rather than of State sovereignty. And in Cherokee Nation v. Georgia,[2] while the case was decided on the specific ground that the Indians were not entitled to sue as a foreign State, Chief Justice Marshall strongly intimated that the suit would have failed because involving simply a political question, in that it sought to control the exercise of physical force by the State legislature. At the same time it was admitted that "The mere question of right might, perhaps, be decided by this Court in a proper case with proper parties." So, in Georgia v. Stanton,[3] it was held that the court was without jurisdiction, since the case made by the bill was essentially political—the references to property rights and their protection being merely incidental.

[1] 12 Pet. 657 [1838].

[2] 5 Pet. 1, 20 [1831].

[3] 6 Wall. 50 [1868].

Relief from a political wrong done by the people of a State and by the State itself, must be given by them or by the legislative and political department of the Government of the United States.[1]

[1] Giles v. Harris, 189 U. S. 475, 488 [1903].

The mere fact that a treaty is involved in a particular case does not necessarily mean that the Court has no jurisdiction. "Congress has no constitutional power to settle the rights under treaties except in cases purely political. The construction of them is the peculiar province of the judiciary, when a case shall arise between

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individuals." [1] Where treaties regulate the mutual rights of citizens of the contracting nations, as e. g., in regard to rights of property by descent or inheritance, it constitutes a law of the land, enforceable in the courts and to which, as in case of a statute, the courts will resort for a rule of decision.[2]

[1] Wilson *v.* Wall, 6 Wall. 83, 89 [1867], involving a treaty with the Cherokees.

[2] Edye *v.* Robertson (Head Money Cases), 112 U. S. 580 [1884].

Since it is the exclusive right of governments to recognize new States which may arise out of revolutions occurring throughout the world, the courts will consider the former situation as remaining until such recognition is given, either by the United States or the Government to which the new State belonged.[1] Such recognition is retroactive in effect and validates the actions of the Government so recognized from the commencement of its existence.[2]

[1] Gelston *v.* Hoyt, 3 Wheat. 246, 324 [1818], citing Rose *v.* Himely, 4 Cr. 241 [1808]. *See also* The "Richmond" *v.* United States, 9 Cr. 102 [1815]; Williams *v.* Suffolk Ins. Co., 13 Pet. 415 [1839]; Kennett *v.* Chambers, 14 How. 38 [1853]; Jones *v.* United States, 137 U. S. 202 [1890]; La Abra Silver Min. Co. *v.* United States, 175 U. S. 423 [1899]; Neely *v.* Henkel, 180 U. S. 109 [1901]; The "Lusitania", 251 Fed. 715 [1918].

[2] Williams *v.* Bruffy, 96 U. S. 176, 186 [1878]; Underhill *v.* Hernandez, 168 U. S. 250, 253 [1897].

Where, however, the question is properly judicial, executive practice in interpreting and administering a statute is not to be taken as evidence of its proper construction.[1]

[1] Andrews *v.* Hovey, 124 U. S. 694, 717 [1888].

POWERS OF CONGRESS WITH RESPECT TO JUDICIAL FUNCTIONS.*

Assignment of Nonjudicial Duties.

Congress has no power to assign to the judiciary any but judicial duties, and the courts have uniformly refused to exercise functions which they have considered outside the judicial power.[1]

[1] Hayburn's Case, 2 Dall. 409 [1792]; where law directed the circuit judges to act as pension commissioners, they individually refused to undertake the duties; Gordon *v.* United States, 117 U. S. 697 [1886], Supreme Court refused to hear an appeal from the Court of Claims, when by law the determination of such court was not final but subject to review by the Secretary of the Treasury; United States *v.* Evans, 213 U. S. 297, 301 [1909], "It was long ago held by this court that the discharge of such a function [declaring their opinion on questions not growing out of the case before them] was not an exercise of judicial power"; In re Sanborn, 148 U. S. 222 [1893], an appeal will not be allowed from findings of fact and law made by the Court of Claims and certified to a department at its request—this being an ancillary and advisory function merely; Muskrat *v.* United States, 219 U. S. 346, 356 [1911], "It is therefore apparent that from its earliest history this court has consistently declined to exercise any powers other than

* *See also* pp. 101, 376, 387, 418, 421.

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Sec. 1.—Judicial Power, Courts, Judges

those which are strictly judicial in their nature"; United States *v.* Todd, 13 How. 52 [1852], note, where circuit courts as such were directed to act as pension commissioners, they refused on ground of unconstitutionality (see Hayburn's Case, *supra*), and it was further held that the act could not be construed to authorize action by the judges extrajudicially.

Where on the contrary a law authorized action by a judge as a claims commissioner under a treaty, and the reference to the judge was simply by way of designating the individual to perform certain duties, such action was constitutional—but not being judicial, could not form the basis of an appeal to the Supreme Court.[1]

[1] United States *v.* Ferreira, 13 How. 40 [1852].

Conversely, the courts have sustained duties imposed upon them (against the contention that Congress was attempting to delegate to the judges nonjudicial functions) under the Interstate Commerce Act, which authorized the Commission to invoke the aid of any court of the United States in requiring the attendance of witnesses and the production of documents, books, and papers,[1] and also under an act requiring the circuit judges, upon due notification by voters of a desire to have an election supervised, to open court at a convenient place, was held not invalid, since the court was not itself to supervise the election but to command others to do so.[2]

[1] Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 489 [1894], followed, as to similar provision in case of pension bureau, in In re Gross, 78 Fed. 107 [1897].

[2] In re Supervisors of Elections, 23 Fed. Cases No. 13628 [1878].

Congress also has the power under the Constitution to vest in the Federal courts the appointment of inferior officers. Hence an act of Congress vesting in the courts the appointment of supervisors of election is not unconstitutional, even though the functions to be performed by such appointees are not particularly of a judicial nature.[1]

[1] Ex parte Siebold, 100 U. S. 371, 397 [1880].

Interference with Judicial Functions.

If a function is strictly judicial it cannot be assumed by Congress,[1] nor can it be delegated to an executive officer. Appeals from the exercise of a judicial power cannot be taken to an executive officer, but only to an appellate court.[2] There is nothing in this section of the Constitution, however, which would prevent a ministerial officer, or person directed by law, from doing an act necessary to bring a person before a court possessing jurisdiction over him.[3]

[1] Kilbourn *v.* Thompson, 103 U. S. 168 [1881].

[2] Andrews *v.* Hovey, 124 U. S. 694, 717 [1888]; Prigg *v.* Pennsylvania, 16 Pet. 539 [1842].

[3] Ableman *v.* Booth, 21 How. 506 [1859].

Congress cannot interfere with a strictly judicial function. Thus, an act of July 12, 1870 (16 Stat. 230, 235), which attempted to pre-

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scribe the effect to be given by the courts to a Presidential pardon was held unconstitutional;[1] so also, an act of August 11, 1188 (25 Stat. 400, 411), by which Congress undertook to fix a rule for the determination of the compensation to be given for property taken for public use.[2] On the other hand, laws have been upheld, against the argument that they constituted an invasion of the judicial power, which extended a remedy by appeal to the Supreme Court so as to be effective retrospectively;[3] or which authorized impeachment of naturalization certificates, theretofore issued, for fraud in connection with their issue.[4] And the United States is not liable for the errors or mistakes of the courts in the course of judicial proceedings. "The courts of the United States are in no sense agencies of the Federal Government." [5]

[1] United States *v.* Klein, 13 Wall. 128, 147 [1872]; James *v.* Appel, 192 U. S. 129 [1904].
[2] Monongahela Nav. Co. *v.* United States, 148 U. S. 312 [1893].
[3] Stephens *v.* Cherokee Nation, 174 U. S. 445, 477 [1899].
[4] Johannessen *v.* United States, 225 U. S. 227 [1912].
[5] United States *v.* Dunnington, 146 U. S. 338, 351 [1892].

A matter which is from its nature the subject of a suit at common law or in equity or admiralty cannot be withdrawn by Congress from judicial cognizance;[1] it is questionable whether Congress can, under the Constitution, abrogate the power of Federal judges as defined by the common law in the submission of cases and the control of the deliberation of juries.[2]

[1] Den ex dem. Murray *v.* Hoboken Land & Improv. Co., 18 How. 272, 284 [1856].
[2] Liverpool & L. & G. Insurance Co. *v.* N. & M. Friedman Co., 133 Fed. 713 [1904]; Ex parte Robinson, 19 Wall. 505 [1874].

Matters Delegable to Courts or Administrative Officers.

There are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts.[1] The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate the power to executive officers, or may commit it to judicial tribunals. As stated in Oceanic Steam Navigation Co. *v.* Stranahan,[2] "the legislation of Congress from the beginning * * * has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power."

[1] Den ex dem. Murray *v.* Hoboken Land & Improv. Co., 18 How. 272, 284 [1856], involving issue of a distress warrant by the Solicitor of the Treasury to enforce a lien of the United States.
[2] 214 U. S. 320, 339 [1909].

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Examples of such matters are:

(1) The determination of claims against the United States—a function which belongs properly to Congress as an incident to its power to pay the debts of the United States, but which in its discretion it may delegate to a court not created under article III.[1]

(2) The valuation of imported merchandise, with power to impose a penalty for undervaluation.[2]

(3) Arrest and identification of aliens subject to exclusion, and causing their deportation—subject to the condition that for Congress further to declare unlawful residence an infamous crime, punishable by deprivation of liberty and property without intervention of the judicial power, is unconstitutional.[3]

(4) Exclusion of aliens with contagious disease, with power in the Secretary of Commerce and Labor to impose and exact penalties from steamship companies for transportation in violation of law.[4]

[1] Ex parte Bakelite Corp., 279 U. S. 438, 451 [1929].

[2] Passavant & Co., v. United States, 148 U. S. 214 [1893]; Bartlett v. Kane, 16 How. 263 [1854]; Origet v. Hedden, 155 U. S. 228 [1894].

[3] United States ex rel. Turner v. Williams, 194 U. S. 279, 291 [1904]; Wong Wing v. United States, 163 U. S. 228 [1896].

[4] Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320 [1909].

Regulation of Procedure.

Congress possesses the sole right to say what shall be the forms of proceeding, either in equity or at law, in the courts of the United States, and in what cases an appeal shall be allowed. It is a matter of sound discretion, and to be exercised by Congress in such a manner as shall in its judgment best promote the public convenience and the true interests of the citizens.[1]

[1] Ex parte City Bank, 3 How. 292, 317 [1845]; Livingston v. Story, 9 Pet. 632, 655 [1835]; Fidelity & D. C. Co. v. United States use of Smoot, 187 U. S. 315 [1902].

Congress may alone determine the remedies which may be pursued for the enforcement of judgments in the Federal courts as well as the procedure to be adopted in the progress of the suit.[1]

[1] Lamaster v. Keeler, 123 U. S. 376 [1887].

Congress may confer upon the courts power to make alterations and additions in process as well as in modes of proceeding in suits. The power to alter and add to the process and modes of proceeding in a suit embraces the whole progress of such suit, and every transaction in it from its commencement to its termination, and until the judgment shall be satisfied.[1]

[1] Wayman v. Southard, 10 Wheat. 1 [1825]; Bank of United States v. Halstead, 10 Wheat. 51 [1825]; Beers v. Haughton, 9 Pet. 329, 359 [1835]; United States v. Union P. R. Co., 98 U. S. 569, 604 [1879].

An act adopting State remedies is valid, and the statute requiring Federal courts to conform to State practice does not require them to renounce jurisdiction lawfully acquired under acts of Congress, nor

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does it conflict with the constitutional clause prescribing the equity jurisdiction of the courts. The power conferred by this clause does not warrant Congress in abrogating any established law of property or in removing any obligation of the citizens of a State to submit to the rule of the local sovereign.[1]

[1] Ex parte Boyd, 105 U. S. 647, 652 [1882]; Phelps v. Oaks, 117 U. S. 236, 239 [1886]; Suydam v. Williamson, 24 How. 427, 433 [1861].

The Judicial Power Shall be Vested in Courts.

THE POWER OF CONGRESS.

The question of whether the Constitution itself vested the judicial power was raised at a very early date. In Turner v. Bank of North America,[1] it was argued by Rawle that the power was thus vested and that Congress could no more limit than enlarge the constitutional grant; but in answer, it was stated by Justice Chase "The notion has frequently been entertained, that the Federal courts derive their judicial power immediately from the Constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise: and if Congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the Federal courts, to every subject, in every form, which the Constitution might warrant."

[1] 4 Dall. 8, 9–10 [1799].

"The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that Congress could not, without a violation of its duty, have refused to carry it into operation. * * * The judicial power must, therefore, be vested in some court, by Congress; and to suppose, that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose, that, under the sanction of the Constitution, they might defeat the Constitution itself; a construction which would lead to such a result cannot be sound. * * * If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to all; for the Constitution has not singled out any class on which Congress are bound to act in preference to others." [1]

[1] Martin v. Hunter, 1 Wheat. 304, 328 [1816].

This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United

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States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it.[1] The Supreme Court alone possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it.[2] The entire judicial power delegated by the Constitution does not vest *ipso facto* in the courts created by Congress.[3] Nor does the creation of a court *ipso facto* confer any jurisdiction. Legislation is necessary to vest in the inferior courts their judicial power; "the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." [4]

[1] Osborn *v.* Bank of United States, 9 Wheat. 738, 819 [1824].

[2] Chisholm *v.* Georgia, 2 Dall. 419, 432 [1793]; United States *v.* Hudson, 7 Cr. 32, 33 [1812]; Stevenson *v.* Fain, 195 U. S. 165, 167 [1904]; Ex parte Wisner, 203 U. S. 449 [1906].

[3] Turner *v.* Bank of North America, 4 Dall. 8, 10 [1799]

[4] Cary *v.* Curtis, 3 How. 236, 245 [1845]. *See also* Johnson Steel Street Rail Co. *v.* Wharton, 152 U. S. 252, 260 [1894]; Nashville *v.* Cooper, 6 Wall. 247, 251 [1868]; Fontain *v.* Ravenel, 17 How. 369, 384 [1855]; Home L. Ins. Co. *v.* Dunn, 19 Wall. 214, 226 [1874]; Gaines *v.* Fuentes, 92 U. S. 10 [1876]; Windsor *v.* McVeigh, 93 U. S. 274 [1876]; Mitchell *v.* Clark, 110 U. S. 633 [1884]; Bankers Trust Co. *v.* Texas & P. R. Co., 241 U. S. 295 [1916]; Kentucky *v.* Powers, 201 U. S. 1, 24 [1906]; United States *v.* Tillou (Eckford), 6 Wall. 484, 488 [1868]; Kline *v.* Burke Constr. Co., 260 U. S. 226 [1922].

LIMITATION OF JURISDICTION.

Jurisdiction prescribed by the Constitution cannot be extended by Congress. Thus, a statute authorizing the Supreme Court to issue writs of mandamus, where under the circumstances, that constituted an original proceeding;[1] or giving it jurisdiction of a prize cause transferred from a lower court, where no action had been taken upon the cause in such court;[2] or giving jurisdiction to the circuit court in all suits in which an alien is a party[3] is invalid. A section of the Expediting Act of 1903 (32 Stat. 823) which, upon division of opinion in circuit court, authorized certification of cases to Supreme Court for review "in like manner as if taken there by appeal" was held to invoke the exercise of original jurisdiction, contrary to the settled rule.[4]

[1] Marbury *v.* Madison, 1 Cr. 137 [1803].

[2] The "Alicia" *v.* United States, 7 Wall. 571 [1869].

[3] Hodgson *v.* Bowerbank, 5 Cr. 303 [1809]; Owings *v.* Norwood, 5 Cr. 344, 348 [1809]; Scott *v.* Sandford, 19 How. 393, 401 [1857].

[4] Baltimore & O. R. *v.* Interstate Commerce Commission, 215 U. S. 216 [1909].

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Sec. 1.—Judicial Power, Courts, Judges

Jurisdiction once prescribed by act of Congress may be withheld or withdrawn within the discretion of Congress,[1] even to the extent, in case of public exigency, of the withdrawal of jurisdiction in a pending case.[2]

[1] Kline *v.* Burke Constr. Co., 260 U. S. 226 [1922].

[2] Re Yerger, 8 Wall. 85, 104 [1869]; Ex parte McCardle, 7 Wall. 506 [1869]; Bird *v.* United States, 187 U. S. 118 [1902]; Hallowell *v.* Commons, 239 U. S. 506 [1916].

It rests with the courts themselves to determine whether a particular case comes within the jurisdiction granted them.[1] While the Supreme Court may by its rules regulate the exercise of jurisdiction by a circuit court, it has no power to increase or diminish that jurisdiction as created by act of Congress enacted in pursuance of the Constitution.[2]

[1] United States *v.* Peters, 5 Cr. 115, 136 [1809]; Freeman *v.* Howe, 24 How. 450, 459 [1861]; Re Tyler, 149 U. S. 164 [1893]; Missouri P. R. Co. *v.* Fitzgerald, 160 U. S. 556, 582 [1896]; United Copper Securities Co. *v.* Amalgamated Copper Co., 244 U. S. 261 [1917].

[2] Venner *v.* Great Northern R. Co., 209 U. S. 24, 35 [1908]. *See also* Turner *v.* Bank of North America, 4 Dall. 8, 10 [1799]; Sheldon *v.* Sill, 8 How. 441, 448 [1850].

To give jurisdiction to a Federal court it is sufficient that the jurisdiction may be found in the Constitution or the law, but the two must cooperate, the Constitution as the fountain and the laws of Congress as the streams which convey the jurisdiction to the court.[1]

[1] Ableman *v.* Booth, 21 How. 506 [1859]; Missouri P. R. Co. *v.* Fitzgerald, 160 U.S. 556, 582 [1896].

The courts of the United States can take cognisance only of subjects assigned to them expressly or by necessary implication; *a fortiori*, they can take no cognisance of matters that by law are either denied to them or expressly referred *ad aliud examen*.[1]

[1] Cary *v.* Curtis, 3 How. 236, 246 [1845].

Jurisdiction cannot be conferred by stipulation[1] nor consent[2] of parties. Without grant by Congress, the Federal courts have no common law jurisdiction.[3]

[1] Chicot County *v.* Sherwood, 148 U. S. 529, 534 [1893]; Byers *v.* McAuley, 149 U. S. 608, 618 [1893].

[2] Baggs *v.* Martin, 179 U. S. 206, 209 [1900].

[3] United States *v.* Hudson, 7 Cr. 32, 34 [1812]; Fitch *v.* Creighton, 24 How. 159 [1860]; Rice, *v.* Minnesota & N. W. R. R. Co., 1 Black 358, 374 [1862]; Ex parte Bollman, 4 Cr. 75 [1807].

Equity jurisdiction may be conferred;[1] and is the same as that of the high court of chancery in England.[2] The usages of that court, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and has been observed

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since the organization of the Government;[3] but the sphere of equitable jurisdiction is not extended, in respect of what is to be deemed a proper proceeding for redress of a specific wrong, where jurisdiction is granted for relief by "action at law, suit in equity, or other proper proceeding." [4] A court of the United States sitting as a court of equity is without jurisdiction of a suit to enjoin the prosecution of a proceeding to remove a State official from office.[5]

[1] Livingston v. Story, 9 Pet. 632 [1835]; Fontain v. Ravenel, 17 How. 369, 384 [1855]; The "Moses Taylor" v. Hammond, 4 Wall. 411, 430 [1867].
[2] Payne v. Hook, 7 Wall. 425, 430 [1869]; Mississippi Mills v. Cohn, 150 U. S. 202 [1893].
[3] Pennsylvania v. Wheeling & B. Bridge Co., 13 How. 518, 563 [1852].
[4] Giles v. Harris, 189 U. S. 475 [1903].
[5] Walton v. House of Representatives, 265 U. S. 487 [1924].

An act conferring on the district court jurisdiction to adjudicate French and Spanish land grants on written evidence of title is to be strictly construed, and confers no jurisdiction to render a decree founded on mere adverse possession.[1]

[1] United States v. Rillieux, 14 How. 189, 190 [1853].

An act conferring on Federal circuit courts jurisdiction of all suits by or against national banks, irrespective of the subject matter, was held constitutional.[1]

[1] Foss v. First Nat. Bank, 3 Fed. 185 [1880], decree affirmed in Bissell v. Foss, 114 U. S. 252 [1885]; First National Bank v. Fellows ex rel. Union Trust Co., 244 U. S. 416 [1917].

A State law cannot give jurisdiction to any Federal court, but it may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence.[1] The local laws can never confer jurisdiction on the courts of the United States. They can only furnish rules to ascertain the rights of parties, and thus assist in the administration of the proper remedies where the jurisdiction is vested by the laws of the United States.[2]

[1] Ex parte McNiel, 13 Wall. 236, 243 [1872].
[2] The "Orleans" v. Phoebus, 11 Pet. 175, 183 [1837].

On the other hand, jurisdiction conferred on the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power, notwithstanding that the State laws frequently

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form rules of decision for the United States courts.[1] A State cannot burden the right of access to the Supreme Court. Thus, it may not authorize assessment by State court of attorneys' fees for services in the Supreme Court upon writ of error.[2] One who is entitled to sue in the Federal courts may sue in equity whenever the established principles and rules of equity permit, and cannot be deprived of that right by reason of a State statute allowing action at law on the same cause of action.[3] A statute requiring all actions against a county to be brought in the county court does not prevent a United States circuit court from taking jurisdiction.[4] A State cannot require waiver of the right to remove a suit into Federal court as a condition upon which a foreign corporation will be allowed to do business in the State.[5]

[1] Hyde *v.* Stone, 20 How. 170, 175 [1858]; Barrow S. S. Co. *v.* Kane, 170 U. S. 100, 111 [1898].

[2] Missouri P. R. Co. *v.* Larabee, 234 U. S. 459 [1914].

[3] Smyth *v.* Ames, 169 U. S. 466, 516 [1898]; Mississippi Mills *v.* Cohn, 150 U. S. 202 [1895].

[4] Mercer County *v.* Cowles 7 Wall. 118 [1869]; Chicot County *v.* Sherwood 148 U. S. 529 [1893].

[5] Terral *v.* Burke Constr. Co., 257 U. S. 529, 532 [1922].

The several State legislatures have not the ultimate right to determine the jurisdiction of the courts of the union; that power necessarily resides in the supreme judicial tribunal of the nation.[1]

[1] United States *v.* Peters, 5 Cr. 115 [1809], involving a statute of Pennsylvania, which after declaring the jurisdiction entertained by the district court of the United States to have been illegally exercised, required payment to the State of certain monies otherwise disposed of by decree of the said district court.

DISTRIBUTION OF JURISDICTION, AS BETWEEN THE FEDERAL COURTS.

Under this article, it was held in Martin *v.* Hunter,[1] that Congress might parcel out the jurisdiction among the inferior courts from time to time, at their own pleasure. The Court further observed that this article of the Constitution took a distinction between two classes of cases to which the judicial power was to extend: First, those as to which all cases were included; and second, others where the word "all" was not used. And it was suggested that this implied that as to the second class (which includes "controversies to which the United States shall be a party", etc.) Congress was left a discretion to qualify the jurisdiction, original or appellate, as might be dictated by public policy. A similar conclusion was reached in Williams *v.* United States,[2] as also in Stevenson *v.* Fain,[3] from a consideration of the use of the word "all", and also the distinction taken between "controversy" and "case."

[1] 1 Wheat, 304, 331 [1816].

[2] 289 U. S. 553, 572 [1933].

[3] 195 U. S. 165, 167 [1904].

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It was with reference to the first of these two classifications noted in Martin *v.* Hunter[1] that the court said in American Ins. Co. *v.* Canter:[2] "The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them, in the constitution, is, we think, conclusive against their identity."

[1] Wheat, 304 [1816].
[2] 1 Pet. 511, 545 [1828].

A still different classification was made in United States *v.* Texas,[1] viz: First, cases where the jurisdiction depends on the character of the cause, whoever may be the parties; and second, where it depends on the character of the parties, whatever the subject of controversy.

[1] 143 U. S. 621, 643 [1892].

Under this clause Congress may invest an inferior Federal court with jurisdiction over matters wherein the Supreme Court has original but not exclusive jurisdiction.[1] Inferior courts may be given original jurisdiction in matters affecting consuls, and an act which confers on the circuit courts jurisdiction to restrain combinations to obstruct interstate commerce is not void for want of power.[2]

[1] Börs *v.* Preston, 111 U. S. 252, 256 [1884].
[2] Ames *v.* Kansas ex rel. Johnston, 111 U. S. 449, 471 [1884]; Davis *v.* Packard, 7 Pet. 276, 281 [1833].

The equity jurisdiction of the courts of the United States is derived from the Constitution and laws of the United States. Their powers and rules of decision are the same in all the States. Their practice is regulated by themselves and by rules established by the Supreme Court.[1] As the courts of the Union have a chancery jurisdiction in every State, and the Judiciary Act confers the same chancery powers on all and gives the same rule of decision, its jurisdiction in one State must be the same as in other States.[2]

[1] Noonan *v.* Braley (Lee), 2 Black 499, 509 [1863].
[2] United States *v.* Howland, 4 Wheat. 108, 115 [1819]; Boyle *v.* Zacharie, 6 Pet. 635 [1832]; Neves *v.* Scott, 13 How. 268, 272 [1852].

DISTRIBUTION OF JURISDICTION, AS BETWEEN FEDERAL AND STATE COURTS.

Exclusiveness of Jurisdiction of Federal Courts.

Except for the limited cases where removal may be had from a State to a Federal court, and for the review of judgments of State courts by the Supreme Court of the United States, "the tribunals of the State and the Union are independent of one another."[1] But the respective courts are, nevertheless, "not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."[2] The

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fact of distinct sovereignties is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied.[3]

[1] Taylor *v.* Carryl, 20 How. 583, 597 [1858].

[2] Claflin *v.* Houseman, 93 U. S. 130, 137 [1876], quoted with approval in Mondou *v.* New York, N. H. & H. R. Co. (Second Employers' Liability Cases), 223 U. S. 1, 58 [1912].

[3] Claflin *v.* Houseman, 93 U. S. 130, 137 [1876]; Plaquemines Tropical Fruit Co. *v.* Henderson, 170 U. S. 511 [1898].

In some cases, from their character, the judicial power is necessarily exclusive of all State authority; in other cases it may be made so at the option of Congress, or it may be exercised concurrently with that of the States.[1] How far the judicial power is, or may be made, exclusive in the courts of the United States, is a much discussed question. In Martin *v.* Hunter,[2] it was noted that a distinction is taken in article III, section 2, clause 1, between two classes of cases: The first, those as to which the judicial power extends to all cases, and the second, including all others to which the judicial power extends, in which the word "all" is dropped. And the suggestion was made, that this difference in language implied an intention to leave it to Congress, in the latter class of cases, to qualify the jurisdiction in such manner as public policy might dictate. Without relying entirely upon this classification, the Court later agreed with Martin *v.* Hunter, that in some cases it was simply unavoidable that the Federal jurisdiction should be exclusive—as, e. g., in the case of admiralty jurisdiction.[3]

[1] Chicago & N. W. R. Co. *v.* Whitton, 13 Wall. 270, 288 [1872]. *See also* Martin *v.* Hunter, 1 Wheat. 304, 337 [1816]; The "Moses Taylor" *v.* Hammons, 4 Wall. 411, 429 [1867].

[2] 1 Wheat. 304, 334 [1816].

[3] The "Moses Taylor" *v.* Hammons, 4 Wall. 411, 428 [1867].

The cases were thus summarized by the Court in 1876: "The general question, whether State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties of the United States, has been elaborately discussed * * * but the result of these discussions has, in our judgment, been * * * to affirm the jurisdiction, where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case." The obiter suggestion in Martin *v.* Hunter that the State courts could not take direct cognizance of cases arising under the Constitution, laws, and treaties of the United States, as no such jurisdiction existed before the Constitution was adopted, is to be taken "with important limitations"; the same jurisdiction (to a certain extent) existed under authority of the States. In such case, jurisdiction is not conferred by Congress on the State court; but the

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State court exercises jurisdiction in cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the Federal courts.[1]

[1] Claflin *v.* Houseman, 93 U. S. 130, 136 [1876], upholding suit by assignee to recover assets of a bankrupt; Teal *v.* Felton, 12 How. 284 [1852], upholding action against a postmaster for neglect of duty to deliver a newspaper under the postal laws; Houston *v.* Moore, 5 Wheat. 1 [1820], State jurisdiction of delinquency of a militiaman. *See also* Pennsylvania R. Co. *v.* Sonman Shaft Coal Co., 242 U. S. 120 [1916]; Pennsylvania R. Co. *v.* Stineman Coal Mine Co., 242 U. S. 298 [1916].

While it is true that Congress has no power under the Constitution to create courts for the States, it does not follow that Congress may not constitutionally authorize the magistrates or courts of a State to enforce a statute providing for a uniform system of naturalization, and including proceedings in a certain class of State courts. Unless prohibited by State legislation, State courts and magistrates may exercise the powers conferred by Congress under such laws.[1]

[1] Holmgren *v.* United States, 217 U. S. 509 [1910].

The legislation of Congress has proceeded, beginning with the Judiciary Act of 1789, upon the supposition that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts. The constitutionality of legislation thus putting certain cases within the exclusive jurisdiction of Federal courts, or permitting a choice of tribunals, or removal from State to Federal courts, "cannot be seriously questioned, and is of frequent recognition by both State and Federal courts." [1]

[1] The "Moses Taylor" *v.* Hammons, 4 Wall. 411, 429–430 [1867], holding the admiralty jurisdiction of the Federal courts exclusive; Claflin *v.* Houseman, 93 U. S. 130, 136 [1876].

No part of the criminal jurisdiction can be delegated by Congress to State courts,[1] but the same act may, as to its character and tendencies and the consequence involved, constitute an offense against both the State and Federal Governments, and may draw to its commission the penalties denounced by either.[2]

[1] Martin *v.* Hunter, 1 Wheat. 304, 337 [1816].

[2] United States *v.* Marigold, 9 How. 560, 569 [1850]. *See also* Cross *v.* North Carolina, 132 U. S. 131, 139 [1889]; Crossley *v.* California, 168 U. S. 640, 641 [1898]; Fox *v.* Ohio, 5 How. 410, 433 [1847]; Prigg *v.* Pennsylvania, 16 Pet. 539 [1842].

Exclusiveness of Jurisdiction of Either Federal or State Court, Once Attached.

In General.—Neither a Federal nor a State court can interfere with the process or proceedings of the other.[1] The doctrine was stated in Taylor *v.* Taintor [2] in the following language: "Where a State court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its

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duty is fully performed and the jurisdiction invoked is exhausted: and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

[1] Washington County *v.* United States ex rel. Durant, 9 Wall. 415, 418 [1870].

[2] 16 Wall. 366, 370 [1873]. *See also* Peck *v.* Jenness, 7 How. 612, 624 [1849]; Watson *v.* Jones, 13 Wall. 679, 715 [1872]; Byers *v.* McAuley, 149 U. S. 608, 614 [1893]; Harkrader *v.* Wadley, 172 U. S. 148, 164 [1898]; Penn General Casualty Co. *v.* Pennsylvania ex rel. Schnader 294 U. S. 189, 194 [1935].

Thus, an injunction issued in a State court is inoperative in any manner to affect process in the Federal court.[1]

[1] United States ex rel. Moses *v.* Keokuk, 6 Wall. 514 [1868]. *See also* McKim *v.* Voorhies, 7 Cr. 279 [1812]; Pennsylvania *v.* Wheeling & B. Bridge Co., 18 How. 421 [1856]; Amy *v.* Barkholder, 11 Wall. 136 [1871]; Keely *v.* Sanders, 99 U. S. 441 [1879]; Central Nat. Bank *v.* Stevens, 169 U. S. 432 [1898].

The jurisdiction of a United States circuit court over a cause properly before it cannot be defeated by the institution, by one of the parties of proceedings in a State court, whether civil or criminal, involving the same legal questions.[1] The principle is well settled that where two tribunals have concurrent jurisdiction over the same subject matter and parties, a suit commenced in one may be pleaded in abatement to an action for the same cause in the other.[2]

[1] Prout *v.* Starr, 188 U. S. 537 [1903]; Wallace *v.* McConnell, 13 Pet. 136 [1839].

[2] Shelby *v.* Bacon, 10 How. 56 [1850].

Proceedings before a State water board to determine rights of claimants to waters of a stream differs so from private suits between a few of the claimants in the Federal court restraining encroachments on rights in the stream as to render the rule inapplicable, that a court of competent jurisdiction first obtaining jurisdiction of the same matter will retain it.[1]

[1] Pacific Live Stock Co. *v.* Lewis, 241 U. S. 440 [1916].

A Federal court in which is first raised the question of the validity, under the Federal Constitution, of a State statute, has a right to decide that question to the exclusion of the State courts, and may enjoin criminal proceedings subsequently commenced under it in the State court until its duty is performed.[1]

[1] Ex parte Young, 209 U. S. 123 [1908].

In Looney *v.* Eastern Texas R. Co.[1] it was said that the use of injunctions by Federal courts first acquiring jurisdiction over the parties or the subject matter of a suit for the purpose of protecting

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and preserving that jurisdiction until the object of the suit is accomplished, is well recognized, and Judicial Code, section 265, prohibiting injunctions staying proceedings in State court is not applicable to such proceedings.

[1] 247 U. S. 214 [1918].

Termination of proceedings brought in a Federal court to foreclose a mortgage on railroad property terminates the jurisdiction of that tribunal, and purchaser is not immune from suit in State court relating to management of the property on the theory that the Federal court was the only proper forum having jurisdiction.[1] So, return of an execution satisfied terminates the control of the Federal court by which issued, and a State court has jurisdiction of a suit versus the marshal as a trespasser.[2] Acceptance of bond, in lieu of the property, discharged a receiver appointed by a Federal circuit court, and the property thereupon became subject to the process of any court of competent jurisdiction.[3]

[1] International & G. N. R. Co. *v.* Anderson County, 246 U. S. 424 [1918].
[2] Derby (Day) *v.* Gallup, 2 Wall. 97 [1865].
[3] Shields *v.* Coleman, 157 U. S. 168, 175, 178 [1895].

Mandamus may be issued by a circuit court to require county officers to levy a tax necessary for obtaining satisfaction of a judgment obtained in such court for interest on bonds issued by the county.[1]

[1] Washington County *v.* United States ex rel. Durant, 9 Wall. 415, 418 [1870]. *See also* United States ex rel. Riggs *v.* Johnson County, 6 Wall. 166 [1868]; Amy *v.* Barkholder, 11 Wall. 136 [1871].

The general principle of exclusiveness of jurisdiction of either Federal or State court, once acquired, is confined to suits between the same parties, or privies, seeking the same relief or remedy, and to such questions as arise ordinarily in the progress of the suit first brought; and does not extend to all matters which may by possibility become involved in it. So held, that suit for trespass lay in a State court against a United States marshal for his tort in wrongfully levying execution from a Federal court upon the property of a man not included in the writ.[1] So also, a receiver appointed by a Federal court is liable to suit in a State court for a disregard of official duty which causes injury to the party suing.[2] The rule does not prevent the maintenance of proceedings in a State court designed simply to preserve statutory rights to property in possession of a court of the United States.[3]

[1] Buck *v.* Colbath, 3 Wall. 334 [1866].
[2] Erb *v.* Morasch, 177 U. S. 584, 585 [1900].
[3] Heidritter *v.* Elizabeth Oil Cloth Co., 112 U. S. 294 [1884].

It is essential that the possession of the one court be either actual or constructive.[1] But where an attachment issued by a State court

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was prevented from being levied by the prior levy of an attachment which had been subsequently issued out of a Federal court, the Federal court will exert its equity power to prevent injustice, and give to the creditor who issued the first attachment, out of State court, the priority to which he was entitled.[2] So, a Federal court does not lose jurisdiction of property taken illegally from the custody of a receiver appointed by such court; but may continue to exercise jurisdiction without regard to citizenship of the parties.[3]

[1] Put-in-Bay Waterworks, Light & R. Co. *v.* Ryan, 181 U. S. 409 [1901].
[2] Gumbel *v.* Pitkin, 124 U. S. 131 [1888].
[3] Milwaukee & M. R. Co. *v.* Soutter, 2 Wall. 609, 632 [1865].

Where a receiver appointed by a Federal court voluntarily went into a State court, he cannot later question the right of that court to determine the controversy.[1]

[1] Grant *v.* Buckner, 172 U. S. 232, 238 [1898].

Property once *in custodia legis* is not removed therefrom by the giving of a bond securing the amount of penalties awarded by judgment, or of a *supersedeas*, merely suspending appointment of a receiver.[1]

[1] Palmer *v.* Texas, 212 U. S. 118 [1909].

The rule is not restricted to cases where property is actually seized under judicial process before a second suit is brought in another court, but often applies where suits are brought to enforce liens against specific property, to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where in progress of litigation the court may be compelled to assume possession and control of property to be affected.[1]

[1] Farmers' Loan & T. Co. *v.* Lake St. Elev. R. Co., 177 U. S. 51, 61 [1900].

A State court is not without jurisdiction of a personal injury action because parties were engaged in work under contract with the Federal Government.[1]

[1] Ohio River Contract Co. *v.* Gordon, 244 U. S. 68 [1917].

The United States courts and the courts of the several States exercise jurisdiction within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it has been carried physically into a different territorial sovereignty.[1] The principle extends to actions taken, within the limits of a court's jurisdiction, until satisfaction of its judgments and decrees.[2] This forbearance, between State and Federal courts, is something more than

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mere comity. It is a principle of right and of law, and therefore, of necessity.[1]

[1] Covell *v.* Heyman, 111 U. S. 176, 182 [1884].

[2] Amy *v.* Barkholder, 11 Wall. 136, 138 [1871]; Leadville Coal Co. *v.* McCreery, 141 U. S. 475 [1890].

JURISDICTION OF PERSONS.—With regard to possession of persons, in case of conflicting jurisdiction, it was established in Abelman *v.* Booth,[1] that a writ of habeas corpus issued by a State judge was without any lawful authority to affect the custody of a person imprisoned under the Federal Fugitive Slave Act. The Supreme Court conceded that the State courts had the right, by habeas corpus, to inquire into the cause of commitment; but upon return showing custody under authority of the United States, they then could proceed no further. "They then know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of habeas corpus, nor any other process issued under State authority can pass over the line of division between the two sovereignties." The rule has been repeatedly laid down, that circuit courts of the United States, while they have power to grant writs of habeas corpus to inquire into the cause of restraint of liberty of any person in custody under State authority in violation of the Constitution, laws or treaties of the United States, ought not, except in cases of "peculiar urgency" to discharge such a person in advance of a final determination of his case in the State courts, and even then will leave him to his remedy by writ of error.[2]

[1] 21 How. 506, 523 [1859]. The rule was reaffirmed in United States *v.* Tarble, 13 Wall. 397 [1872]; in Robb *v.* Connolly, 111 U. S. 624 [1884]; and in Re Johnson, 167 U. S. 120 [1887]. *See also* Wood *v.* Brush, 140 U. S. 278, 289 [1891]; Cook *v.* Hart, 146 U. S. 183, 195 [1892]; Draper *v.* United States, 164 U. S. 240, 257 [1896]; . Ker *v.* Illinois, 119 U. S. 436 [1886]; Ex parte Dorr, 3 How. 103 [1845]; Ex parte Crouch, 112 U. S. 178 [1884].

[2] Tinsley *v.* Anderson, 171 U. S. 101, 104 [1898], citing Ex parte Royall, 117 U. S. 241 [1886]; Ex parte Fonda, 117 U. S. 516 [1886]; Re Frederich, 149 U. S. 70 [1893]; Pepke *v.* Cronan, 155 U. S. 100 [1894]; Bergemann *v.* Backer, 157 U. S. 655 [1895]; Whitten *v.* Tomlinson, 160 U. S. 231 [1895]; Baker *v.* Grice, 169 U. S. 284 [1898]. *See also* New York *v.* Eno, 155 U. S. 89 [1894]; Fitts *v.* McGhee, 172 U. S. 516, 532 [1899].

It is equally well settled that when a State court with competent jurisdiction has entered upon the trial of a criminal case under a statute not repugnant to the Constitution or laws of the United States, no mere error in conduct of the trial can be made the basis of jurisdiction in a Federal court to review by habeas corpus.[1]

[1] Harkrader *v.* Wadley, 172 U. S. 148, 164 [1898], citing Andrews *v.* Swartz, 156 U. S. 272 [1895]; Bergemann *v.* Backer, 157 U. S. 655 [1895]. *See also* Kohl *v.* Lehlback, 160 U. S. 293 [1895]; Crossley *v.* California, 168 U. S. 640 [1898]; Re Boardman, 169 U. S. 39 [1898]; Mahon *v.* Justice, 127 U. S. 700 [1888].

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A person in custody under *a capias ad satisfaciendum* issued under authority of a circuit court of the United States, cannot legally be discharged from imprisonment by a State officer acting under a State insolvency law.[1]

[1] Duncan *v.* Darst, 1 How. 301 [1843].

POSSESSION OF PROPERTY.—With reference to personal property the rule "has been so often restated as to have become one of the maxims of the law."[1] The headnote of a recent case states it as follows: "It is an established principle applicable to both federal and state courts, that where these courts have concurrent jurisdiction of suits *in rem* or *quasi in rem*, the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other."[2]

[1] Re Johnson, Petitioner, 167 U. S. 120, 125 [1897]. *See also* Ellis *v.* Davis, 109 U. S. 485, 498 [1883]; Wabash R. Co. *v.* Adelbert College, 208 U. S. 38 [1908]; Re Swan, 150 U. S. 637, 652 [1893]; Peale *v.* Phipps, 14 How. 368 [1853]; Moran *v.* Sturges, 154 U. S. 256, 274 [1894]; Porter *v.* Sabin, 149 U. S. 473, 480 [1893].

[2] Penn General Casualty Co. *v.* Pennsylvania ex rel. Schnader, 294 U. S. 189, 194 [1935].

It is for the court having possession to determine how far it will permit any other court to interfere with that possession.[1]

[1] Peoples' Bank *v.* Winslow, 102 U. S. 256, 261 [1880]; Palmer *v.* Texas, 212 U. S. 118 [1909].

Thus, it has been held that—

(1) A seizure and sale, by a United States marshal, of a vessel in actual legal possession of a sheriff, was inoperative.[1]

(2) Property held by a sheriff cannot be taken by a United States marshal, in execution, upon final process on judgment rendered in a Federal court.[2]

(3) Property in possession of a marshal under execution upon a judgment of a circuit court cannot be replevied by action in a State court, regardless of rightful ownership.[3]

(4) A State court has no jurisdiction of a proceeding to deprive a Federal court receiver of the possession of property committed to him.[4]

(5) A State court may not subpena books in possession of a receiver in bankruptcy without consent of the Federal court.[5]

[1] Taylor *v.* Carryl, 20 How. 583 [1858].

[2] Hagan *v.* Lucas, 10 Pet. 400 [1836]. *See also* Brown *v.* Clarke, 4 How. 4 [1846]; Pulliam *v.* Osborne, 17 How. 471 [1855].

[3] Covell *v.* Heyman, 111 U. S. 176 [1884], affirming Freeman *v.* Howe, 24 How. 450 [1861]. *See also* Krippendorf *v.* Hyde, 110 U. S. 276 [1884]; Borer *v.* Chapman, 119 U. S. 587, 600 [1887].

[4] Calhoun *v.* Lanaux, 127 U. S. 634, 640 [1888].

[5] Dier *v.* Banton, 262 U. S. 147 [1923].

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But the owner may bring replevin in a State court for the cargo of a vessel under seizure by an officer of the United States, even though the Federal courts have exclusive jurisdiction of seizures.[1] A circuit court of the United States may, despite the pendency of probate proceedings in State court, proceed to the enforcement of a lien existing on the property involved by a special mortgage made before the debtor's death;[2] and may determine whether liens exist in favor of citizens of another State—such liens to be enforced only after the probate court has concluded its functions.[3]

[1] Slocum *v.* Mayberry, 2 Wheat. 1 [1817].

[2] Erwin *v.* Lowry, 7 How. 172 [1849].

[3] Ingersoll *v.* Coram, 211 U. S. 335 [1908]. *See also* Waterman *v.* Canal-Louisiana Bank & T. Co., 215 U. S. 33, 46 [1909]; Yonley *v.* Lavender, 21 Wall. 276 [1875]; Kendall *v.* Creighton, 23 How. 90, 107 [1860], where it was said: "under the decisions of this court, a foreign creditor may establish his debt in the courts of the United States against the representative of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates."

Where the surviving members of a partnership in Louisiana surrendered their own and (purportedly) the deceased member's interests for the benefit of creditors, and such surrender was acted on by a State court as provided by State law, that action cannot be attacked collaterally by proceeding to attach the entire interest of all partners.[1]

[1] Tua *v.* Carriere, 117 U. S. 201 [1886].

REMOVAL OF CAUSES.

Congress has constitutional authority to transfer causes from one inferior court to another; there are no restrictions in the Constitution on the legislative power in this respect.[1] "The power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power."[2] The court was here discussing the question of the review by the Supreme Court of judgments in State courts. It continued: "A writ of error is, indeed, but a process which removes the record of one court to the possession of another court. * * * On the whole, the Court are of opinion, that the appellate power of the United States does extend to cases pending in the State courts; and that the twenty-fifth section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the Constitution."

[1] Stuart *v.* Laird, 1 Cr. 299, 309 [1803].

[2] Martin *v.* Hunter, 1 Wheat. 304, 349 [1816].

In Chicago & N. W. R. Co. *v.* Whitton,[1] it was held that Congress might authorize removal to a Federal court upon request of a plaintiff who, after suit brought, discovered that local prejudice was likely to

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prevent his obtaining justice. It was further intimated that removal was an indirect mode of exercising original jurisdiction; but whether considered as appellate or original jurisdiction, "the constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt"; and it extends to removal of criminal as well as civil cases.[2] The transfer of jurisdiction previously exercised by courts of a provisional government is also within the power of Congress.[3]

[1] 13 Wall. 270 [1872].

[2] Tennessee *v.* Davis, 100 U. S. 257, 265 [1880]. *See also* Nashville *v.* Cooper, 6 Wall. 247 [1868]; Home L. Ins. Co. *v.* Dunn, 19 Wall. 214, 215 [1874].

[3] Leitensdorfer *v.* Webb, 20 How. 176, 182 [1858]. *See also* United States *v.* Ritchie, 17 How. 525, 530 [1855]; Fremont *v.* United States, 17 How. 542 [1855]; The "Grapeshot" *v.* Wallerstein, M. & Co., 7 Wall. 563 [1869]; Edwards *v.* Tanneret, 12 Wall. 446, 449 [1871].

Congress may prescribe the law of limitations for suits which may by law be removed into Federal courts, and when Congress has done so the law is binding on State and Federal courts.[1]

[1] Arnson *v.* Murphy, 109 U. S. 238 [1883]; Mitchell *v.* Clark, 110 U. S. 633 [1884]; Jenkins *v.* International Bank, 106 U. S. 571 [1883]; Jenkins *v.* Lowenthal, 110 U. S. 222 [1884].

The right of removal thus given by a constitutional act of Congress cannot be taken away or abridged by State statutes.[1] Thus, where under State law the form of attachment against a nonresident was equitable, still if the principal action was at law, the right of removal based upon diversity of citizenship remained.[2] Even in eminent domain proceedings brought against a nonresident owner of land the owner may demand that the question of compensation be determined in a Federal court, because of diversity of citizenship.[3]

[1] Missouri P. R. Co. *v.* Larabee, 234 U. S. 459 [1914]; Donald *v.* Philadelphia & R. Coal & I. Co., 241 U. S. 329 [1916].

[2] Courtney *v.* Pradt, 196 U. S. 89 [1905].

[3] Mississippi & R. River Boom Co. *v.* Patterson, 98 U. S. 403 [1879].

A statute of Arkansas requiring the cancellation of the license of a foreign corporation to do business in the State, upon notice that such corporation has removed a case to a Federal court, is invalid. "The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the Federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether State or interstate, although that has been suggested as a distinction in some cases. It rests on

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the ground that the Federal Constitution confers upon citizens of one State the right to resort to Federal courts in another, that State action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law. * * *"[1] Nor can the right of removal on account of diversity of citizenship be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy.[2]

[1] Terral v. Burke Constr. Co., 257 U. S. 529, 532 [1922], overruling Doyle v. Continental Ins. Co., 94 U. S. 535 [1877] (which upheld a similar Wisconsin statute) and Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246 [1906], and citing Home Ins. Co. v. Morse, 20 Wall. 445 [1875]; Barron v. Burnside, 121 U. S. 186 [1887]; Southern P. Co. v. Denton, 146 U. S. 202 [1892]; Gerling v. Baltimore & O. R. R., 151 U. S. 673, 684 [1894]; Barrow S. S. Co. v. Kane, 170 U. S. 100, 111 [1898]; Herndon v. Chicago, R. I. & P. R. Co., 218 U. S. 135 [1910]; Harrison v. St. Louis & S. F. R. Co., 232 U. S. 318 [1914]; Donald v. Philadelphia & R. Coal & I. Co., 241 U. S. 329 [1916].

[2] Wilson v. Republic Iron & Steel Co., 257 U. S. 92 [1921]; Wecker v. National Enameling & Stamping Co., 204 U. S. 176, 185 [1907].

Establishment of Courts.

IN GENERAL.

"It was necessarily left to the legislative power to organzie the Supreme Court, to define its powers consistently with the Constitution, as to its original jurisdiction; and to distribute the residue of the judicial power between this and the inferior courts which it was bound to ordain and establish, defining their respective powers, whether original or appellate, by which and how it should be exercised."[1]

[1] Rhode Island v. Massachusetts, 12 Pet. 657, 721 [1838]; Chisholm v. Georgia, 2 Dall. 419, 432 [1793].

It was stated by Justice Story in Martin v. Hunter:[1] "It is manifest that a Supreme Court must be established; but whether it be equally obligatory to establish inferior courts is a question of some difficulty * * * It would seem * * * that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the Constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction amongst such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested, either in an original or appellate form, in some courts created under its authority."

[1] 1 Wheat. 304, 330–331 [1816].

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Sec. 1.—Judicial Power, Courts, Judges

Under this article, Congress has undoubted power to establish circuit and district courts in any State of the Union, and may confer on them equitable jurisdiction in cases coming within the Constitution, and in all cases to which the judicial power extends Congress may rightfully vest exclusive jurisdiction.[1]

[1] Livingston *v.* Story, 9 Pet. 632, 655 [1835]; The "Moses Taylor" *v.* Hammons 4 Wall. 411, 430 [1867].

It was early stated:[1] "[The judicial power] is to be exercised by courts organized for the purpose and brought into existence by an effort of the legislative power of the Union." In Martin *v.* Hunter[2] the Court said: "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself." This statement was repeated in Houston *v.* Moore.[3] In Prigg *v.* Pennsylvania[4] it was held that the Fugitive Slave Act of 1793 (1 Stat. 302), which empowered State magistrates equally with Federal judges to take cognizance of cases of fugitive slaves, was constitutional. The only difference of opinion among the Court was as to whether State judges would be bound to act under it—it was agreed that they might act, unless prohibited by State legislation.

[1] United States *v.* Hudson, 7 Cr. 32, 33 [1812].
[2] 1 Wheat. 304, 330 [1816].
[3] 5 Wheat. 1, 27 [1820].
[4] 16 Pet. 539, 622 [1842].

"Inferior courts" contemplated under this section are "inferior" only in the technical sense that they are courts of special and limited authority erected on such principles that proceedings must show their jurisdiction, their judgments being entirely disregarded for this purpose, and whose judgments are subject to revision by an appellate court. Their jurisdiction depends exclusively on the Constitution and the terms of statutes passed in pursuance thereof, and must appear of record.[1] A circuit court of the United States was not an inferior court in the language of the common law, but its proceedings were held entitled to as liberal presumptions in favor of their regularity, as those of any supreme court.[2]

[1] Kempe *v.* Kennedy, 5 Cr. 173, 185 [1809]; Ex parte Cuddy, 131 U. S. 280, 284 [1889]; Grignon *v.* Astor, 2 How. 319, 341 [1844]; Re Watkins, 3 Pet. 193, 205 [1830]; Grace *v.* American Cent. Ins. Co., 109 U. S. 278, 283 [1883].

[2] Turner *v.* Bank of North America, 4 Dall. 8, 11 [1799].

COURTS OF THE UNITED STATES GENERALLY.

A distinction is to be observed between "constitutional" or "inferior courts of the United States", established under article III and exercising the judicial power of the United States, and "court of the United States", used without special reference to inherent juris-

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diction. In this latter sense, the courts of the District of Columbia were early held to be "courts of the United States" to whose judgments the same effect was to be given as to domestic judgments of the States.[1]

[1] Embry *v.* Palmer, 107 U. S. 3, 9 [1883].

In 1891, the expression "judges of the courts of the United States" as used in Revised Statutes (sec. 1768) was held to have been used with reference to the rcognized distinction between courts of the United States (i. e., constitutional courts) as distinguished from merely territorial legislative courts, and therefore not to apply to the judges of the district for Alaska.[1]

[1] McAllister *v.* United States, 141 U. S. 174, 184 [1891].

LEGISLATIVE COURTS.

It long has been settled that article III does not express the full authority of Congress to create courts, and that other articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes of courts. Those established under the specific power given in section 2 of article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.[1]

[1] Ex parte Bakelite Corp., 279 U. S. 438, 449 [1929], holding the Court of Customs Appeals a legislative court on which could legally be imposed the duty of giving advisory opinions.

Thus, it has been held from early times that the Territorial courts 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." [1]

[1] American Ins. Co. *v.* Canter, 1 Pet. 511, 546 [1828]. Followed in Benner *v.* Porter, 9 How. 235 [1850]; Clinton *v.* Englebrecht, 13 Wall. 434, 447 [1872]; Hornbuckle *v.* Toombs, 18 Wall. 648, 655 [1874]; Good *v.* Martine, 96 U. S. 90, 98 [1877]; Reynolds *v.* United States, 98 U. S. 145, 154 [1879]; The "City of Panama" *v.* Phelps, 101 U. S. 453, 460 [1880]; Romeu *v.* Todd, 206 U. S. 358, 368 [1907].

The fact that the judges of Territorial courts are appointed by the President under act of Congress does not make the courts which they hold courts of the United States. Broadly speaking, however,

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the Territorial district courts are dual in their nature and sit both as Territorial and Federal courts. Congress may define the jurisdiction of Territorial courts, or delegate the authority to the Territorial government.[1]

[1] Clinton *v.* Englebrecht, 13 Wall. 434, 447 [1872]; Ex parte Gonshay-ee, 130 U. S. 343, 349 [1889]; Leitensdorfer *v.* Webb, 20 How. 176 [1858]. *See also* McAllister *v.* United States, 141 U. S. 174 [1891]; United States *v.* Pridgeon, 153 U. S. 48, 58 [1894]; United States *v.* McMillan, 165 U. S. 504 [1897].

The ground of these decisions was said to be the "presumably ephemeral nature of a Territorial government." [1]

[1] Downes *v.* Bidwell, 182 U. S. 244, 293 [1901].

Prior to 1932, the Supreme Court and Court of Appeals of the District of Columbia were similarly considered legislative courts, established under the authority of Congress to exercise exclusive legislation over the seat of government.[1] But in O'Donoghue *v.* United States [2] the Territorial cases were distinguished, on the ground largely of the impermanent character of the Territorial governments, and the conclusion reached that these courts in the District of Columbia "are courts of the United States, vested generally with the same jurisdiction as that possessed by the inferior Federal courts located elsewhere in respect of the cases enumerated in section 2 of article III. The provision of this section of the article is that the 'judicial power shall extend' to the cases enumerated, and it logically follows that where jurisdiction over these cases is conferred upon the courts of the District, the judicial power, since they are capable of receiving it, is, *ipso facto*, vested in such courts as the inferior courts of the United States." The Keller case [1] is distinguished as simply holding that Congress by reason of its dual authority over the District of Columbia may vest the courts in the District with other than judicial functions; and the statements in the Bakelite case as *obiter*.

[1] *See* Keller *v.* Potomac Electric Power Co., 261 U. S. 428, 442–444 [1923]; Postum Cereal Co. *v.* California Fig Nut Co., 272 U. S. 693, 700 [1927]; Ex parte Bakelite Corp., 279 U. S. 438 [1929].
[2] 289 U. S. 516, 545 [1933].

The Court of Customs Appeals,[1] the Court of Claims,[2] the United States Court for China and the consular courts,[3] the Court of Private Land Claims,[4] the Choctaw and Chickasaw Citizenship Court [5] all have been held to be legislative courts. The President has power, incident to military occupation, to establish provisional courts, but such courts cannot decide prize cases as ordinary courts of admiralty.[6]

[1] Ex parte Bakelite Corp., 279 U. S. 438 [1929].
[2] Williams *v.* United States, 289 U. S. 553 [1933], approving Gordon *v.* United States, 117 U. S. 697 [1886]; Re Sanborn, 148 U. S. 222 [1893]; United States *v.* Klein, 13 Wall. 128 [1872], and distinguishing United

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Sec. 1.—Judicial Power, Courts, Judges

States v. Union P. R. Co., 98 U. S. 569, 602 [1879], as dictum, and Miles v. Graham, 268 U. S. 501 [1925], as not on the point.

[3] Ross v. McIntyre, 140 U. S. 453 [1891].

[4] United States v. Coe, 155 U. S. 76 [1894].

[5] Wallace v. Adams, 204 U. S. 415 [1907].

[6] Mechanics' & T. Bank v. Union Bank, 22 Wall. 276, 296 [1875]; The "Grapeshot" v. Wallerstein, 9 Wall. 129, 132 [1870]; Lewis v. Cocks, 23 Wall. 466, 469 [1874]; Jecker v. Montgomery, 13 How. 498, 515 [1852]; Ex parte Milligan, 4 Wall. 2, 121 [1866]; Re Vidal, 179 U. S. 126 [1900].

Judges.

TENURE.

This section removes from Congress all control over the tenure of office of judges of the Supreme Court and inferior Federal courts.[1] The fact of a definite tenure was adverted to apparently as settling the status of territorial courts in Florida by Chief Justice Marshall in American Insurance Co. v. Canter,[2] in the following language: "The judges of the superior courts of Florida hold their offices for 4 years. These courts, then, 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 * * *." This view was affirmed in Benner v. Porter[3] where the Court further stated: "The judges appointed to administer them [inferior courts within a State] must possess the constitutional tenure of office before they can become invested with any portion of the judicial power of the Union. There is no exception to this rule in the Constitution." Similarly, the tenure of justices of the peace in the District of Columbia was noted as definitely excluding them from being inferior courts of the United States.[4]

[1] Martin v. Hunter, 1 Wheat. 304, 328 [1816].

[2] 1 Pet. 511, 546 [1828].

[3] 9 How. 235, 244 [1850].

[4] Capital Traction Co. v. Hof, 174 U. S. 1, 17 [1899].

It was pointed out in Myers v. United States[1] that Territorial judges were in early times appointed for life, but that after 10 or 15 years appointments were made for terms, and removals were frequently made by the President just as though such judges had been executive officers. But the question of the constitutionality of such removal or of a provision by Congress restricting removals, was not decided.

[1] 272 U. S. 52, 155 [1926].

COMPENSATION.

This section, precluding any diminution in the compensation of judges during their continuance in office,[1] seems to have been first construed by the Circuit Court for the District of Columbia in 1803. Congress, by the act of February 27, 1801 (2 Stat. 103), had granted to justices of the peace for the District certain fees. This act was repealed on May 23, 1802 (2 Stat. 193). More, a justice of the peace

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for the District, on being indicted for receiving fees, contended that the latter act was unconstitutional, because it diminished his compensation as a judge of a court of the United States. The Circuit Court in an opinion written by Justice Cranch, concurred in by Chief Justice Marshall sitting on circuit (but with Chief Justice Kilty dissenting) held that the act of Congress of May 3, 1802 (2 Stat. 193), abolishing the fees for justices of the peace was void as to incumbent judges.[2]

[1] Martin *v.* Hunter, 1 Wheat. 304, 328 [1816].

[2] The opinion of the Circuit Court is printed as a footnote to United States *v.* More, 3 Cr. 159 [1805]. The appeal to the Supreme Court was dismissed on the ground that Congress had not given to the Supreme Court appellate jurisdiction to review criminal proceedings of this nature.

The Supreme Court itself has held that a tax upon the net income of a United States district judge, assessed under the act of February 24, 1919 (40 Stat. 1062), by including his official salary in gross income, operates to diminish his compensation, and is therefore unconstitutional under this section.[1] In Miles *v.* Graham,[2] it was held that the salary of a judge of the Court of Claims appointed subsequent to the same revenue act would be diminished within the meaning of this clause by including his official salary in gross income for tax purposes. The Constitution imposes upon Congress the duty "definitely to declare what sums shall be received by each judge out of the public funds." The argument proceeded upon the assumption that the judges were within the scope of article III, and is therefore pertinent here, despite the subsequent case of Williams *v.* United States [3] which specifically held that judges of the Court of Claims receive no rights from the judicial article of the Constitution, but from the acts of Congress passed in pursuance of other and distinct constitutional provisions.

[1] Evans *v.* Gore, 253 U. S. 245 [1920].

[2] 268 U. S. 501 [1925].

[3] 289 U. S. 553, 581 [1933].

Judges of the Court of Appeals and Supreme Court of the District of Columbia are protected by this clause—those courts being established under the dual authority of Congress over the seat of government.[1]

[1] O'Donoghue *v.* United States, 289 U. S. 516 [1933].

District or circuit judges of the United States retiring pursuant to Section 260 of the Judicial Code and remaining subject to call for judicial duty, continue in office and their compensation is secured from diminution by this clause. Further, any diminution is prohibited, even though, on account of an intervening increase, the amount of compensation after the reduction is as great as at the date of the judge's original appointment.[1]

[1] Booth *v.* United States, 291 U. S. 339 [1934].

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Article III. Sec. 2. Jurisdiction. Cl. 1. Extent of the judicial power.

SECTION 2.* The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Cases and Controversies.

IN GENERAL.

"The better opinion is * * * that [the judicial power which the Constitution intended to confine to courts created by Congress] extends only to the trial and determination of 'cases' in courts of record." [1]

[1] Robertson *v.* Baldwin, 165 U. S. 275, 279 [1897].

It is not open to question that the judicial power vested by article III of the Constitution in this Court and the inferior courts of the United States established by Congress thereunder,[1] extends only to "cases" and "controversies" in which the claims [2] of litigants are brought before them for determination by such regular proceedings [3] as are established for the protection and enforcement of rights, or the prevention, redress, or punishment of wrongs; and that their jurisdiction is limited to cases and controversies presented in such form, with adverse litigants,[4] that the judicial power is capable of acting upon them,[5] and pronouncing and carrying into effect a judgment [6] between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the Court without real parties or a real case.[7]

[1] Where the court involved is a legislative rather than a constitutional court, it was held unnecessary to inquire whether the proceeding before it was or was not a case or controversy within the meaning of art. III. Ex parte Bakelite Corp., 279 U. S. 438, 460 [1929].

[2] The Court will not entertain a bill in equity simply to vindicate an abstract principle of justice, where complainant would not benefit, and

* Many cases dealing with the character and distribution of judicial power and citing both sec. 1 and sec. 2 of art. III are noted under sec. 1, "judicial power." "As modified by the 11th Amendment this clause prescribes the limits of the judicial power of the court." United States *v.* Louisiana, 123 U. S. 32, 35 [1887].

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the parties really in interest are content with the *status quo*. Foster *v.* Mansfield, C. & L. M. R. Co., 146 U. S. 88, 101 [1892].

In Fairchild *v.* Hughes, 258 U. S. 126, 129 [1922], it was held that the mere right of plaintiff as a citizen to have the Government administered according to law, without waste of public money, did not entitle him to institute a suit to determine whether a proposed constitutional amendment, if adopted, would be valid. And in Massachusetts *v.* Mellon, 262 U. S. 447 [1923], the interest of an individual taxpayer in the public moneys was held no basis for a suit in equity to prevent their use in the administration of the Maternity Act.

[3] "[The judicial] power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case * * *." Osborn *v.* Bank of United States, 9 Wheat. 738, 819 [1824]; Smith *v.* Adams, 130 U. S. 167, 173 [1889].

[4] South Spring Hill Gold Min. Co. *v.* Amador Medean Gold Min. Co., 145 U. S. 300 [1892]; American Wood-paper Co. *v.* Heft, 8 Wall. 333 [1869]. The rule originated with a case of collusion, Lord *v.* Veazie, 8 How. 251 [1850], followed by Chamberlin *v.* Cleveland, 1 Black 419 [1862]. One ground of the decision in Muskrat *v.* United States, 219 U. S. 346 [1911], was that, while the United States was made a party defendant, it actually had no interest adverse to the claimant's. *See also* Old Colony Trust Co. *v.* Commissioner of Internal Revenue, 279 U. S. 716 [1929].

[5] La Abra Silver Min. Co. *v.* United States, 175 U. S. 423, 457 [1899]; Re Sanborn, 148 U. S. 222, 226 [1893]; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 483 [1894].

[6] A decision of the District of Columbia Court of Appeals under the Trade Mark Act of 1905, reviewing a decision of the Commissioner of Patents, was held to be an administrative matter only, and not a "case" within the meaning of art. III, since it was not really a judgment at all, and did not preclude any party in interest from contesting the validity of the trade mark in question in any court. Postum Cereal Co. *v.* Calif. Fig Nut Co., 272 U. S. 693 [1927]. *See also* Keller *v.* Potomac Electric Power Co., 261 U. S. 428, 444 [1923]; Federal Radio Commission *v.* General Electric Co., 281 U. S. 464 [1930].

So, the award of a district judge, under an act authorizing him to adjudicate claims under a treaty with Spain, was held not to be the judgment of a court, so as to afford the basis for an appeal. United States *v.* Ferreira, 13 How. 40 [1852]. *See also* Gordon *v.* United States, 2 Wall. 561 [1865], 117 U. S. 697 [1886].

[7] Muskrat *v.* United States, 219 U. S. 346 [1911], where an act was held invalid which authorized suit, with appeal to the Supreme Court, by certain representative Indians, to determine the validity of specific laws. *See also* Texas *v.* Interstate Commerce Commission, 258 U. S. 158, 162 [1922]; New Jersey *v.* Sargent, 269 U. S. 328, 330 [1926]; Alabama *v.* Arizona, 291 U. S. 286, 291 [1934]; Liberty Warehouse Co. *v.* Grannis, 273 U. S. 70, 74 [1927]; Willing *v.* Chicago Auditorium Asso., 277 U. S. 274 [1928]; Aetna Life Insurance Co. *v.* Haworth, 300 U. S. 227 [1937].

The Constitution does not require that the case or controversy should be presented by traditional forms of procedure, involving only traditional remedies. The judicial clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked.[1] In the exercise of its control over practice and procedure of the lower Federal courts, Congress is not limited

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to traditional forms or remedies but may create and improve as well as abolish or restrict.[2]

[1] Nashville, C. & St. L. R. Co. v. Wallace, 288 U. S. 249, 264 [1933], entertaining an appeal from a judgment under the Declaratory Judgments Law of Tennessee.

[2] Aetna Life Insurance Co. v. Haworth, 300 U. S. 227 [1937].

The Federal Declaratory Judgment Act must be deemed to fall within the ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.[1]

[1] Aetna Life Insurance Co. v. Haworth, 300 U. S. 227, 240 [1937].

If a proceeding involves a right which in its nature is susceptible of judicial determination, and if the determination of it is not simply ancillary or advisory, but is the final and indisputable basis of action by the parties, it is a "case" within the meaning of this provision.[1]

[1] La Abra Silver Min. Co. v. United States, 175 U. S. 423, 457 [1899].

Where a controversy within the scope of the judicial power, comes to an end by act of the parties, or a subsequent law, the case becomes moot and will be dismissed.[1]

[1] United States v. Alaska S. S. Co., 253 U. S. 113 [1920], where an intervening statute rendered necessary substantial changes in the forms of bills of lading, against the enforcement of which the suit was originally brought; Singer Mfg. Co. v. Wright, 141 U. S. 697 [1891], where the tax which was sought to be enjoined was paid by complainant, pending the appeal. Similarly, in Washington Market Co. v. District of Columbia, 137 U. S. 62 [1890], an appeal was dismissed where the assessments in question had been quashed by the District of Columbia Supreme Court in the meantime.

It is not necessary that a proceeding, to be judicial, shall be one entirely *de novo;* it is enough that, before the judgment which must be final has been invoked as an exercise of judicial power, it shall have certain necessary features (referring to the description cited from Re Pacific Railway Comm., 32 Fed. 241, 255 [1887]).[1]

[1] Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716, 723 [1929], holding a proceeding before a circuit court of appeals, under act of 1926, in which a taxpayer sought review of a decision of the Board of Tax Appeals, to be a case calling for the exercise of judicial power.

A suit to enjoin the enforcement of a statute, before the taking of any steps to enforce it, is not premature where the statute is certain to operate as apprehended by the complainant.[1]

[1] Carter v. Carter Coal Co., 298 U. S. 238 [1936].

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CASE AS INCLUDING SUIT OR CAUSE.

"In any legal sense, action, suit, and cause, are convertible terms."[1] The term "suit" is not used in article III; but the nearly contemporaneous Judiciary Act of 1789 uses "suit" and not "case" or "controversy."

[1] Ex parte Milligan, 4 Wall. 2, 112 [1866].

Construing the Judiciary Act and other legislation, the Court has often had occasion to consider what was meant by the term "suit." Thus, in Weston *v.* Charleston [1] it was said to be a "very comprehensive term"; and "is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him." In that case a writ of prohibition was held to be a suit. Holmes *v.* Jennison [2] held a proceeding for writ of habeas corpus to be a suit.

[1] 2 Pet. 449, 464 [1829].
[2] 14 Pet. 540 [1840].

Again, in the Eleventh Amendment, the word used is "suit"; and as so used was held in Cohens *v.* Virginia [1] to be "prosecution or pursuit of some claim demand or request; in law language, it is the prosecution of some demand in a court of justice."

[1] 6 Wheat. 264, 407 [1821].

In Ex parte Milligan [1] it was held that a proceeding for writ of habeas corpus was a "cause" within the meaning of an act of 1802 authorizing certification of questions in case of disagreement among the judges of a circuit court.

[1] 4 Wall. 2 [1866].

Cases at Law or in Equity.

In the interpretation of this clause and section 11 of the Judiciary Act of 1789, the Supreme Court has repeatedly ruled, that by cases at common law are to be understood suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized, and equitable remedies are administered and that by cases in equity are to be understood suits in which relief is sought according to the principles and practice of the equity jurisdiction, as established in English jurisprudence [1]—or, more precisely, the principles applied by the English Court of Chancery before 1789, as they have been developed in the Federal courts.[2]

[1] Irvine *v.* Marshall, 20 How. 558, 565 [1858], citing Parsons *v.* Bedford, 3 Pet. 433, 447 [1830], and Robinson *v.* Campbell, 3 Wheat. 212, 222 [1818]; Fenn v. Holme, 21 How. 481, 484 [1859], followed in Sheirburn *v.* De Cordova, 24 How. 423 [1861]. *See also* Strother *v.* Lucas, 6 Pet. 763, 768, 769 [1832]; Parish *v.* Ellis, 16 Pet. 451, 453, 454 [1842].

[2] Gordon *v.* Washington, 295 U. S. 30, 36 [1935]. *See also* Waterman *v.* Canal-Louisiana Bank & T. Co., 215 U. S. 33, 43 [1909].

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In creating and defining the judicial power of the General Government the situation establishes the distinction between law and equity; and a party who claims a legal title must proceed according to the forms of practice in such cases in the State court. But if the claim is an equitable one, he must proceed according to rules which have been prescribed by the United States Supreme Court regulating proceedings in equity in the courts of the United States.[1]

[1] Bennett *v.* Butterworth, 11 How. 669, 674 [1850]. *See also* McFaul *v.* Ramsey, 20 How. 523, 525 [1858]; Fenn *v.* Holme, 21 How. 481, 484 [1859]; Eberly *v.* Moore, 24 How. 147, 158 [1861]; Thompson *v.* Central Ohio R. Co., 6 Wall. 134, 137 [1868]; Gibson *v.* Chouteau, 13 Wall. 92, 102 [1872]; Ex parte Boyd, 105 U. S. 647, 648 [1882]; Ellis *v.* Davis, 109 U. S. 485 [1883]; Ex parte Sawyer, 124 U. S. 200 [1888].

Want of jurisdictional amount involved in a controversy, which deprives a Federal court of its authority to act at law, is not ground for invoking its equity powers.[1]

[1] Di Giovanni *v.* Camden F. Ins. Assoc., 296 U. S. 69 [1935].

Cases Arising Under the Constitution and Laws of the United States.

A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either.[1] The suit must really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends;[2] and this must appear on the record in due form.[3] But it is sufficient, if a special verdict or the instruction of a court involve such facts that the judgment must necessarily affirm the validity of a State law, or invalidity of a right set up under the laws or Constitution of the United States.

[1] Cohens *v.* Virginia, 6 Wheat. 264, 379 [1821]; Tennessee *v.* Davis, 100 U. S. 257, 264 [1880]; New Orleans, M. & T. R. Co. *v.* Mississippi, 102 U. S. 135, 140 [1880]; Patton *v.* Brady, 184 U. S. 608, 611 [1902]; Bier *v.* McGehee, 148 U. S. 137 [1893], where the facts found below showed the real question was not Federal.

[2] Western U. Teleg. Co. *v.* Ann Arbor R. Co., 178 U. S. 239, 243 [1900]; Gableman *v.* Peoria D. & E. R. Co., 179 U. S. 335, 339 [1900].

[3] Little York Gold Washing & Water Co. *v.* Keyes, 96 U. S. 199 [1878]; Lawler *v.* Walker, 14 How. 149 [1853]; Mississippi & M. R. Co. *v.* Rock, 4 Wall. 177 [1867]; Ryan *v.* Thomas, 4 Wall. 603 [1867].

The Supreme Court has repeatedly held that the validity of a statute is not necessarily drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority challenged every time an act done by such authority is disputed.[1]

[1] Ferry *v.* King County, 141 U. S. 668, 673 [1891], citing Snow *v.* United States, 118 U. S. 346, 352 [1886]; Baltimore & P. R. *v.* Hopkins, 130 U. S. 210 [1889]; Cook County *v.* Calumet & C. Canal & Dock Co., 138 U. S. 635 [1891]. *See also* Shoshone Mining Co. *v.* Rutter, 177 U. S. 505, 507 [1900].

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Where Federal jurisdiction is dependent upon the character of the cause, it is sufficient that one of the ingredients is a question to which the judicial power is extended by the Constitution, and it is immaterial that other questions of law or fact are involved.[1] The mere fact of a Federal question being involved does not, however, create jurisdiction in Federal court of a suit by a citizen against his own State; the present clause is subject to an exception in such case.[2]

[1] Osborn v. Bank of United States, 9 Wheat. 738, 819, 823 [1824].

[2] Hans v. Louisiana, 134 U. S. 1 [1890], followed in North Carolina v. Temple, 134 U. S. 22 [1890].

Congress may give the Federal courts jurisdiction of suits arising under an act of Congress which chartered a railroad company and conferred on it certain rights and benefits and imposed on it certain obligations.[1]

[1] United States v. Union P. R. Co., 98 U. S. 569, 602 [1879].

When the right of action, in a case brought in a State court, is based on an act of Congress, the suit is one arising under the laws of the United States, and, under the acts of Congress, the Supreme Court of the United States may review the decision of the State court on the Federal question raised.[1] A suit by or against a corporation of the United States is a suit arising under the laws of the United States,[2] as is a suit in trespass against a Federal marshal.[3]

[1] St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281 [1908].

[2] Union P. R. Co. v. Myers, 115 U. S. 1 [1885], Southern P. Co. v. California, 118 U. S. 109 [1885].

[3] Bock v. Perkins, 139 U. S. 628 [1891].

A suit to collect promissory notes exceeding the jurisdictional amount, brought by a Federal Intermediate Credit Bank, is because of the plaintiff's Federal incorporation a suit arising under the laws of the United States.[1]

[1] Federal Intermediate Credit Bank v. Mitchell, 277 U. S. 213, 217 [1928].

A suit against a national bank, upon a contract by which the bank agreed to pay the debts of an insolvent bank, was not one arising under the laws of the United States so as to justify removal to a Federal court; the debts in question were taxes imposed by State law, and a contract for their payment is enforcible in a State court.[1]

[1] Gully v. First Nat. Bank in Meridian, 299 U. S. 109 [1936].

The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. The right to possession and control of a child, as contested by its father and grandfather, is one in regard to which neither Congress nor any authority of the United States has any special jurisdiction, when whether the one or the other is entitled to

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the possession does not depend upon any act of Congress or any treaty of the United States or its Constitution.[1]

[1] Ex parte Burrus, 136 U. S. 593 [1890].

All Cases Arising Under Treaties.

The reason for this clause was, that all persons who have real claims under a treaty should have their causes decided by the national tribunals. It was to avoid the apprehension as well as the danger of State prejudices. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the States; and whoever may have this right, it is to be protected.[1]

[1] Owings *v.* Norwood, 5 Cr. 344, 348 [1809].

The construction of a treaty was drawn in question, within the meaning of the twenty-fifth section of the Judiciary Act of 1789, where the construction of the Maryland confiscation law, although the most difficult and important part of the case, was merely preliminary to the construction and meaning of article 6 of the treaty of peace with Great Britain.[1]

[1] Smith *v.* Maryland, 6 Cr. 286, 304 [1810].

Except in cases purely political, Congress has no constitutional power to settle the rights under a treaty or to affect title already granted by the treaty itself; the construction of treaties is the peculiar province of the judiciary.[1]

[1] Jones *v.* Meehan, 175 U. S. 1, 32 [1899] construing the grant in a certain Indian treaty as vesting immediate title in the Indian named; Wilson *v.* Wall, 6 Wall. 83 [1867].

All Cases Affecting Ambassadors, Other Public Ministers, and Consuls.

The words "ambassadors and other public ministers" are "descriptive of a class existing by the law of nations, and apply to diplomatic agents whether accredited by the United States to a foreign power or by a foreign power to the United States, and the words are so used in section 2 of article III."[1] The Court further considered that the definition in Revised Statutes (sec. 1674), of diplomatic officers of the United States, expressed the view of Congress as to what are included within the term "public ministers", viz, ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, chargés d'affaires, agents and secretaries of legation and none others.

[1] Ex parte Bais, 135 U. S. 413, 419 [1890].

In Osborn *v.* Bank of United States[1] though this clause was not directly in issue, Chief Justice Marshall discussed it, as one "where the nature of the controversy is, in some degree, blended with the character of the party." And he put the case of the arrest of the

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servant of an ambassador, where the ambassador himself does not become a party to the suit, but the suit is nevertheless to be dismissed because it "affects" him.

[1] 9 Wheat. 738, 854 [1824].

The clause was held not to include a prosecution, under the Crimes Act of 1790 (1 Stat. 112), for an assault upon the Spanish chargé d'affaires; "the minister himself, although he was the person injured by the assault, has no concern, either in the event of the prosecution, or in the costs attending it." [1]

[1] United States v. Ortega, 11 Wheat. 467, 469 [1826], holding that a circuit court had jurisdiction of the indictment.

The contemporaneous Judiciary Act of 1789 conferred on the Federal district courts exclusive jurisdiction of suits against consuls (except for certain crimes), and original but not exclusive jurisdiction in the Supreme Court of suits in which a consul should be a party. While it was held that the jurisdiction thus vested in the Supreme Court was not exclusive of the other Federal courts,[1] the act was early upheld as an exclusion of jurisdiction in the State courts.[2] The privilege [i. e., of jurisdiction in the Federal courts only] was not merely personal: "It was deemed fit and proper that the courts of the Government, with which rested the regulation of all foreign intercourse, should have cognizance of suits against the representatives of such foreign governments."

[1] Börs v. Preston, 111 U. S. 252, 256 [1884].
[2] Davis v. Packard, 7 Pet. 276, 284 [1833].

Cases of Admiralty and Maritime Jurisdiction.*

IN GENERAL.

Federal Nature of Admiralty Jurisdiction.

Justice Cushing in his opinion in Chisholm v. Georgia [1] indicated the national character of admiralty jurisdiction as follows: [The judicial power of the United States extends—] "5th: To all cases of admiralty and maritime jurisdiction; because, as the seas are the joint property of nations, whose right and privileges relative thereto, are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction."

[1] 2 Dall. 419, 475 [1793].

"* * * It is remarkable, too, that the words, 'all cases of admiralty and maritime jurisdiction', as they now are in the Constitution, were in the first plan of government submitted to the convention, and that in all subsequent proceedings and reports they were never changed. There was but one opinion concerning the grant, and that was, the necessity to give a power to the United States to relieve

*See also p. 133.

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them from the difficulties which had arisen from the exercise of admiralty jurisdiction by the States separately. That would not have been accomplished, if it had been intended to limit the power to the few cases of which the English courts took cognizance." [1]

[1] Waring *v.* Clarke, 5 How. 441, 457 [1847].

In the case of Glass *v.* The "Betsey",[1] a vessel captured by the French and sent into Baltimore to be adjudicated as prize by the prize court established by the French consul was libelled by the neutral American and Swedish owners, in Federal district court. And the Supreme Court, after holding that the district courts had "all the powers of a court of admiralty, whether considered as an instance, or as a prize court", further "decreed and adjudged" that the admiralty jurisdiction which had been exercised in the United States by the consuls of France, not being in pursuance of treaty, "is not of right."

[1] 3 Dall. 6, 16 [1794].

Relation to the Commerce Power.

"The exclusive jurisdiction in admiralty cases was conferred on the National Government, as closely connected with the grant of the commercial power. It [the admiralty court] is a maritime court instituted for the purpose of administering the law of the seas. There seems to be ground, therefore, for restraining its jurisdiction, in some measure within the limit of the grant of the commercial power, which would confine it, in cases of contracts, to those concerning the navigation and trade of the country upon the high seas and tidewaters with foreign countries, and among the several States." [1] However, the admiralty jurisdiction cannot be made to depend upon the power of Congress to regulate commerce. They are entirely distinct things, having no necessary connection with one another. Congress cannot enlarge the judicial power, not even to suit the wants of commerce, nor for the more convenient execution of its commercial regulations.[2]

[1] New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 How. 344, 392 [1848].

[2] The "Belfast" *v.* Boone, 7 Wall. 624, 640–641 [1869], overruling, in effect, the dicta in Allen *v.* Newberry, 21 How. 244, 245 [1859], *and also* Maguire *v.* Card, 21 How. 248, 249 [1859], which held that admiralty jurisdiction did not extend to a contract for supplies furnished to a vessel trading between ports of the same State; Ex parte Garnett, 141 U. S. 1, 15 [1891].

An act of March 3, 1825 (4 Stat. 115), punished the theft of goods from vessels stranded, etc., "upon any surf, shoal, bank, or rocks of the sea, or in any place within the admiralty or maritime jurisdiction." It was held that this act could not be sustained under the admiralty jurisdiction as applied to theft of property from a stranded vessel, above high-water mark—but was sustained under the commerce power.[1]

[1] United States *v.* Coombs, 12 Pet. 72 [1838].

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Character of Proceedings.

Courts of admiralty are not governed by the rigid principles of common law,[1] but act upon enlarged rules of equity.[2] "Wherever a maritime lien arises, the libellant or plaintiff may waive the lien in the admiralty, and pursue his remedy by a suit *in personam*, or he may institute an action at law, if the common law is competent to give him a remedy." [3]

[1] Penhallow *v.* Doane, 3 Dall. 54, 79 [1795]; Oakes *v.* United States, 174 U. S. 778, 790 [1899].
[2] The "Virgin" *v.* Vyfhius, 8 Pet. 538, 549 [1834].
[3] Norton *v.* Switzer, 93 U. S. 355, 356 [1876].

Where the Limitation of Liability Act of 1851 (9 Stat. 635) provided, in section 4, for apportionment of damages (in case the value of vessel and freight pending should prove insufficient to pay in full the losses of all cargo owners) by "appropriate proceedings in any court", it was argued that this called for action in a court of equity; but held that the district court sitting in admiralty had jurisdiction.[1] Where the prayer of a shipowner for limitation of liability under the act was denied, the court proceeded to adjudicate all claims arising out of the accident, whether independently cognizable in admiralty or not, and rendered judgment *in rem*, and also against the owner *in personam*.[2]

[1] Norwich N. Y. Transp. Co. *v.* Wright, 13 Wall. 104 [1872].
[2] Hartford Accd. & Indemnity Co. *v.* Southern P. Co., 273 U. S. 207 [1927].

An agreement for arbitration of maritime controversies, whether executory or executed, cannot be enforced in admiralty by specific performance, because that court lacks the power to grant equitable relief. The substantive right created by such an agreement is recognized as a perfect obligation.[1]

[1] Red Cross Line *v.* Atlantic Fruit Co., 264 U. S. 109, 123 [1924].

Where the pleadings in a case of capture were "too informal and defective, to pronounce a final decree upon the merits", the Court remanded with directions to permit amendment; "the Court has always endeavored to keep these proceedings within some kind of rule, though not requiring the same technical strictness as at common law." [1]

[1] The "Divina Pastora," 4 Wheat. 52, 64 [1819].

The expression "cases in admiralty" is not identical with "cases arising under the laws and Constitution of the United States," and grant of jurisdiction over one class does not confer jurisdiction over the other. A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as

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navigation itself; and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise.[1]

[1] American Ins. Co. v. Canter, 1 Pet. 511, 545 [1828].

Causes of admiralty jurisdiction are not "civil suits" within the meaning of the Judiciary Act, section 11, restricting venue of civil suits to the district whereof defendant is an inhabitant or in which he shall be found at time of serving the writ. Courts of admiralty "have been found necessary in all commercial countries, for the safety and convenience of commerce and the speedy decisions of controversies, where delay would often be ruin." [1]

[1] Ex parte Louisville Underwriters, 134 U. S. 488, 493 [1890]. *See also* Atkins v. Fiber Disintegrating Co., 18 Wall. 272 [1874].

Determination of Limits.

The Constitution assumes that the meaning of the phrase "admiralty and maritime jurisdiction" is well understood. There was most certainly intended, and referred to, the general system of maritime law which was familiar to the lawyers and statesmen of the time. In ascertaining what the maritime law of the country is, we must have regard not only to foreign works and codes, but to our own legal history, Constitution, legislation, customs and adjudications.[1]

[1] Rodd v. Heartt (The "Lottawanna"), 21 Wall. 558, 574–576 [1875].

Determination of the bounds of admiralty jurisdiction is a judicial function; "certainly no State law can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits."[1]

[1] Meyer v. Tupper (The "St. Lawrence"), 1 Black 522, 527 [1862]; Rodd v. Heartt (The "Lottawanna"), 21 Wall. 558, 575–576 [1875]; Workman v. New York, 179 U. S. 552 [1900]; Union Fish Co. v. Erickson, 248 U. S. 308 [1919]. *See also* The "Chusen", 5 Fed. Cas. No. 2717 [1834].

The general terms of the grant, together with the differing powers and duties of the admiralty courts existing in the several colonies, rendered it difficult to determine the exact limits of its power in the United States. The boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government.[1]

[1] Meyer v. Tupper (The "St. Lawrence"), 1 Black 522, 526–527 [1862].

THE POWER OF CONGRESS.

While the limits of admiralty jurisdiction are a matter for judicial determination, the jurisdiction rests on the grant in the Constitution and can only be exercised under the laws of the United States extending that grant to the respective courts of the United States.[1] The

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Constitution in this section by implication made the admiralty and maritime law the law of the United States, subject to power in Congress to alter, qualify, or supplement it as experience or changing conditions might require.[2]

[1] Janney *v.* Columbian Insurance Co., 10 Wheat. 411, 418 [1825]; Manro *v.* Almeida, 10 Wheat. 488 [1825]; Atlantic Transport Co. *v.* Imbrovek, 234 U. S. 52 [1914]. *See also* United States *v.* Coombs, 12 Pet. 72 [1838]; Atkins *v.* Fiber Disintegrating Co., 18 Wall. 302 [1874]; Duncan *v.* The "Francis Wright", 105 U. S. 381 [1882].

[2] Rodd *v.* Heartt (The "Lottawanna"). 21 Wall. 558, 577 [1875]; Butler *v.* Boston S. S. Co., 130 U. S. 527, 555 [1889], followed in Ex parte Garnett, 141 U. S. 1 [1891], holding valid an act of Congress (24 Stat. 79, sec. 4) extending the limitations on liability of vessel owners to owners of vessels used on inland lakes and rivers, etc.

An attempt by Congress to permit application of State compensation laws in cases of admiralty and maritime jurisdiction, by amending the saving clause in the section giving admiralty jurisdiction to district courts (40 Stat. 395) was held invalid, the court saying: "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere."[1]

[1] Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149, 160 [1920].

A second amendment of the saving clause was passed in 1922 (42 Stat. 634, ch. 216) as follows: "Saving * * * to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State * * *. Provided that the jurisdiction of district courts shall not extend to causes arising out of injuries to or death of persons other than the master or members of the crew, for which compensation is provided by the workmen's compensation law of any State." This was held invalid as an attempt to delegate legislative powers to the States.[1] Congress thereupon, in 1927 enacted the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424) setting up a system of compulsory compensation, applicable without regard to fault, when employees in maritime employment are disabled from accidental injuries in course of employment upon navigable waters of the United States, where "recovery for the disability or death through work-

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men's compensation proceedings may not validly be provided by State law." This act, as to its substantive provisions, was upheld.[2]

[1] Washington *v.* Dawson & Co., 264 U. S. 219 [1924].
[2] Crowell *v.* Benson, 285 U. S. 22 [1932].

The power of Congress extends to the entire subject, substantive and procedural, and permits of the exercise of a wide discretion, though subject to well-recognized limitations, one of which is that there are boundaries to the maritime law and admiralty jurisdiction which cannot be altered by legislation,[1] and another, that the enactments, when not relating to matters whose existence or influence is confined to a more limited field, shall be coextensive with and operative uniformly in the whole United States.[2] The maritime law, however, derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.[3]

[1] *Cf.* Meyer *v.* Tupper (The "St. Lawrence"), 1 Black 522, 527 [1862].
[2] Panama R. Co. *v.* Johnson, 264 U. S. 375 [1924].
[3] United States *v.* Thompson (The "Western Maid"), 257 U. S. 419, 432 [1922], holding that in a case of collision with a vessel owned by the Government and employed in public business, no liability arose against the United States, which, while remaining dormant during Government ownership, could be enforced when the vessel passed into other hands. *See also* National Steam Nav. Co. *v.* Dyer (The "Scotland"), 105 U. S. 24 [1882].

The legislative powers accruing to Congress through the grant of this clause are not limited by the provision in article I, section 8, clause 10, specifically giving Congress authority to punish felonies upon the high seas. It has never been doubted that the grant in article III includes the legislative power to define and punish crimes committed upon vessels on navigable waters of the United States; and Congress has further asserted the power to punish crimes committed on the high seas not within the territorial jurisdiction of a State; and while criminal jurisdiction of the United States is in general based on the territorial principle, that principle is qualified to the extent that a merchant vessel is deemed a part of the territory of the sovereign whose flag it flies.[1] This principle of extraterritorial jurisdiction was recognized in the Criminal Code, section 272, punishing murder committed "within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, on board a vessel of the United States." And it was held, that a district court had jurisdiction of an indictment for murder committed on a United States merchant vessel while unloading at a port on the Congo River within the territorial jurisdiction of Belgium.[2]

[1] *Cf.* United States *v.* Rodgers, 150 U. S. 249 [1893].
[2] United States *v.* Flores, 289 U. S. 137 [1933].

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Congress may authorize injunction by admiralty courts; it is "at liberty to draw upon another system of procedure to equip the court with suitable and adequate means for enforcing the standards of the maritime law." [1]

[1] Crowell v. Benson, 285 U. S. 22, 49 [1932].

JURISDICTION WHERE PARTIES ARE FOREIGNERS.

Admiralty courts have jurisdiction of an action between parties who are foreigners where they consent thereto.[1] In such case the sailors are presumed to be of the same nationality as the vessel, regardless of actual nationality.[2] Where the parties are of different foreign nationalities, an admiralty court will take jurisdiction if the case arises on the high seas and is therefore *communis juris*. "The existence of jurisdiction in all such cases is beyond dispute; the only question will be, whether it is expedient to exercise it." The law to be applied in such cases must be the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted.[3]

[1] Mason v. The "Blaireau", 2 Cr. 240, 264 [1804] (salvage, by a British ship against a French ship); Re Transportes Maritimos, 264 U. S. 105 [1924].

[2] Ross v. McIntyre, 140 U. S. 454 [1891].

[3] The "Belgenland" v. Jensen, 114 U. S. 355, 365 [1885].

The admiralty courts of this country may afford redress for breach of a contract of affreightment, notwithstanding the ship is a foreign one and the contract was made and to be performed in foreign countries;[1] but a war vessel of a friendly power coming into our ports and demeaning herself in a friendly manner is not amenable to process of our courts. While the sovereign of the place may destroy the implication of such exemption, until it does so in a manner not to be misunderstood, it cannot be considered to have imparted to the ordinary tribunals a jurisdiction which it would be a breach of faith to exercise.[2] However, the public status of a ship, when in doubt, cannot be determined upon a mere suggestion of private counsel appearing as *amici curiae* in behalf of the embassy of the foreign country,[3] nor by the master of a vessel who, though a naval officer, is not functioning as such and is not shown to have authority to represent his sovereign in making the objection.[4]

[1] The "Maggie Hammond" v. Morland, 9 Wall. 435 [1870].

[2] The "Exchange" v. McFaddon, 7 Cr. 116 [1812]; Ex parte Newman, 14 Wall. 152, 169 [1872] (libel for wages, by Prussian seamen against the Prussian vessel).

[3] Re Muir, 254 U. S. 522 [1921].

[4] The "Gul Djemal" v. Campbell & Stuart 264 U. S. 90 [1924].

EXCLUSIVENESS OF FEDERAL JURISDICTION.

It was assumed in Martin *v.* Hunter [1] that the admiralty jurisdiction granted by the Constitution was exclusive in the courts of

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the United States; "Congress, throughout the judicial act, and particularly in the ninth, eleventh, and thirteenth sections, have legislated upon the supposition, that in all the cases to which the judicial powers of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts."

[1] 1 Wheat. 304, 337 [1816].

This view prevailed against the opinion expressed by Chancelor Kent and others that the admiralty jurisdiction given by the Constitution was in all cases necessarily exclusive. Justice Story, who wrote the opinion in Martin *v.* Hunter, stated in his Commentaries on the Constitution (vol. 3, sec. 1666 note) that the admiralty jurisdiction "is exclusive in all matters of prize, for the reason that, at the common law, this jurisdiction is vested in the courts of admiralty to the exclusion of the court of common law. But in cases, where the jurisdiction of common law and admiralty are concurrent (as in cases of possessory suits, mariners' wages and marine torts) there is nothing in the Constitution necessarily leading to the conclusion that the jurisdiction was intended to be exclusive—The reasonable interpretation would seem to be, that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was concurrent, it remained so * * *."

The opinion in Martin *v.* Hunter was approved in Taylor *v.* Carryl,[1] where the Court held that since courts of common law deal with ships as with other personal property, a seizure by a State officer of Pennsylvania under process of foreign attachment, constituted actual legal possession which could not be interfered with by a libel in admiralty.

[1] 20 How. 583, 599 [1858].

By 1867 it was declared to be "the settled law of this court, that wherever the district courts of the United States have original cognizance of admiralty causes, by virtue of the act of 1789, that cognizance is exclusive and no other court, State or national, can exercise it."[1] In 1897 the court thus summed up the state of the decisions: "The maritime and admiralty jurisdiction conferred by the Constitution and laws of the United States upon the district courts of the United States is exclusive."[2]

[1] The "Hine" *v.* Trevor, 4 Wall. 555, 568, 569 [1867], citing The "Moses Taylor" *v.* Hammons, 4 Wall. 411 [1867]. *See also* The "Belfast" *v.* Boon, 7 Wall. 624 [1869]; Rodd *v.* Heartt (The "Lottawanna"), 21 Wall. 579 [1875]; The "J. E. Rumbell", 148 U. S. 1 [1893].

[2] The "Glide," 167 U. S. 606, 623 [1897].

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EXTENT OF STATE JURISDICTION.

It was argued in Waring *v.* Clarke,[1] that the test of admiralty jurisdiction was the competency of a court of common law to give a remedy in a given case in a trial by jury; or, that in all cases except in seamen's wages, where the courts of common law had concurrent jurisdiction with the admiralty, and could try the case and give relief, that alone took away admiralty jurisdiction. This test was rejected. What at the time of the adoption of the Constitution were cases in admiralty (considered as a class) were still cases in admiralty; and while the Constitution guarantees jury trial of all crimes, including those within admiralty jurisdiction, the Seventh Amendment, guaranteeing that right in suits at common law involving over $20, cannot be construed to affect the jurisdiction of admiralty courts, wherein the trial may in the discretion of Congress be either with or without jury.

[1] 5 How. 441 [1847].

The saving of a common law remedy by section 9 of the Judiciary Act of 1789 ("* * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it") meant that the jurisdiction of common law courts was not taken away; it was a saving for the benefit of both plaintiff and defendant, not of defendant alone.[1] What was saved was a common law remedy, not merely a remedy in the common law courts; a proceeding *in rem*, as used in the admiralty courts, is not such a remedy [2] nor was a statutory proceeding to wind up a corporation.[3] But an action of trespass for damages caused by negligence of defendant's servant in cutting loose from the wharf a burning scow and allowing it to drift against plaintiff's vessel, was held within the saving clause,[4] and a bill in equity to foreclose a common law lien upon a raft of lumber for towage services was upheld.[5]

[1] Waring *v.* Clarke, 5 How. 441, 460, 461 [1847].

[2] The "Moses Taylor" *v.* Hammons, 4 Wall. 411, 431 [1867]; The "Hine" *v.* Trevor, 4 Wall. 555 [1867]; The "Glide," 167 U. S. 606 [1897]; but where the State law authorized suit against the owner by name, even though incidentally accompanied by an attachment, it was held not a proceeding *in rem*, Garcia y Leon *v.* Galceran, 11 Wall. 185 [1871].

[3] Moran *v.* Sturges, 154 U. S. 256, 277 [1894].

[4] Chappell *v.* Bradshaw, 128 U. S. 132 [1888].

[5] Knapp, S. & Co. *v.* McCaffrey, 177 U. S. 638 [1900].

In Red Cross Line *v.* Atlantic Fruit Co.,[1] the Court declared that the right so saved includes all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies *en pais*, as well as proceedings in court, judicial remedies conferred by statute as well as those existing at the common law, remedies in equity as well as those enforceable in a court of law. This opinion upholding a New York

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law under which a State court enforced an agreement for arbitration of disputes arising under maritime contracts distinguished prior cases dealing with State workmen's compensation laws, particularly Southern P. Co. *v.* Jensen,[2] holding invalid the extension of a State compensation act to a stevedore killed in the course of unloading a ship at a wharf in navigable waters[3] and Knickerbocker Ice Co. *v.* Stewart,[4] holding invalid the act of Congress (40 Stat. 395) saving to claimants the rights and remedies under the workmen's compensation law of any State. The Court also referred to the case of Union Fish Co. *v.* Erickson,[5] holding invalid an attempt by State law to modify the remedial law of admiralty courts. The opinion cites other cases upholding State laws as being supplementary to or not in conflict with the substantive maritime law.[6]

[1] 264 U. S. 109 [1924].

[2] 244 U. S. 205 [1917]. In this case it was said that no such State legislation is valid "if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." Followed in Clyde S. S. Co. *v.* Walker, 244 U. S. 255 [1917]; Peters *v.* Veasey, 251 U. S. 121 [1919].

[3] A contract for such work being a maritime contract within admiralty jurisdiction. *See* Atlantic Transport Co. *v.* Imbroveck, 234 U. S. 52 [1914], followed in Northern Coal & Dock Co. *v.* Strand, 278 U. S. 142 [1928]; Employers' Liability Assur. Corp. *v.* Cook, 281 U. S. 233 [1930].

[4] 253 U. S. 149 [1920].

[5] 248 U. S. 308 [1919].

[6] Western Fuel Co. *v.* Garcia, 257 U. S. 233 [1921]; Great Lakes Dredge & Dock Co. *v.* Kierejewski, 261 U. S. 479 [1923]; Grant Smith-Porter Ship Co. *v.* Rohde, 257 U. S. 469 [1922]; State Industrial Commission *v.* Nordenholt Corp., 259 U. S. 263 [1922].

The grant of this clause (to the Federal Government) does not extend to a cession of the waters in which admiralty cases may arise, or of general jurisdiction over the same. General jurisdiction over the place still adheres to the territory and the residuary powers of legislation still remain in the State.[1] The clause did not affect the jurisdiction nor the legislative power of the States, over so much of their territory as lies below high-water mark save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States.[2]

[1] United States *v.* Bevans, 3 Wheat. 336 [1818]; The "Jas. Gray" *v.* The "John Frasier" 21 How. 184 [1859].

[2] Smith *v.* Maryland, 18 How. 71, 76 [1855], upholding State laws for protection of oysters, which prohibited use of specified instruments, declared forfeitures, etc. Followed in Manchester *v.* Massachusetts, 139 U. S. 240 [1891], holding valid the Massachusetts laws regulating menhaden fisheries in Buzzards Bay. *See also* United States *v.* Coombs, 12 Pet. 72, 75 [1838].

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The State courts have jurisdiction of personal suits on maritime contracts or for maritime torts.[1] The courts of the United States, merely by virtue of this grant of judicial power, and in the absence of legislation by Congress, have no criminal jurisdiction whatever.[2]

[1] Schoonmaker *v.* Gilmore, 102 U. S. 118 [1880]; Garcia y Leon *v.* Galceran, 11 Wall. 185 [1871].

[2] Manchester *v.* Massachusetts, 139 U. S. 240, 262 [1891].

The act of February 26, 1845 (5 Stat. 726), extending the jurisdiction of district courts to matters of contract or tort arising on or in connection with steamboats licensed for the coasting trade and in course of interstate voyages upon the Great Lakes and their connecting waters, was valid not under the commerce power, but on the basis that the admiralty jurisdiction as understood in the United States at the time of the adoption of the Constitution included those waters. Under it, the State courts exercised "a concurrent jurisdiction in all cases arising within their respective territories, as broadly and as independently as it is exercised by the old 13 States"—where the admiralty jurisdiction has been in full force ever since adoption of the Constitution.[1]

[1] The "Genessee Chief" *v.* Fitzhugh, 12 How. 443, 453, 458 [1852].

Where a State statute prescribed an exclusive remedy in case of injury in hazardous occupations within the State, it was held that, as applied to an injury occurring in course of construction of a vessel, launched and lying in navigable water within the State, it would not necessarily work any material prejudice to any characteristic feature of the general maritime law, and that it might be enforced.[1] Similarly where a longshoreman on board ship was struck by a hoist and knocked onto the wharf, the injury was held within maritime jurisdiction;[2] while one standing on a wharf and knocked into the water, recovered under State law.[3] Where one was struck by a sling-load of lumber on board ship, but was taken ashore and died on land, his administrator was held entitled to enforce in admiralty a lien given by the State law.[4]

[1] Grant Smith-Porter Ship Co. *v.* Rohde, 257 U. S. 469 [1922], distinguishing Southern P. Co. *v.* Jensen, 244 U. S. 205 [1917]; Chelentis *v.* Luckenbach S. S. Co. 247 U. S. 372 [1918]; Union Fish Co. *v.* Erickson, 248 U. S. 308 [1919]; and Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149 [1920], on the ground the employment or contract in those cases was maritime.

[2] Minnie *v.* Port Huron Terminal Co., 295 U. S. 647 [1935].

[3] T. Smith & Son *v.* Taylor, 276 U. S. 179 [1928].

[4] Vancouver S. S. Co. *v.* Rice, 288 U. S. 445 [1933].

TERRITORIAL OPERATION OF ADMIRALTY JURISDICTION.

The general admiralty and maritime jurisdiction "by the settled law of this country extends wherever public navigation extends—on

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the sea and the great inland lakes, and the navigable waters connecting therewith",[1] including canals.[2]

[1] Butler *v.* Boston & S. S. Co., 130 U. S. 527, 557 [1889], citing Waring *v.* Clarke, 5 How. 441 [1847]; The "Genessee Chief" *v.* Fitzhugh, 12 How. 443 [1852]; Jackson *v.* The "Magnolia," 20 How. 296 [1858]; Commercial Transp. Co. *v.* Fitzhugh, 1 Black 574 [1862].

Waring *v.* Clarke, decided in 1847, held that a collision on the Mississippi River 95 miles above New Orleans, but within the ebb and flow of the tide, was within the admiralty jurisdiction, although occurring within the body of a county. To reach this conclusion the Court rejected the view that admiralty jurisdiction under the Constitution was to be limited by what were admiralty cases in England when the Constitution was adopted. The lawyers of America were familiar with a broader jurisdiction than was allowed in England; and to limit the constitutional jurisdiction by the restrictions applicable in England would be to write those restrictions into the Constitution and take from the courts the interpretation of what is a case of admiralty jurisdiction, and a denial to Congress of all legislation on the subject. For the proposition that "admiralty jurisdiction of the courts of the United States extends to tide waters, as far as the tide flows, though that may be *infra corpus comitatus*" the Court cited Peyroux *v.* Howard, 7 Pet. 342 [1833]; The "Orleans" *v.* Phoebus, 11 Pet. 175 [1837]; The "Thomas Jefferson", 10 Wheat. 428 [1825]; United States *v.* Coombs, 12 Pet. 72 [1838].

Jurisdiction of the district courts does not, however, extend to all cases which would fall within such jurisdiction "according to the civil law and the practices and usages of continental Europe", Ex parte Easton, 95 U. S. 68, 70 [1877].

The "Genessee Chief," 12 How. 443 [1852] arose under, and upheld the constitutionality of, an act of 1845 extending the jurisdiction of district courts in admiralty to collisions upon the Great Lakes and connecting waters, i. e., it specifically held the admiralty jurisdiction was not limited to tide waters but extends to all public navigable lakes and rivers where commerce is carried on between different States or with foreign countries. It therefore overruled the "Thomas Jefferson", and The "Orleans" *v.* Phoebus, which were based on the restriction of jurisdiction to the ebb and flow of the tide. While the "Genessee Chief" necessarily involved only the Great Lakes and connecting waters, its doctrine was followed and carried in practice a step further in Jackson *v.* The "Magnolia," 20 How. 296 [1858], which was a case of collision upon a fresh-water river, navigable from the sea, but above the flow of the tide and within the body of a county. The Court held that this jurisdiction was granted by the Judiciary Act of 1789, which in terms extended it to "rivers navigable from the sea—as well as upon the high seas."

Commercial Transp. Co. *v.* Fitzhugh (The Propeller "Commerce"), 1 Black 574 [1862] finally held that admiralty jurisdiction in case of tort depends solely upon locality—and therefore, that the question whether the vessel in a particular instance was or was not engaged in interestate commerce was immaterial. *See also* Fretz *v.* Bull, 12 How. 466 [1852].

[2] Re Boyer, 109 U. S. 629 [1884].

'THE SCOPE OF ADMIRALTY AND MARITIME JURISDICTION.

In General.

The term includes jurisdiction of all things done upon and relating to the sea and for damages for injuries on the high seas, the

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subject matter in cases of contract and the locality in cases of tort being the true tests of jurisdiction. The jurisdiction was not intended to be as limited as it was in England at the time of the adoption of the Constitution, and it was to guard against a narrow construction of the word "admiralty" that "maritime" was added.[1]

[1] Waring *v.* Clarke, 5 How. 441, 459 [1847], cited in Grant Smith-Porter Ship Co. *v.* Rohde, 257 U. S. 469 [1922].

Maritime Contracts.

In matters of contract, the jurisdiction of courts of admiralty is limited to those, and those only, which are maritime [1]—to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation.[2] The sole essential to admiralty jurisdiction *in rem* is that the contract is maritime, and that the property proceeded against is within the lawful custody of the court.[3]

[1] The "Orleans" *v.* Phoebus, 11 Pet. 175, 183 [1837], citing The "Thomas Jefferson", 10 Wheat. 428 [1825].
[2] Peoples Ferry Co. *v.* Beers, 20 How. 393, 401 [1858].
[3] The "Resolute", 168 U. S. 437 [1897].

"Wide differences of opinion have existed as to the extent of the admiralty jurisdiction; but it may now be said, without fear of contradiction, that it extends to all contracts, claims, and services essentially maritime, among which are bottomry bonds, contracts of affreightment and contracts for the conveyance of passengers, pilotage on the high seas, wharfage, agreements of consortship, surveys of vessels damaged by the perils of the seas, the claims of material-men and others for the repair and outfit of ships belonging to foreign nations or to other States, and the wages of mariners; and also to civil marine torts and injuries, among which are assaults or other personal injuries, collision, spoliation, and damage, illegal seizures or other depredations on property, illegal dispossession or witholding of possession from the owners of ships, controversies between the part owners as to the employment of ships, municipal seizures of ships, and cases of salvage and marine insurance." [1]

[1] Ex parte Easton, 95 U. S. 68, 72 [1877]. *See also* Ex parte Gordon, 104 U. S., 515 [1882].

Bottomry Bonds.

A bottomry bond, for repayment of advances to supply the necessities of the ship, creates a lien on the ship which may be enforced in admiralty in case of her safe arrival at the port of destination.[1] But where the obligee of such a bond does not pursue his remedy until after the ship has made further voyages beyond that covered by his bond, he loses his lien, especially where a subsequent common-law execution was levied before service of the admiralty warrant.[2] To make such a bond valid it must be shown by the creditor that the master acted within the scope of his authority—i. e., that the advances

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were made for repairs and supplies necessary for effectuating the objects of the voyage, or the safety and security of the ship.[3]

[1] The "Grapeshot" *v.* Wallerstein, 9 Wall. 129, 135 [1870]; Carrington *v.* The "Ann C. Pratt," 18 How. 63, 67 [1855].

[2] Blaine *v.* The "Charles Carter," 4 Cr. 328 [1808]. *See also* The "St. Jago de Cuba," 9 Wheat. 409 [1824].

[3] The "Aurora," 1 Wheat. 96, 105 [1816].

An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty therefore has no jurisdiction of a libel to foreclose it, or to assert either right or title of possession under it.[1]

[1] Bogart *v.* The "John Jay," 17 How. 399, 400 [1855], where nothing in the case indicated that the money borrowed was for the use of the vessel; Rea *v.* The "Eclipse" (The "Eclipse"), 135 U. S. 599, 608 [1890]; The "J. E. Rumbell," 148 U. S. 1, 15 [1893].

By the Ship Mortgage Act of 1920 (41 Stat. 1000), Congress granted to the district courts of the United States exclusive jurisdiction, by suit *in rem* in admiralty, to enforce "preferred mortgages" of vessels documented under laws of the United States, made in good faith, duly recorded, etc. This legislative creation of a lien was upheld as within the discretion of Congress as an appropriate means to encourage investment in shipping securities notwithstanding the act made no requirement as to use of the moneys borrowed, i. e., regardless of whether the loan was made for the direct benefit of the vessel.[1]

[1] Detroit Trust Co. *v.* The "Thomas Barlum," 293 U. S. 21 [1934].

A bottomry bond may be good in part and bad in part; and it will be upheld by courts of admiralty as a lien to the extent to which it is valid.[1] But where a bond is fraudulently taken for a larger amount than was actually loaned, the entire bond is tainted with fraud and an admiralty court will not enforce any part of it at suit of the lender. Nor can the lender in such case recover on a general maritime lien for repairs.[2]

[1] The "Virgin" *v.* Vyfhius, 8 Pet. 537, 549 [1834].

[2] Carrington *v.* The "Ann C. Pratt," 18 How. 63 [1855].

Contracts of Affreightment and Charter Party.

Contracts of affreightment are regarded by the courts of the United States as maritime contracts over which the courts of admiralty have jurisdiction, and a ship owner may enforce his lien by a proceeding *in rem*.[1] Admiralty jurisdiction is not limited by the restrictions on admiralty in England under the restraining statutes of Richard II—but extends to contracts, as of affreightment, which are to be executed on land and includes proceedings *in personam* as well as *in rem*.[2] The district courts have exercised jurisdiction in such cases without question until the New Jersey Steam Navigation Co. case;

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and since that time no objection has been raised in the Supreme Court to the jurisdiction.[3]

[1] Sears *v.* Wills (Bags of Linseed), 1 Black 108 [1861]. In Brittan *v.* Barnaby, 21 How. 527, 538, [1859], Justice Daniel based a dissent upon the ground that "courts of admiralty in this country, as in England, can take no cognizance of charter parties or bills of lading."

[2] New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 343 [1848]; Mordecai *v.* Lindsay (The "Eddy"), 5 Wall. 481, 494 [1867].

[3] Morewood *v.* Enequist, 23 How. 491, 494 [1860]. *See also* Rich *v.* Lambert, 12 How. 347 [1852].

Contracts of Insurance.

Marine insurance was definitely recognized as within the jurisdiction of the admiralty courts in DeLovio *v.* Boit [1] in an opinion by Justice Story; this decision was expressly affirmed in New England M. Ins. Co. *v.* Dunham,[2] where the Court, among other arguments, stated: "Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom * * * ."[3]

[1] 7 Fed. Cas. No. 3776 [1815].

[2] 11 Wall. 1, 31 [1871].

[3] *See also* the remarks of Justice Johnson in Croudson *v.* Leonard, 4 Cr. 434, 435 [1808].

Pilotage.

"That contracts relating to pilotage are within the sphere of the admiralty jurisdiction has not been controverted by the counsel for the petitioner. The question is not an open one in this court." [1]

[1] Ex parte McNiel, 13 Wall. 236, 243 [1872]. *See also* Hobart *v.* Drogan (The "Hope"), 10 Pet. 108, 119 [1836]; Ex parte Hagar, 104 U. S. 520 [1882]; The "Ann", 1 Mason (U. S.) 508 [1818].

Wharfage.

Wharf accommodation is a necessity of navigation; and compensation for wharfage may be claimed upon an express or an implied contract, regardless of whether the craft benefited was without motive power of her own.[1] But wharfage furnished to a ship while laid up for the winter is not maritime.[2]

[1] Ex parte Easton, 95 U. S. 68 [1877].

[2] The "C. Vanderbilt", 86 Fed. 785 [1898].

Consortship.

An agreement of consortship between the masters of two vessels engaged in the business of wrecking, is a contract enforceable in admiralty—it extends to the owners and crews, and is not merely personal between the masters.[1] But an agreement for a trade venture, where one furnished the ship and the other his skill and labor, was held a mere partnership and not within the admiralty jurisdiction.[2]

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Admiralty has no jurisdiction at all in matters of account between part owners;[3] nor between an owner and his agent or broker.[4]

[1] Andrews *v.* Wall, 3 How. 567 [1845].
[2] Ward *v.* Thompson, 22 How. 330 [1859].
[3] The "Orleans" *v.* Phoebus, 11 Pet. 175, 182 [1837]. *See also* Grant *v.* Poillon, 20 How. 162 [1858].
[4] Minturn *v.* Maynard, 17 How. 477 [1855].

Surveys of Vessels Damaged.

By the laws of most maritime nations, the master is authorized, in case of urgent necessity, to sell his vessel.[1]

[1] Conkling on Admiralty, 2d ed., p. 311.

The condemnation of a ship found upon survey to be damaged or otherwise in such a condition that further proceeding upon her voyage would be unsafe, or repairs disproportionate to resulting value, was held by Justice Story in The "Tilton",[1] to be within admiralty jurisdiction, citing Janney *v.* Columbian Ins. Co.[2] The Janney case was a common law action upon an insurance policy which contained a clause freeing the insurers if the vessel "after a regular survey should be condemned for being unsound or rotten." Survey in the case was had by port wardens in Louisiana under local law, and they further proceeded to condemn the vessel without express authority in the law therefor; and the question was whether such condemnation and resulting sale was conclusive evidence of compliance with the terms of the policy. The court stated: "* * * there is nothing in the laws of Louisiana which vests the power expressly in the master and wardens of the port to condemn a vessel as unfit for sea or unworthy of repair. As to damaged merchandise, the power is expressly given; but as to ships, it appears to be exercised as incidental to the surveying power. In other parts of the world, it is very generally exercised as an incident to the admiralty power. * * * We do not mean to intimate, that the power is one which cannot be exercised under municipal regulations. On the contrary, there are many reasons for maintaining that it may be so exercised, until Congress may think proper to establish some general rule upon the subject, either as one appertaining to trade and commerce, or within the admiralty jurisdiction * * *."

[1] 23 Fed. Cas. No. 14054 [1830].
[2] 10 Wheat. 411, 412, 415, 418 [1825].

The contract to build a ship, or furnish materials therefor, being a contract made on land and to be performed on land, is not maritime; and a lien to secure it, given by local statute, is not a maritime lien and cannot be enforced in admiralty.[1] The rule has been extended to contracts for work and material necessary to finish a partly constructed vessel which has been launched.[2] More recently, however, the Court stated: "We are not disposed to enlarge the compass of

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the rule * * * reasonable doubts * * * should be resolved in favor of the admiralty jurisdiction;" and consequently held that a contract for woodwork involved in converting a car-float into a pleasure steamer was a maritime contract.[3]

[1] People's Ferry Co. *v.* Beers (The "Jefferson"), 20 How. 393, 400 [1858], reaffirmed in Roach *v.* Chapman, 22 How. 129 [1860]; The "J. E. Rumbell", 148 U. S. 1, 11 [1893]. *See also* Edwards *v.* Elliott, 21 Wall 532 [1874]; Johnson *v.* Chicago & P. Elevator Co., 119 U. S. 388 [1886]; Iroquois Transp. Co. *v.* Delaney Forge & Iron Co. (The "Winnebago"), 205 U. S. 354 [1907]; North Pacific S. S. Co. *v.* Hall Bros. Marine R. & Shipbuilding Co., 249 U. S. 119, 125 [1919].

[2] Thames Towboat Co. *v.* The "Francis McDonald", 254 U. S. 242 [1920].

[3] New Bedford Dry Dock Co. *v.* Purdy, 258 U. S. 96, 99 [1922].

Claims of Materialmen, etc.

A contract to repair is maritime, and the general maritime law gives a lien enforceable in admiralty for repairs to a vessel in a foreign port [1] (which includes ports of any State other than that where the vessel belongs [2]). But independently of local statute, there is no lien enforceable in admiralty for repairs or supplies in the home port of a vessel.[3] If such a lien is given by statute, being in the nature of a maritime lien, it may be enforced in admiralty courts of the United States;[4] and is within the exclusive jurisdiction of these courts.[5] But no State may create a lien upon a foreign vessel for supplies furnished a contractor, without making provision for notice to owner.[6] Such a lien is preferred to a prior mortgage, recorded under Revised Statutes, sec. 4192.[7] It is not waived by a materialman, by acceptance of the notes of the owner for the amount due, when it was understood by the parties that the lien should continue.[8]

[1] The "General Smith," 4 Wheat, 438, 443 [1819]; The "St. Jago de Cuba", 9 Wheat. 409, 417 [1824]; The "Virgin" *v.* Vyfhius 8 Pet. 538, 550 [1834]; Thomas *v.* Osborn (The "Laura"), 19 How. 22 [1856]; The "Grapeshot" *v.* Wallerstein 9 Wall. 129 [1870]; Hazelhurst *v.* The "Lulu", 10 Wall, 192 [1870].

[2] Pendergast *v.* The "Kalorama", 10 Wall. 204, 212 [1870].

[3] The "General Smith", 4 Wheat. 438 [1819]; and The "St. Jago de Cuba", 9 Wheat. 409 [1824]. *See also* Rodd *v.* Heartt (The "Lottawanna"), 21 Wall. 558 [1875]; Poole *v.* Tyler (The "Edith"), 94 U. S. 578 [1877].

[4] Peyroux *v.* Howard (The "Planter"), 7 Pet. 324, 341 [1833]; Rodd *v.* Heartt (The "Lottawanna"), 21 Wall. 558, 579, 580 [1875].

[5] The "Moses Taylor" *v.* Hammons, 4 Wall. 411 [1867]; The "Hine" *v.* The "Trevor", 4 Wall. 555 [1867]; The "Belfast" *v.* Boone, 7 Wall. 624 [1869]; Rodd *v.* Heartt (The "Lottawanna"), 21 Wall. 558, 580 [1875]; Johnson *v.* Chicago & P. Elevator Co., 119 U. S. 388, 397 [1886].

[6] The "Roanoke", 189 U. S. 185 [1903].

[7] The "J. E. Rumbell", 148 U. S. 1 [1893].

[8] Meyer *v.* Tupper (The "St. Lawrence"), 1 Black 522 [1862].

"That a State may provide for liens in favor of materialmen for necessaries furnished to a vessel in her home port, or in a port of the State to which she belongs, though the contract to furnish the same

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is a maritime contract, and that such liens can be enforced by proceedings *in rem* in the district courts of the United States, is so well settled by a series of cases in this court as to be no longer open to question." [1]

[1] Perry *v.* Haines (The "Robert W. Parsons"), 191 U. S. 17, 24 [1903], holding that a maritime lien arose in case of a canal boat. *See also* Thomas *v.* Osborn (The "Laura"), 19 How. 22 [1857]; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344 [1848]; American S. B. Co. *v.* Chace, 16 Wall. 522 [1873]; The "Glide", 167 U. S. 606 [1897].

Seamen's Wages.

"This lien is so sacred and indelible, that it has, on more than one occasion, been expressively said, that it adheres to the last plank of the ship." "Over the subject of seamen's wages, the admiralty has an undisputed jurisdiction, *in rem*, as well as *in personam*." [1]

[1] Sheppard *v.* Taylor, 5 Pet. 675, 710, 711 [1831].

The master, however, by the general maritime law had no lien on the ship even for maritime wages.[1] Denial of the lien was based upon the theory that the master had a lien upon the freight for his wages. It was argued in the "William H. Hoag,"[2] that under modern methods a purser or other agent is employed to collect the freights, and that the reason for the rule having ceased, the rule itself had become obsolete. Since the Court upheld the assumption of jurisdiction in the case, it may be inferred that the contract is maritime.[3]

[1] The "Orleans" *v.* Phoebus, 11 Pet. 175, 183 [1837].
[2] 168 U. S. 443 [1897].
[3] *Cf.* Hughes on Admiralty, p. 26.

Maritime Torts.

In General.—Jurisdiction of maritime torts depends solely upon the commission of the wrongful act upon navigable water,[1] without reference to the voyage or destination of the vessel;[2] the tort may even originate in a foreign port and yet be the subject of an action in United States courts.[3] But where the substance and consummation of the wrong takes place on land, suit in admiralty cannot be maintained.[4]

[1] The "Belfast" *v.* Boone, 7 Wall. 637 [1869]; Philadelphia, W. & B. R. Co. *v.* Philadelphia Towboat Co., 23 How. 209, 215 [1860].
[2] Ex parte Garnett, 141 U. S. 1, 16 [1891].
[3] Panama R. Co. *v.* Napier Shipping Co., 166 U. S. 280, 285 [1897], where the tort occurred in waters of Panama.
[4] Hough *v.* Western Transp. Co. (The "Plymouth"), 3 Wall. 20 [1866], Ex parte Phenix Ins. Co., 118 U. S. 610 [1886], damage to buildings by fire communicated from a vessel lying in navigable waters; Johnson *v.* Chicago & P. Elevator Co., 119 U. S. 388, 397 [1886], damage to building, caused by jib-boom of a vessel being towed in Chicago River. *See also* Ramsdell Transp. Co. *v.* La Compagnie Générale Transatlantique, 182 U. S. 406 [1901]; Cleveland Terminal & V. R. Co. *v.* Cleveland S. S. Co., 208 U. S. 316 [1908]; Duluth & S. Bridge Co. *v.* The "Troy," 208 U. S. 321 [1908]; Martin *v.* West, 222 U. S. 191 [1911]; Phoenix Constr. Co. *v.* The "Poughkeepsie," 212 U. S. 558 [1909].

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An exception to this general rule is made in the case of Government aids to navigation, where the practical character and relation to shipping have been held to outweigh the technical attachment to the land, and injuries to such structures have been held within maritime jurisdiction.[1]

[1] United States *v.* Evans (The "Blackheath"), 195 U. S. 361 [1904]; Latta & T. Constr. Co. The "Raithmoor," 241 U. S. 166 [1916].

PERSONAL INJURIES.—Injuries to a passenger give rise to a claim for compensation which may be prosecuted by a libel *in rem* against the vessel; and the rule is universal that if the libel is sustained, the decree may be enforced *in rem*, as in other cases where a maritime lien arises.[1]

[1] The "City of Panama" *v.* Phelps, 101 U. S. 453, 462 [1880].

Where a passenger who was lawfully on board, even though he was being carried gratuitously, was injured by a boiler explosion, it was held to be a maritime tort.[1] The term "tort" is not confined to wrongs or injuries committed by direct force; it extends to torts of negligence and malfeasance. Thus, it was held a maritime tort, where a consignee of cargo went on board at the implied invitation of the master and by negligence of the master was injured by the fall of a bale of cotton;[2] and similarly where one fell from the shore end of the gangplank by reason of negligence of vessel in not providing a rail—the gangplank was held a part of the ship.[3] Where an employee of an interstate railroad was injured while loading freight cars upon a car float in navigable water, the injury was held to be within the exclusive admiralty jurisdiction.[4]

[1] The "New World" *v.* King, 16 How. 469 [1854].
[2] Leathers *v.* Blessing, 105 U. S. 626, 630 [1882].
[3] The "Admiral Peoples," 295 U. S. 649 [1935].
[4] Noguera *v.* New York N. H. & H. R. Co., 281 U. S. 128 [1930].

But in the absence of statute, a court of admiralty cannot entertain an action for the death of a person caused by another's negligence on the high seas.[1] Even where local statute permits action, if it give no lien, admiralty cannot entertain a libel *in rem*.[2] Where a State statute gave a right of action for death by wrongful act, it was held not to interfere with the admiralty jurisdiction of the United States,[3] and again it was held that a court of admiralty would entertain a libel *in personam*, but that State statutes of limitations were applicable.[4]

[1] The "Harrisburg" *v.* Rickards, 119 U. S. 199 [1886], followed in Metcalfe *v.* The "Alaska," 130 U. S. 201 [1889]; Butler *v.* Boston S. S. Co., 130 U. S. 527, 555 [1889]; Western Fuel Co. *v.* Garcia, 257 U. S. 233, 240 [1921].
[2] Barton *v.* Brown (The "Corsair"), 145 U. S. 335 [1892].
[3] American S. B. Co. *v.* Chace, 16 Wall. 522 [1873].
[4] Western Fuel Co. *v.* Garcia, 257 U. S. 233 [1921].

PROPERTY DAMAGE.—Collisions upon navigable waters are within admiralty jurisdiction, though occurring within the body of a

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county and above the ebb and flow of the tide.[1] The jurisdiction extends to a libel by one of two colliding vessels, where both are adjudged in fault, to enforce contribution by the other on account of its payment of the entire damage.[2]

[1] Jackson *v.* The "Magnolia", 20 How. 296 [1858]. *See also* Nelson *v.* Leland, 22 How. 48 [1860]; Commercial Transp. Co. *v.* Fitzhugh (The Propeller "Commerce"), 1 Black 574 [1862]; The "J. E. Eagle" *v.* Fraser, 8 Wall. 15 [1869]; St. John *v.* Paine, 10 How. 557 [1851]; Newton *v.* Stebbins, 10 How. 586 [1851]; The "Belgenland" *v.* Jensen, 114 U. S. 355 [1885]; Workman *v.* New York, 179 U. S. 552 [1900]; Martin *v.* West, 222 U. S. 191 [1911]; Ex parte Gordon, 104 U. S. 515 [1882]; Metcalfe *v.* The "Alaska", 130 U. S. 201 [1889]; Old Dominion S. S. Co. *v.* Gilmore, 207 U. S. 398 [1907].

[2] Erie R. Co. *v.* Erie & W. Transp. Co., 204 U. S. 220 [1907]; Lehigh Valley R. Co. *v.* Cornell S. Co. (The "Ira Hedges"), 218 U. S. 264 [1910].

Where an injury was caused to a passing vessel by a pier built in a navigable stream and unlawfully obstructing navigation, no question was raised as to the jurisdiction of an admiralty court, although suit might have been maintained at common law.[1] Injury caused by a rock negligently allowed to remain within the limits of the ship's berth at the wharf was within admiralty jurisdiction.[2] It is a tort cognizable in admiralty to leave piles in the bed of a tide river within the body of a county, whereby a ship is injured.[3]

[1] Atlee *v.* Northwestern Union Packet Co., 21 Wall. 389 [1875].

[2] Smith *v.* Burnett, 173 U. S. 430 [1899].

[3] Philadelphia W. & B. R. Co. *v.* Philadelphia & H. de G. Steam Towboat Co., 23 How. 209 [1860]. *See also* The "James Gray" *v.* The "John Fraser," 21 How. 184, 187 [1859]; Panama R. Co. *v.* Napier Shipping Co., 166 U. S. 280 [1897].

The law in this country is entirely well settled, that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of any one who is lawfully in possession of her, whether as owner or charterer.[1]

[1] The "Barnstable", 181 U. S. 464, 467 [1901].

Dispossession of Property.—Every violent dispossession of property on the seas is *prima facie* a maritime tort [1] entitling the injured party to admiralty process against the property, or to a remedy *in personam*.[2]

[1] "L'Invincible", 1 Wheat. 238, 257 [1816], holding that courts of admiralty have no jurisdiction of torts committed on the high seas upon the property of citizens, by a ship of war of a friendly power, except where such vessel has been fitted out in violation of our neutrality.

[2] Manro *v.* Almeida, 10 Wheat. 473, 486 [1825].

The lien for duties on imported goods cannot be enforced by a libel in admiralty, as the revenue jurisdiction of the district courts *in rem* is confined to seizures for forfeitures under the laws of impost, etc.; the remedy is by suit at common law.[1] But where a pleasure yacht was seized and held in customs custody as an article liable to

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duty, it was held a maritime tort cognizable in a cause of possession in admiralty by any district court of the United States finding the vessel within the territorial limits of its process.[2]

[1] United States *v.* Lippincott (Three Hundred Fifty Chests of Tea), 12 Wheat. 486 [1827]. Forfeiture of a vessel for slave running was held a case of admiralty jurisdiction in United States *v.* "La Vengeance", 3 Dall. 297 [1796]; United States *v.* The "Sally" (The "Sally"), 2 Cr. 405 [1805].

[2] Ex parte Fassett, 142 U. S. 479, 484 [1892].

Salvage.

A salvor is entitled to compensation to the extent of the merit of his services, viewed in the light of a liberal public policy.[1] The reason for the apparent prodigality in rewarding services at sea is intended as an inducement to render them, which is for the public interests, and for the general interests of humanity, to hold forth to those who navigate the ocean.[2] Compensation may be allowed for salvage services rendered by a corporation, and under contract,[3] and such a contract, though calling for a larger compensation than a *quantum meruit* will not be held bad unless shown to have been corruptly entered into or its enforcement otherwise would be contrary to equity and good conscience.[4] The claim of one salvor is not lost because a co-salvor fails to prosecute a claim.[5]

[1] Hobart *v.* Drogan (The "Hope"), 10 Pet. 108, 121 [1836], holding that a pilot as such is not disqualified, in virtue of his office, from becoming a salvor.

[2] Mason *v.* The "Blaireau", 2 Cr. 240, 266 [1804], holding that embezzlement by a salvor of part of the goods saved forfeits his right to salvage; and that a mariner may become entitled to salvage when by abandonment he is discharged from his contract as mariner.

[3] The "Camanche" *v.* Coast Wrecking Co., 8 Wall. 448 [1869].

[4] The "Elfrida", 172 U. S. 186 [1898].

[5] The "Blackwall" *v.* Sancelito Tug Co., 10 Wall. 1 [1870].

A fixed structure (e. g., a drydock) not used for the purpose of navigation is not a subject of salvage service, any more than is a wharf or a warehouse when projecting into or upon the water; "no structure that is not a ship or vessel is a subject of salvage." [1] But repairs made to a vessel in drydock are not made upon land so as to withdraw the vessel from admiralty jurisdiction;[2] and such a vessel is subject of salvage from perils of fire originating on land.[3]

[1] Cope *v.* Vallette Dry Dock Co., 119 U. S. 625, 627 [1887].

[2] Perry *v.* Haines (The "Robt. W. Parsons"), 191 U. S. 17 [1903].

[3] The "Jefferson", 215 U. S. 130 [1909].

General Average.

"The law of general average is part of the maritime law, and not of the municipal law, and applies to maritime adventures only." [1] Contribution cannot be enforced by libel *in personam* by the owner of a vessel against the owner of cargo which has been voluntarily delivered before the libel was filed, where the master in order to save

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both passengers and cargo ran the vessel on shore and thereby saved the cargo but destroyed the vessel.[2]

[1] Ralli *v.* Troop, 157 U. S. 386, 418 [1895], holding that where a vessel was scuttled by municipal authorities without direction of the master, to extinguish a fire in her hold, it was not a general average loss, although such measures were the best available to save the cargo from greater loss.

[2] Cutler *v.* Rae, 7 How. 729 [1849].

Controversies to Which the United States Is a Party.

RIGHT OF THE UNITED STATES TO SUE.

In 1818 it was argued that the United States had no right to sue in any case without an act of Congress for the purpose; but the Court held there was no doubt of the matter. In all cases of contract with the United States, they must have a right to enforce the performance or recover for violation, by action in their own name unless a different mode is prescribed.[1] Suit may be instituted by the Attorney General without express statutory authority.[2]

[1] Dugan *v.* United States, 3 Wheat. 172 [1818]. *See also* Cotton *v.* United States, 11 How. 229 [1851]; Den ex dem. Murray *v.* Hoboken Land & Improv. Co., 18 How. 272 [1856].

[2] United States *v.* San Jacinto Tin Co., 125 U. S. 273 [1888]; United States *v.* American Bell Teleph. Co., 128 U. S. 315 [1888].

It is settled that the United States can properly proceed by bill in equity for cancellation of land patents obtained by fraud, where the Government has a direct interest in the land involved or is under an obligation respecting the relief asked.[1]

[1] United States *v.* Beebe, 127 U. S. 338 [1888].

The States of the Union agreed in this clause that the judicial power of the United States should extend to controversies to which the United States shall be a party without regard to the subject of such controversies. It is not to be assumed that the framers of the Constitution, while extending the judicial power to controversies between two or more States of the Union, and between a State and a foreign country, intended to exempt a State altogether from suit by the General Government.[1] The Supreme Court has jurisdiction of a suit in equity by the United States against a State to determine boundaries.[2] The United States may also bring suit upon bonds issued by a State and held by the Federal Government.[3] It is a matter of indifference under this clause whether the United States is a party plaintiff or defendant.[4] Under the act of 1888 (25 Stat. 433), Federal courts have jurisdiction regardless of the value of the matter in dispute where the United States is a party.[5]

[1] United States *v.* Texas, 143 U. S. 621, 642 [1892]; United States *v.* Michigan, 190 U. S. 379 [1903].

[2] United States *v.* Texas, 143 U. S. 621, 644, 646 [1892].

[3] United States *v.* North Carolina, 136 U. S. 211 [1890].

[4] Minnesota *v.* Hitchcock, 185 U. S. 373, 384 [1902].

[5] United States *v.* Sayward, 160 U. S. 493 [1895].

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That another party joins in the suit does not take from it its status as a suit brought by the United States.[1]

[1] Erickson *v.* United States, 264 U. S. 246 [1924].

UNITED STATES AS A PARTY DEFENDANT.

No principle is better established than that the United States may not be sued in the courts of this country without its consent.[1] Nor can an officer of the United States, acting in excess of instructions and statutory authority, waive this exemption of the United States, or submit the United States or its property to the jurisdiction of the court in a suit brought against such officer.[2]

[1] Louisiana *v.* McAdoo, 234 U. S. 627, 628 [1914], citing United States *v.* Clarke, 8 Pet. 436 [1834]; United States *v.* Lee, 106 U. S. 196 [1882]; Kansas *v.* United States, 204 U. S. 331, 333 [1907]. *See also* Cohens *v.* Virginia, 6 Wheat. 264 [1821]; United States *v.* Kaufman, 96 U. S. 567 [1878]; The "Siren" *v.* United States, 7 Wall. 152, 154 [1869]; United States *v.* Douglas (The "Davis"), 10 Wall. 15 [1870]; Belknap *v.* Schild, 161 U. S. 10 [1896]. In United States *v.* Lee, 106 U. S. 196 [1882], however, an action of ejectment against officers of the United States in possession of the Lee homestead (Arlington estate) was upheld when plaintiff showed a good title and the United States proved no valid title. *See also* United States *v.* Peters, 5 Cr. 115 [1809]; Meigs *v.* M'Clung, 9 Cr. 11 [1815].

[2] Stanley *v.* Schwalby, 162 U. S. 255, 270 [1896].

The question whether the United States is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on record, but by the effect of the judgment or decree which can be rendered. Thus, a suit against the Secretary of the Treasury, to review his decision as to the rate of duty to be exacted on imported sugar "would operate to disturb the whole revenue system of the Government and affect the revenues which arise therefrom. Such suits would obviously, in effect, be suits against the United States." Leave to file was therefore denied.[1] An action of trespass to try title to property in possession of United States military authorities was a suit against the United States.[2] A suit against the Secretary of the Interior to restrain sale of certain Indian lands, was a suit against the United States, to which it had consented by act of March 2, 1901 (31 Stat. 950);[3] but in a similar situation, where such consent had not been given, jurisdiction was declined.[4]

[1] Louisiana *v.* McAdoo, 234 U. S. 627, 628 [1914]. *See also* Wells *v.* Roper, 246 U. S. 335 [1918].

[2] Stanley *v.* Schwalby, 162 U. S. 255, 270 [1896].

[3] Minnesota *v.* Hitchcock, 185 U. S. 373 [1902].

[4] Oregon *v.* Hitchcock, 202 U. S. 60 [1906]. *See also* Naganab *v.* Hitchcock, 202 U. S. 473 [1906]; Louisiana *v.* Garfield, 211 U. S. 70 [1908]; New Mexico *v.* Lane, 243 U. S. 52 [1917]; United States ex rel. Goldberg *v.* Daniels, 231 U. S. 218 [1914].

The adjustment of balances due from an accounting officer of the Government is not necessarily, and without regard to the consent of Congress, a judicial controversy within the meaning of this clause.[1]

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And a proceeding to restrain the Secretary of the Interior from doing under color of office an illegal act which would cast a cloud on the title of complainant was held not a suit against the United States.[2] An equity suit to require payment of attorney's fees out of a fund appropriated by Congress in satisfaction of a finding of the Court of Claims, brought against the Treasury officials and impleading also the owner of the fund, was upheld as a proceeding to enforce performance of a purely ministerial duty.[3]

[1] Den ex dem. Murray *v.* Hoboken Land & Improv. Co., 18 How. 272, 280 [1856].

[2] Lane *v.* Watts, 234 U. S. 525 [1914].

[3] Houston *v.* Ormes, 252 U. S. 469 [1920].

The immunity of the United States from suit otherwise than it as sovereign may allow does not exempt an agent of the United States merely because of the extent of the powers conferred on such agent; nor does it matter that the agent is a corporation rather than a single man.[1] Where the United States is a formal party merely (a conduit through which one private person can conduct litigation against another private person) a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the rights of the United States alone.[2]

[1] Sloan Shipyards Corp. *v.* United States Shipping Board Emergency Fleet Corp., 258 U. S. 549 [1922], holding the Fleet Corporation suable in a State court for breach of a contract made by it as a District of Columbia corporation "representing the United States of America," in which certain necessities and rights of the United States were recognized but in which the Corporation was recognized throughout as the immediate contracting party.

[2] United States *v.* Beebe, 127 U. S. 338, 347. [1888]. *See also* Curtner *v.* United States, 149 U. S. 662 [1893].

Controversies Between Two or More States.

By the grant of this clause the States waived their exemption from judicial power, as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases. While it does not in terms extend to all controversies, yet it in terms excludes none, whatever may be their nature or subject.[1] They did not, however, "renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests."[2]

[1] Rhode Island *v.* Massachusetts, 12 Pet. 657, 721 [1838], where the Court upon a motion to dismiss, for want of jurisdiction, a bill brought by Rhode Island to establish the boundary between it and Massachusetts took jurisdiction and proceeded to construe the compact fixing the boundary as a judicial question, and without deciding whether any appropriate process to enforce judgment existed.

[2] Georgia *v.* Tennessee Copper Co., 206 U. S. 230, 237 [1907]. *Cf.* Pennsylvania *v.* Wheeling & B. Bridge Co., 13 How. 518 [1852]; Kentucky *v.* Dennison, 24 How. 66 [1861]; South Carolina *v.* Georgia, 93 U. S. 4 [1876].

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The framers of the Constitution contemplated the distinction between cases in which a State was interested and those in which it was a party and made no provision for a case of interest without being a party on the record.[1] In view of the fact that the Constitution originally allowed suit by a citizen of one State against another State, it could not have been the intention of the framers to allow also a remedy through intervention on his behalf by the State; and a State cannot create a controversy with another State, within the meaning of this clause, by assuming the prosecution of debts owing to its citizens by the other State[2] or by suit in the character of *parens patriae* for the relief of its citizens at large from an alleged maladministration of the laws of another State.[3] But the State as *parens patriae* is the proper party to represent its inhabitants when their health and comfort are threatened, as, by the discharge of sewage from Chicago into the Mississippi River[4]—and that, without showing any pecuniary interest in the controversy. And *a fortiori*, the rule applies where State property is also involved.[5]

[1] Osborn *v.* Bank of United States, 9 Wheat. 738, 851 [1824].

[2] New Hampshire *v.* Louisiana, 108 U. S. 76 [1883]. But where bonds were donated to one State outright (with the hope that it would sue the issuing State thereon and that such suit might inure to the benefit of its donor as owner of other like bonds), jurisdiction of suit by such State was upheld in South Dakota *v.* North Carolina, 192 U. S. 286 [1904].

[3] Louisiana *v.* Texas, 176 U. S. 1 [1900].

[4] Missouri *v.* Illinois, 180 U. S. 208 [1901].

[5] Kansas *v.* Colorado, 185 U. S. 125 [1902]; Pennsylvania *v.* West Virginia, 262 U. S. 553 [1923]; South Dakota *v.* North Carolina, 192 U. S. 286 [1904]; Virginia *v.* West Virginia, 206 U. S. 290 [1907].

A suit against the Governor of a State in his official character is a suit against the State.[1]

[1] Kentucky *v.* Dennison, Governor of Ohio, 24 How. 66 [1861]. In this case a writ of mandamus to compel extradition of a fugitive was refused on the sole ground that there was no power in the Federal Government to coerce a State officer.

Where one State raises a controversy with another, it is for the Court to determine whether there is any principle of law upon which the plaintiff can recover. Not every matter which would warrant a resort to equity by one citizen against another will equally warrant interference by the court with the action of a State; the case should not only be of serious magnitude but clearly and fully proved.[1] Where a State sought leave to bring a bill against five separate States to enjoin enforcement of statutes which would result in prohibiting sale of plaintiff's convict-made goods in those States, leave was denied not only on the ground of multifariousness (in that no concert of action or joint liability was claimed and that a single case would be sufficient for a precedent) but on the further ground of want of equity. But compare the statement in Virginia *v.* West Virginia;[2]

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"The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy * * *. Therefore, we shall spend no time on objections as to multifariousness, laches and the like, except so far as they affect the merits."

[1] Missouri *v.* Illinois, 200 U. S. 496 [1906], dismissing, without prejudice, upon the proofs submitted, Missouri's bill for abatement of a nuisance by the deposit of sewage in the Mississippi River. *See also* New York *v.* New Jersey, 256 U. S. 296 [1921]; North Dakota *v.* Minnesota, 263 U. S. 365 [1923]; Connecticut *v.* Massachusetts, 282 U. S. 660 [1931]; Alabama *v.* Arizona, 291 U. S. 286 [1934]; Kansas *v.* Colorado, 206 U. S. 46 [1907].

[2] 220 U. S. 1, 27 [1911]. *See also* Virginia *v.* West Virginia, 234 U. S. 117 [1914].

This clause has been frequently invoked in boundary disputes arising between the States.[1] In fact boundary disputes have constituted a large portion of cases where the original jurisdiction of the Supreme Court has been resorted to.[2]

[1] New Jersey *v.* New York, 5 Pet. 284 [1831]; Rhode Island *v.* Massachusetts, 12 Pet. 657 [1838]; Florida *v.* Georgia, 11 How. 293 [1851]; Virginia *v.* West Virginia, 11 Wall. 39 [1871]; Florida *v.* Georgia, 17 How. 478 [1855]; Louisiana *v.* Mississippi, 202 U. S. 1 [1906]; Arkansas *v.* Tennessee, 246 U. S. 158 [1918]; Georgia *v.* South Carolina, 257 U. S. 516 [1922]; Minnesota *v.* Wisconsin, 258 U. S. 149 [1922].

[2] Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 288 [1888].

Controversies Between a State and Citizens of Another State.

The object of vesting in the courts of the United States jurisdiction of suits by one State against the citizens of another was to enable such controversies to be determined by a national tribunal and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens.[1]

[1] Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 289 [1888].

Under this clause, the Court in 1792 entertained jurisdiction of a suit by Georgia, against several defendants, one of whom was a citizen of South Carolina.[1] It originally applied equally to a case where the State was defendant.[2] "A dispute between A and B is surely a dispute between B and A."[3]

[1] Georgia *v.* Brailsford, 2 Dall. 402 [1792]. *See also* New York *v.* Connecticut, 4 Dall. 1 [1799].

[2] *See* Oswald *v.* New York, 2 Dall. 402 [1792], s. c. 2 Dall. 415 [1793]; Chisholm *v.* Georgia, 2 Dall. 419 [1793]; Grayson *v.* Virginia, 3 Dall. 320 [1796].

[3] Chisholm *v.* Georgia, 2 Dall. 419, 450 [1793]. It was this decision which led to the adoption of the 11th Amendment prohibiting suit in Federal court against a State by citizens of another State. *See also* Cohens *v.* Virginia, 6 Wheat. 264, 412 [1821], where the Court said: "in its origin, the judicial power was extended to all cases arising under the Constitution or laws of the United States, without respect to parties."

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It is a general rule that whenever jurisdiction depends on the party, it is the party named in the record.[1] In 1828 the Court stated: "There is * * * no case in which a State has been sued, without making it nominally a defendant."[2] In that case a libel against the governor in his official capacity was considered a suit against the State, and was dismissed since there was no person capable of appearing as defendant against whom a decree *in personam* could be pronounced.[3] On the other hand, a suit to compel State officers to do what the State law requires is not a suit against the State;[4] nor is a suit against a corporation of which the State is a stockholder,[5] or even the exclusive stockholder.[6] Nor will a suit be upheld under this clause where a State undertakes to vindicate in its own name the grievances of certain of its citizens against the enforcement of laws of another State—jurisdiction hereunder does not embrace determination of political questions.[7] Although the claims of a State may be ultimately affected by the decision, yet if the State is not necessarily a defendant, the Federal courts are bound to exercise jurisdiction.[8]

[1] Osborn *v.* Bank of United States, 9 Wheat. 857 [1824].

[2] Sundry African Slaves *v.* Madrazo, 1 Pet. 110, 122 [1828]. *See also* Fowler *v.* Lindsey, 3 Dall. 411 [1799]; Osborn *v.* Bank of United States, 9 Wheat. 857 [1824].

[3] For cases relating to appearance by a State and the rule of Court regulating service of process against a State, *see* Grayson *v.* Virginia, 3 Dall. 320 [1796]; Oswald *v.* New York, 2 Dall. 415 [1793]; New Jersey *v.* New York, 3 Pet. 461 [1830] and 5 Pet. 284 [1831]; Poydras de la Lande *v.* Treasurer of Louisiana, 17 How. 1 [1855]; Kentucky *v.* Dennison, 24 How. 66, 97 [1861].

[4] Rolston *v.* Crittenden (Missouri Fund Commissioners), 120 U. S. 390, 411 [1887], distinguishing Louisiana ex rel. Elliott *v.* Jumel, 107 U. S. 711 [1883].

[5] Bank of the United States *v.* Planters' Bank, 9 Wheat. 904 [1824].

[6] Briscoe *v.* Bank of Kentucky, 11 Pet. 257, 324 [1837]; Bank of Kentucky *v.* Wister, 2 Pet. 318 [1829].

[7] Louisiana *v.* Texas, 176 U. S. 1, 23 [1900].

[8] United States *v.* Peters, 5 Cr. 115 [1809].

A controversy between a State and a corporation organized under the laws of another State comes within this clause, being a case "between a State and the citizens of another State."[1]

[1] Pennsylvania *v.* Quicksilver Min. Co., 10 Wall. 553 [1871].

Controversies Between Citizens of Different States.

OBJECT OF CLAUSE.

The object of this clause (and of the statutes accordingly conferring jurisdiction upon circuit courts) was to secure a tribunal presumed to be more impartial than a court of the State in which one of the litigants resides.[1] In furtherance of this object, it would

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seem, it has been held that the principle of comity due to State decisions will not be pushed to the extent of overruling on this ground a decision made on due deliberation as to the construction of the State constitution.[2]

[1] Barrow S. S. Co. *v.* Kane, 170 U. S. 100, 111 [1898]; Gordon *v.* Longest, 16 Pet. 97, 104 [1842].

[2] Rowan *v.* Runnels, 5 How. 134 [1847], where the Court upheld certain contracts for purchase of slaves, following its decision in Groves *v.* Slaughter, 15 Pet. 449 [1841], notwithstanding the Mississippi court had in the interim construed the State constitution as prohibiting such contracts.

LIMITED TO CITIZENS OF STATES.

The District of Columbia is not a State within the meaning of this clause,[1] and a citizen thereof cannot, by joining a competent person as co-plaintiff, sue in a Federal court on the ground of diversity of citizenship.[2] It is further established that the Territories are not States.[3] Nor is a corporation chartered by the United States a citizen of a State for diversity of citizenship purposes.[4] Prior to this decision it had been held that under the act of Congress creating a court for the Orleans territory, with the same jurisdiction as the district court for Kentucky, citizens of that Territory were empowered to sue in like case as citizens of a State.[5] Prior to the adoption of the Fourteenth Amendment it was held in the Dred Scott case that Negroes were not "citizens" entitled to sue in that character in courts of the United States.[6]

[1] Hepburn *v.* Ellzey, 2 Cr. 445 [1805]. Followed in Barney *v.* Baltimore, 6 Wall. 280 [1868].

[2] Hooe *v.* Jamieson, 166 U. S. 395 [1897].

[3] Downes *v.* Bidwell, 182 U. S. 244, 270 [1901], citing New Orleans *v.* Winter, 1 Wheat. 91 [1816].

[4] Bankers Trust Co. *v.* Texas & P. R. Co., 241 U. S. 295 [1916].

[5] Serè *v.* Pitot, 6 Cr. 332 [1810].

[6] Scott *v.* Sanford, 19 How. 393 [1857].

A State itself is not a citizen, and a suit between a State and a citizen of another State is not between citizens of different States.[1] But a county, being a corporation, is a "citizen" which may be sued in a Federal court.[2]

[1] Postal Teleg. Cable Co. *v.* Alabama, 155 U. S. 482, 487 [1894]. *See also* Stone *v.* South Carolina, 117 U. S. 430 [1886]; Minnesota *v.* Northern Securities Co., 194 U. S. 48, 63 [1904].

[2] Mercer County *v.* Cowles, 7 Wall. 118 [1869]; Lincoln County *v.* Luning, 133 U. S. 529 [1890]; Yost *v.* Dallas County, 236 U. S. 50 [1915].

SCOPE OF CASES INCLUDED.

The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States to which

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the judicial power of the United States may be extended; and Congress may therefore lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the Federal judiciary.[1]

[1] Gaines *v.* Fuentes, 92 U. S. 10, 18 [1876], sustaining jurisdiction of a circuit court, on removal, of a suit for annulment of a will, of which otherwise it would have had no jurisdiction. In this case it was assumed that the relief sought in the State court, in the nature of an equitable remedy, was authorized under the laws of the State. The precise question was considered at length in O'Callaghan *v.* O'Brien, 199 U. S. 89 [1905], where the court laid down two propositions: first, that matters of pure probate are not within jurisdiction of Federal courts, and second, that where State law gives citizens of the State the right to question the probate, in an action *inter partes*, the Federal courts administering the rights of citizens of other States, will enforce such remedies. Considering the laws of the State of Washington, the Court held that the remedy afforded was not an action *inter partes* and the circuit court was without jurisdiction. *See also* Ellis *v.* Davis, 109 U. S. 485 [1883].

Where a bill to impeach for fraud the decree rendered in a suit by a citizen of Maryland against a citizen of Kentucky, was brought against the original defendants by another citizen of Kentucky, his claim that it was in the nature of a bill of review was not sufficient to divest it of the character of an original proceeding.[1]

[1] Wickliffe *v.* Eve, 17 How. 468 [1855].

DIVERSITY OF CITIZENSHIP.

In General.

To bring a case within Federal jurisdiction under this clause, the diversity of citizenship must be positively averred; it is not sufficient that jurisdiction may be inferred argumentatively from the averments.[1] A mere averment of residence is not enough;[2] although where an allegation of residence was not questioned below it was held sufficient.[3] And residence for a considerable period, carrying on business, may well give rise to a presumption of citizenship, unless the contrary appear.[4] The diversity of citizenship must exist at time suit was begun as well as at time of removal to a Federal court.[5]

[1] Brown *v.* Keene, 8 Pet. 112 [1834]. *See also* Bingham *v.* Cabot, 3 Dall. 382 [1798]; Wood *v.* Wagnon, 2 Cr. 9 [1804]; Capron *v.* Van Noorden, 2 Cr. 126 [1804]; Edwards *v.* Tanneret, 12 Wall. 446 [1871]; Jackson *v.* Ashton, 8 Pet. 148 [1834]; Continental L. Ins. Co. *v.* Rhoades, 119 U. S. 237 [1886]; King Iron Bridge & Mfg. Co. *v.* Otoe Co., 120 U. S. 225 [1887]; Timmons *v.* Elyton Land Co., 139 U. S. 378 [1891]; Horne *v.* Geo. H. Hammond Co., 155 U. S. 393 [1894]; Hanford *v.* Davies, 163 U. S. 273 [1896]; Grace *v.* American Cent. Ins. Co., 109 U. S. 278 [1883].

[2] Abercrombie *v.* Dupuis, 1 Cr. 343 [1803]. *See also* Robertson *v.* Cease, 97 U. S. 646 [1878]; Godfrey *v.* Terry, 97 U. S. 171 [1878]; Steigleder

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v. McWuesten, 198 U. S. 141, 143 [1905]; Menard *v.* Goggan, 121 U. S. 253 [1887]; Wolfe *v.* Hartford Life & A. Ins. Co., 148 U. S. 389 [1893].

[3] Sully *v.* American Nat. Bank, 178 U. S. 289, 298 [1900].

[4] Shelton *v.* Tiffin, 6 How. 163 [1848]. *See also* Utah-Nevada Co. *v.* De Lamar, 133 Fed. 113 [1904], certiorari denied, 199 U. S. 605 [1905].

[5] Mansfield, C. & L. M. R. Co. *v.* Swan, 111 U. S. 379 [1884].

Where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in Federal court.[1] For purposes of jurisdiction, regard is had to the real rather than to the nominal party;[2] and jurisdiction is not to be defeated by joining formal or unnecessary parties.[3] The mere fact that a sheriff's bond is taken in the name of the governor of the State does not make him a party to a suit upon that bond, brought necessarily in his name for the benefit of the beneficiary obligee.[4]

[1] Strawbridge *v.* Curtiss, 3 Cr. 267 [1806]. Followed in New Orleans *v.* Winter, 1 Wheat. 91 [1816]; Susquehanna & W. V. R. & C. Co. *v.* Blatchford, 11 Wall. 172 [1871]; Grover & B. Sewing-Mach. Co. *v.* Florence Sewing-Mach. Co., (The Sewing Machine Cases) 18 Wall. 553 [1874]; Peninsular Iron Co. *v.* Stone, 121 U. S. 631 [1887]; Smith *v.* Lyon, 133 U. S. 315 [1890]. *Cf.* Brooks *v.* Clark, 119 U. S. 502 [1886].

[2] Stewart *v.* Baltimore & O. R. Co. 168 U. S. 445, 449 [1897].

[3] Salem Trust Co. *v.* Manufacturers' Finance Co., 264 U. S. 182 [1924], citing Wormley *v.* Wormley, 8 Wheat. 421, 451 [1823]; Wood *v.* Davis, 18 How. 467, 469 [1856]; Walden *v.* Skinner, 101 U. S. 577, 589 [1880]; Wilson *v.* Oswego Township, 151 U. S. 56, 64 [1894]; Geer *v.* Mathieson Alkali Works, 190 U. S. 435 [1903]; Massachusetts & S. Constr. Co. *v.* Cane Creek, 155 U. S. 283 [1894].

[4] McNutt *v.* Bland, 2 How. 9 [1844].

On the other hand, where a suit is substantially between aliens and citizens (as to whom the Federal jurisdiction is undoubted) the fact that the complaint, filed in Kentucky, originally included as plaintiff one citizen of Pennsylvania and as defendant one citizen of Ohio prevented the exercise of jurisdiction, but that impediment was removed by striking the name of the citizen plaintiff and joining him as a defendant, before the case was brought to a hearing.[1] And where one of several defendants would necessarily have benefited from a judgment for plaintiffs, the fact that she was a citizen of the same State as the real defendant was ground for dismissal.[2]

[1] Conolly *v.* Taylor, 2 Pet. 556 [1829]. *Cf.* Anderson *v.* Watt, 138 U. S. 694 [1891]. In Louisville, N. A. & C. R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 566, [1899] it is stated: "Jurisdiction of a suit, once acquired by a court of the United States, by reason of the requisite citizenship, is not lost by a change in the citizenship of either party pending the suit."

[2] Blacklock *v.* Small, 127 U. S. 96 [1888].

Representatives (such as executors, guardians, trustees, receivers, etc.) may stand upon their own citizenship in the Federal courts irrespective of the citizenship of the persons represented.[1] It is the

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voluntary creation of Federal jurisdiction by simulated assignments which is the evil aimed at by the law.[3] Thus the fact that the beneficiary in a trust deed is a citizen of the same State as the grantor would not defeat Federal jurisdiction if the trustee is a citizen of a different State;[3] so, in the case of a guardian[4] or executor.[5] A bona fide transfer of interest, although made for the avowed purpose of enabling Federal court to entertain jurisdiction[6] or even if made by connivance and consent of parties, if not collusive in a legal sense[7] would be effectual for that purpose; but where such a conveyance is colorable only, the court cannot take jurisdiction.[8] Congress may, also, limit the right of an assignee of a chose in action to avail himself of the diversity of citizenship provision of this article.[9] The mere fact that a person changed his domicile in order to have recourse to a Federal court does not defeat the jurisdiction of such court. The motive is immaterial.[10]

[1] Rice *v.* Houston, 13 Wall. 66 [1871].
[2] New Orleans *v.* Whitney, 138 U. S. 595, 606 [1891].
[3] Dodge *v.* Tulleys, 144 U. S. 451, 456 [1892].
[4] Mexican C. R. Co. *v.* Eckman, 187 U. S. 429 [1902].
[5] Childress *v.* Emory, 8 Wheat. 669 [1823].
[6] McDonald *v.* Smalley, 1 Pet. 620 [1828].
[7] Lehigh Min. & Mfg. Co. *v.* Kelly, 160 U. S. 327 [1895]; Dickerman *v.* Northern Trust Co., 176 U. S. 181, 191 [1900].
[8] Barney *v.* Baltimore, 6 Wall. 280 [1868]; Crawford *v.* Neal, 144 U. S. 585, 593 [1892]; Jones *v.* League, 18 How. 76 [1855].
[9] Sheldon *v.* Sill, 8 How. 441 [1850]; Plant Invest. Co. *v.* Jacksonville, T. & K. W. R. Co., 152 U. S. 71 [1894].
[10] Williamson *v.* Osenton, 232 U. S. 619 [1914].

The Court has uniformly, upon its own motion,[1] taken the objection of want of jurisdiction below, to protect itself from collusive agreements between parties desirous of litigating their controversies in the Federal courts. Lack of jurisdiction below cannot be cured by affidavits in the Supreme Court,[2] but the lower court may upon remand of a case allow amendment to show the facts of citizenship.[3] While it is not necessary that these essential facts shall be averred in the pleadings, they must appear in the record on which judgment is entered, and not in averments surreptitiously introduced for the purpose.[4] Upon discovery of a want of jurisdiction it is proper for a court to set aside orders theretofore improperly made.[5]

[1] Chapman *v.* Barney, 129 U. S. 677, 681 [1889]; Great Southern Fireproof Hotel Co. *v.* Jones, 177 U. S. 449 [1900].
[2] Cameron *v.* Hodges, 127 U. S. 322 [1888]. *See also* Metcalf *v.* Watertown, 128 U. S. 586 [1888]; Parker *v.* Ormsby, 141 U. S. 81, 86 [1891].
[3] Continental L. Ins. Co. *v.* Rhoads, 119 U. S. 237 [1886].
[4] Denny *v.* Pironi, 141 U. S. 121 [1891].
[5] New Orleans & B. S. Mail Co. *v.* Fernandez, 12 Wall. 130 [1870].

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The test of citizenship for purposes of suit, is domicile.[1] The essence of domicile is, a place of abode which one has no present intention of changing.[2]

[1] Morris *v.* Gilmer, 129 U. S. 315 [1889]; Williamson *v.* Osenton, 232 U. S. 619, 624 [1914], approving Dicey (Conflict of Laws, 2d Ed. 111), that change of domicile arises where there is a change of abode and "absence of any present intention to not reside permanently or indefinitely in the new abode."

[2] Gilbert *v.* David, 235 U. S. 561 [1915]. *See also* Anderson *v.* Watt, 138 U. S. 694 [1891]; Chicago & N. W. R. Co. *v.* Ohle, 117 U. S. 123 [1886].

Corporations.

In General*.—While a corporation itself can be a citizen of no State, in the sense in which the word "citizen" is used in the Constitution,[1] yet the word citizen as used in this clause has always been held to include corporations. Jurisdiction of suit between a citizen of one State and a corporation of another "was at first maintained upon the theory that the persons composing the corporation were suing or being sued in its name, and upon the presumption of fact that all those persons were citizens of the State by which the corporation had been created; but that this presumption might be rebutted, by plea and proof, and the jurisdiction thereby defeated.[2] * * * But the earlier cases were afterwards overruled; and it has become the settled law of this Court that, for the purposes of suing and being sued in the courts of the United States, a corporation created by and doing business in a State is, although an artificial person, to be considered as a citizen of the State, as much as a natural person; and there is a conclusive presumption of law that the persons composing the corporation are citizens of the same State with the corporation[3] * * *" (Barrow S. S. Co. *v.* Kane, 170 U. S. 100, 106 [1898]). This presumption however does not preclude a stockholder from asserting his actual citizenship in a State different from that of the corporation's charter, and thereby conferring jurisdiction on Federal court of a suit against a citizen of the latter State.[4] The doctrine does not extend to a joint stock company or a partnership, although such association may be authorized by State law to sue in the association name.[5]

[1] Muller *v.* Dows, 94 U. S. 444, 445 [1877].

[2] *See* Bank of United States *v.* Deveaux, 5 Cr. 61, 87, 88 [1809]; Hope Ins. Co. *v.* Boardman, 5 Cr. 57 [1809]; Bank of Augusta *v.* Earle, 13 Pet. 519 [1839]; Commercial Bank *v.* Slocomb, 14 Pet. 60 [1840]; Irvine *v.* Lowry, 14 Pet. 293 [1840]. *Cf.* Sullivan *v.* Fulton Steamboat Co., 6 Wheat. 450 [1821], where the Court affirmed a dismissal below, when it did not appear from the record that the circuit court had jurisdiction—said record describing defendant simply as a corporation of New York, and not averring diversity of citizenship of the corporators severally. *See also* Kansas P. R. Co. *v.* Atchison, T. & S. F. R. Co., 112 U. S. 414 [1884];

**See also* pp. 528, 766, 772, 952.

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Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265 [1888]; Shaw *v.* Quincy Mining Co. (Ex parte Shaw), 145 U. S. 444, 451 [1892].

[3] *See* Louisville, C. & C. R. Co. *v.* Letson, 2 How. 497, 558 [1844]. Marshall *v.* Baltimore & O. R. Co, 16 How. 314, 329 [1854]; Covington Drawbridge Co. *v.* Shepherd, 20 How. 227, 232 [1858]; Ohio & M. R. Co. *v.* Wheeler, 1 Black 286 [1862]; Chicago & N. W. R. Co. *v.* Whitton, 13 Wall. 270 [1872]; Grover & B. Sewing Mach. Co. *v.* Florence Sewing-Mach. Co., 18 Wall. 553, 575 [1874]; Muller *v.* Dows, 94 U. S. 444 [1877]; National S. S. Co. *v.* Tugman, 106 U. S. 118 [1883]; St. Louis & S. F. R. Co. *v.* James 161 U. S. 545, 555–559 [1896]; Rundle *v.* Delaware & R. Canal Co., 14 How. 80 [1853].

[4] Doctor *v.* Harrington, 196 U. S. 579 [1905].

[5] Chapman *v.* Barney, 129 U. S. 677 [1889].

Corporations Chartered or Operating in Several States.—A corporation chartered by two States has legal existence within each State only under the law of that State;[1] it is a citizen of that State only for purposes of suit; so that a railway incorporated in both Illinois and Wisconsin, when sued in Wisconsin by a citizen of Illinois could not object to the jurisdiction of Federal court.[2] The fact that a corporation is doing business in a State other than where chartered, does not render it liable in that State to suit in Federal court by a citizen of a third State,[3] nor by a citizen of the State in a district other than that of his residence.[4] So, where a railroad, with the implied assent of State of charter and of a foreign State, enters the latter State and uses a road there, it does not lose the right to remove into Federal court a suit brought against it there by a citizen of that State.[5] Even where a State law specifically provided that a foreign corporation complying with its terms and doing business within the State should thereupon become a domestic corporation, the foreign corporation did not thereby become a citizen of the State within the meaning of this clause.[6] Where a railroad, originally chartered in Indiana, but afterward incorporated in Kentucky and Illinois, brought suit in Kentucky against citizens of Kentucky and Illinois, the jurisdiction was upheld, but not to the extent of adjudicating the rights of the railroad as a Kentucky or Illinois corporation.[7]

[1] Ohio & M. R. Co. *v.* Wheeler, 1 Black 286 [1862]. *See also* Memphis & C. R. Co. *v.* Alabama, 107 U. S. 581 [1883]; Nashua & L. R. Corp. *v.* Boston & L. R. Corp., 136 U. S. 356 [1890]; Patch *v.* Wabash R. Co., 207 U. S. 277 [1907]. *Cf.* Missouri P. R. Co. *v.* Castle, 224 U. S. 541 [1912].

[2] Chicago & N. W. R. Co. *v.* Whitton, 13 Wall. 270, 283 [1872]. *See also* Baltimore & O. R. Co. *v.* Harris, 12 Wall. 65 [1871]; St. Joseph & G. I. R. Co. *v.* Steele, 167 U. S. 659 [1897].

[3] Shaw *v.* Quincy Mining Co. (Ex parte Shaw), 145 U. S. 444 [1892]. Martin *v.* Baltimore & O. R. Co., 151 U. S. 673 [1894].

[4] St. Joseph & G. I. R. Co. *v.* Steele, 167 U. S. 659 [1897]; Southern P. Co. *v.* Denton, 146 U. S. 202 [1892].

[5] Baltimore & O. R. Co. *v.* Koontz, 104 U. S. 5 [1881].

[6] Southern R. Co. *v.* Allison, 190 U. S. 326 [1903]. *See also* Pennsylvania R. Co. *v.* St. Louis, A. & T. H. R. Co. 118 U. S. 290 [1886]; St. Louis & S. F. R. Co. *v.* James, 161 U. S. 545 [1896].

[7] Louisville, N. A. & C. Ry. Co. *v.* Louisville Trust Co., 174 U. S. 552 [1899].

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A distinction is to be taken between cases thus involving essentially the question of diversity of citizenship, and others where the point at issue is jurisdiction in the procedural sense. [1]

[1] *See* Ex parte Schollenberger, 96 U. S. 369 [1878], where a Pennsylvania insurance company, doing business in New York, was held properly within the jurisdiction, in a suit in New York brought by a citizen of that State, when process was served upon an authorized agent in the State (in this case the language of the jurisdictional statute was "found within the district"), and Pennsylvania Lumbermen's Mut. F. Ins. Co. *v.* Meyer, 197 U. S. 408 [1905], where service on a director of the Pennsylvania company, residing in New York, was held sufficient to give the circuit court jurisdiction.

Controversies Between Citizens of a State Claiming Lands under Grants of Different States.

This clause had no reference to the antecedent situation of the territory; it simply regarded the fact whether grants arose under the same or different States. Accordingly, the circuit court had jurisdiction where plaintiff claimed under a grant from the State of Vermont, and defendant under a grant from New Hampshire, while that State still included the territory which later became the State of Vermont.[1] It was pointed out in Osborn *v.* Bank of United States, 9 Wheat. 738, 851 [1824], that while a State may be supposed to take a more immediate interest in disputes concerning its territory than in most questions, the express grant of jurisdiction proves that the Constitution does not consider the State a party to controversies under this clause.

[1] Pawlet *v.* Clark, 9 Cr. 292 [1815]. Followed in Colson *v.* Lewis, 2 Wheat. 377 [1817], where the Court upheld jurisdiction in a case involving a grant by Kentucky and another by Virginia, both based upon warrants issued prior to the separation of Kentucky. Title passed by the grant itself, and Federal jurisdiction extends to a controversy founded upon conflicting grants of different States "whatever may have been the equitable title of the parties prior to the grant". *Cf.* Stevenson *v.* Fain, 195 U. S. 165 [1904].

Controversies between a State, or the Citizens thereof, and Foreign States, Citizens, or Subjects.

This clause has regard, not to the subject of suit, but the parties;[1] and a description of the parties is therefore indispensable to jurisdiction.[2] Omission to aver the citizenship of defendants is fatal to a suit by an alien.[3] An averment that a plaintiff is a "citizen of London, England," is insufficient to give jurisdiction;[4] but jurisdiction of suit by an alien was upheld where defendant was alleged to be a "citizen of the United States, naturalized in Louisiana, and residing there." [5]

[1] *See* Cohens *v.* Virginia, 6 Wheat. 264, 378 [1821].

[2] Mossman *v.* Higginson, 4 Dall. 12, 14 [1800]; Börs *v.* Preston, 111 U. S. 263 [1884].

[3] Hodgson *v.* Bowerbank, 5 Cr. 303, 304 [1809]; Jackson *v.* Twentyman, 2 Pet. 136 [1829].

[4] Stuart *v.* Easton, 156 U. S. 46 [1895].

[5] Gassies *v.* Ballon, 6 Pet. 761 [1832].

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It is no objection to the Federal jurisdiction that an alien is suing as trustee for a citizen,[1] or a citizen for the use of an alien.[2] But jurisdiction does not extend to suits where both parties are aliens;[3] although it was held that a circuit court had jurisdiction of a suit between two aliens, to impeach a decree rendered by the same court in a former suit where the record showed jurisdiction.[4] If a person be an alien at the commencement of suit, he may sue in Federal court;[5] and it is incumbent on a defendant, objecting to jurisdiction on ground of citizenship, to establish the fact of a change of allegiance.[6]

[1] Chappedelaine *v.* Dechevaux, 4 Cr. 306, 308 [1808].

[2] Browne *v.* Strode, 5 Cr. 303 [1809].

[3] Mossman *v.* Higginson, 4 Dall. 12, 14 [1800]; Montalet *v.* Murray, 4 Cr. 46 [1807]; Bailiff *v.* Tipping, 2 Cr. 406 [1805]; Jackson *v.* Twentyman, 2 Pet. 136 [1829].

[4] Lacassagne *v.* Chopius, 144 U. S. 119 [1892].

[5] Cook *v.* Lillo, 103 U. S. 792 [1881].

[6] Jones *v.* McMasters, 20 How. 8, 20 [1858].

A foreign state or sovereign, as well as any other person who has a demand of a civil nature against a citizen of the United States, may maintain an action therefor in the Federal courts,[1] but an Indian nation within the United States is not a foreign state.[2] In suits against a State of the Union jurisdiction depends upon the consent of the State sued. The need for such consent, though not expressed in the Constitution, is clearly to be implied.[3] Where an act of Congress made judgment of the Circuit Court of Appeals final in cases where the jurisdiction was dependent upon the parties being aliens, it was held that a foreign Republic was not an "alien" so as to preclude it from an appeal to the Supreme Court, in a case which it had seen fit to submit to our courts.[4]

[1] The "Sapphire" *v.* "Napoleon III", 11 Wall. 164 [1871], suit by the Emperor of France.

[2] Cherokee Nation *v.* Georgia, 5 Pet. 1, 20 [1831].

[3] Monaco *v.* Mississippi, 292 U. S. 313 [1934], refusing leave to sue, in absence of consent by the State, on certain State bonds, acquired by the Principality of Monaco by gift from the purchasers. The Court pointed out that the right of suit by a foreign State is not limited to cases of debt, but might involve international questions in relation to which the United States has a sovereign prerogative; and that the clause should be construed in light of all its applications.

[4] Colombia *v.* Cauca Co., 190 U. S. 524 [1903].

The right of a Chinese to an adjudication on the legality of his detention by the master of a vessel under orders of the collector of customs, was not taken away by the exclusion acts of 1882 and 1884.[1]

[1] United States *v.* Jung Ah Lung, 124 U. S. 621 [1888].

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Article III.
Sec. 2. Jurisdiction.
Cl. 2. Original and appellate jurisdiction of the Supreme Court.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

In General.

This clause distributes the jurisdiction conferred on the Supreme Court in the preceding clause into original and appellate jurisdiction, but does not confer any jurisdiction.[1]

[1] Pennsylvania *v.* Quicksilver Min. Co., 10 Wall. 553 [1871]. *See also* California *v.* Southern P. Co., 157 U. S. 229 [1895]; Minnesota *v.* Hitchcock, 185 U. S. 373, 383 [1902]; Duhne *v.* New Jersey, 251 U. S. 311, 314 [1920]; Monaco *v.* Mississippi, 292 U. S. 313, 321 [1934].

Original Jurisdiction.

IN GENERAL.

The Constitution does not confide any original jurisdiction to the Supreme Court except in this clause;[1] this limitation has always been considered restrictive of any other original jurisdiction, as the affirmative words must be construed negatively as to all other cases.[2]

[1] Ex parte Barry, 2 How. 65 [1844]; Marbury *v.* Madison, 1 Cr. 137, 174 [1803]; Martin *v.* Hunter, 1 Wheat. 304, 330 [1816].
[2] Ex parte Vallandigham, 1 Wall. 243, 252 [1864].

The original jurisdiction of the Supreme Court cannot be extended by Congress to any other cases than those expressly defined by the Constitution.[1] Thus, where an act of Congress (1 Stat. 80, sec. 13) purported to authorize the Court to issue mandamus, in cases warranted by the principles and usages of law, to any person holding office under the United States, the Court refused to issue a mandamus to the Secretary of State, requiring him to deliver to complainant a commission as justice of the peace in the District of Columbia—such a proceeding being held an exercise of original jurisdiction not covered by the Constitution.[2]

[1] Re Yerger, 8 Wall. 85, 98 [1869].
[2] Marbury *v.* Madison, 1 Cr. 137 [1803].

Similarly, without any statute involved, the Court held it had no original jurisdiction in prize causes, and therefore an intervenor could not first apply to the Supreme Court, as such application is in its nature original and not appellate.[1]

[1] The "William Bagaley" *v.* United States, 5 Wall. 377, 412 [1867].

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EXCLUSIVENESS OF ORIGINAL JURISDICTION.

The question whether the original jurisdiction of the Supreme Court was exclusive of other Federal courts was raised in 1793,[1] where the circuit court for Pennsylvania (composed of Justices Wilson, Iredell, and Peters, of the Supreme Court) decided, two to one, that Congress had power to grant the lower courts a concurrent jurisdiction, and sustained an indictment against a foreign consul. In Osborn *v.* Bank of United States,[2] language was used which indicated a contrary view: "With the exception of these cases, in which original jurisdiction is given to this Court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the Constitution." The point, however, was immaterial to the decision. It was first raised in the Supreme Court, but not decided, in United States *v.* Ortega.[3] In 1884, with the case of Börs *v.* Preston,[4] it was expressly held that, given the requisite citizenship, consuls may be sued in the lower courts; and in Ames *v.* Kansas ex rel Johnston,[5] the Court states that "we are unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction."

[1] United States *v.* Ravara, 2 Dall. 297 [1793].
[2] 9 Wheat. 738, 820 [1824].
[3] 11 Wheat. 467 [1826].
[4] 111 U. S. 252 [1884].
[5] 111 U. S. 449, 469 [1884]. *See also* United States *v.* Louisiana, 123 U. S. 32 [1887].

PROCESS AND PROCEDURE.

In all cases where original jurisdiction is given by the Constitution the Supreme Court may regulate and mold the process it uses in such manner as in its judgment will best promote the purposes of justice.[1] Although Congress undoubtedly has the right to prescribe the process and mode of proceeding in cases of which the Court has original jurisdiction as fully as in any other court, yet the omission to legislate on the subject could not deprive the Court of the jurisdiction conferred; in the absence of any legislation by Congress the Court itself is authorized to prescribe its mode and form of proceeding so as to accomplish the ends for which the jurisdiction was given.[2]

[1] Kentucky *v.* Dennison, 24 How. 66, 98 [1861].
[2] Florida *v.* Georgia, 17 How. 478, 491 [1855].

In dealing with such a *quasi* international controversy as a suit between States, there is no municipal code governing the matter, and the Supreme Court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone. That Court, therefore, will not consider objections on

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matters of procedure, abatement, and the like, except so far as they affect the merits.[1]

[1] Virginia *v.* West Virginia, 220 U. S. 1 [1911], 246 U. S. 565 [1918]; Kansas *v.* Colorado, 206 U. S. 46 [1907]; Missouri *v.* Illinois, 200 U. S. 496 [1906]; Rhode Island *v.* Massachusetts, 14 Pet. 210 [1840].

CASES AFFECTING AMBASSADORS, ETC.

This provision manifestly refers to diplomatic and consular representatives accredited to the United States by foreign powers, not to those representing this country abroad. It was inserted, no doubt, in view of the important and sometimes delicate nature of our relations and intercourse with foreign governments. It is a privilege, not of the official, but of the sovereign or government which he represents, accorded from high consideration of public policy.[1]

[1] Ex parte Gruber, 269 U. S. 302 [1925], dismissing a petition for mandamus to a United States Consul General at Montreal to visa a passport.

An indictment under the Crimes Act of 1790 (1 Stat. 112) for violating the law of nations by offering violence to the person of a foreign minister is not a case "affecting ambassadors, other public ministers, and consuls" of which the Supreme Court has original jurisdiction. It is a public prosecution, instituted and conducted by and in the name of the United States, for the purpose of vindicating the law of nations, and that of the United States, offended, as the indictment charges, in the person of a public minister, by an assault committed on him by a private individual.[1]

[1] United States *v.* Ortega, 11 Wheat. 467 [1826].

The Supreme Court does not assume to sit in judgment of the decision of the Executive in reference to the public character of a person claiming to be a foreign minister; it therefore has the right to accept a certificate of the State Department on the question.[1]

[1] Ex parte Baiz, 135 U. S. 403, 432 [1890].

The provisions of this clause do not of themselves, and without more, exclude jurisdiction in the courts of a State over a suit against a vice-consul for divorce and alimony; and the Judicial Code, section 24, paragraph 18, giving district courts original jurisdiction, exclusive of State courts of "suits against consuls and vice-consuls" should not be construed as referring to what formerly would have belonged to the ecclesiastical courts, but only to ordinary civil proceedings.[1]

[1] Ohio ex rel. Popovici *v.* Agler, 280 U. S. 379 [1930].

CASES IN WHICH A STATE SHALL BE PARTY.

In General.

In order for a State to exercise the right to sue in the Supreme Court, there must be a State government competent to represent it

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in its relations with the National Government, so far at least as the institution and prosecution of a suit is concerned.[1]

[1] Texas v. White, 7 Wall. 700, 726 [1869].

Formal Parties and Process.

It was stated in 1860, upon a review of the cases to be settled, that "where the State is a party, plaintiff or defendant, the Governor represents the State, and the suit may be, in form, a suit by him as Governor in behalf of the State, where the State is plaintiff and he must be summoned or notified as the officer representing the State, where the State is defendant." [1]

[1] Kentucky v. Dennison, 24 How. 66, 98 [1861], citing Georgia v. Brailsford, 2 Dall. 402 [1792]; Chisholm v. Georgia, 2 Dall. 419 [1793]; Grayson v. Virginia, 3 Dall. 320 [1796]; Sundry African Slaves v. Madrazo, 1 Pet. 110 [1828].

It was decided in the case of Madrazo,[1] that where the chief magistrate of a State is sued, not by his name as an individual, but by his style of office, and the claim made upon him is entirely in his official character, the State itself may be considered a party on the record. But a suit against the governor to restrain him from violating Federal constitutional rights of private persons by action under color of State law, is not a suit against the State, and the district court has jurisdiction.[2]

[1] Sundry African Slaves v. Madrazo, 1 Pet. 110 [1828].
[2] Sterling v. Constantin, 287 U. S. 378, 393 [1932].

No question was raised in the earliest cases as to the power of the Supreme Court to exercise the original jurisdiction without legislation by Congress regulating the service of process, etc. And the Court, by a majority opinion in Chisholm v. Georgia,[1] decided in favor of the jurisdiction and held that process served on the Governor and Attorney General was sufficient. A rule of practice was established by the Court in Grayson v. Virginia,[2] accordingly. The Court acted in the matter with the object of disengaging the proceedings where sovereign States were parties from all unnecessary technicalities and niceties, and of conducting them in the simplest form in which the ends of justice could be attained. It adopted, as a general rule, the custom and usage of courts of admiralty and equity, with a discretionary authority, however, to deviate from that rule where its application would be injurious or impracticable. The principle upon which process was then framed, as well as the mode of service then prescribed, "has been followed ever since, with this exception, that in subsequent cases the chancery practice, and not the admiralty, is regarded as furnishing the best analogy." [3]

[1] 2 Dall. 419 [1793].
[2] 3 Dall. 320 [1796].
[3] Florida v. Georgia, 17 How. 478, 491–492 [1855], where it was held that when, in a boundary dispute between the two States, the United

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States Attorney General filed an information stating that the interests of the United States were involved, he had a right to appear and adduce proofs on behalf of the Government, which would be considered in deciding the matter, although the United States was not technically a party and no judgment would be rendered for or against it.

In Pennsylvania *v.* Wheeling & B. Bridge Co.,[1] objection was raised to the jurisdiction on the ground the State had not consented to the prosecution of the suit in its name. It was held a sufficient answer that the proceeding has been instituted by the Attorney General of the State.

[1] 13 How. 518, 560 [1852].

The jurisdiction is not affected by the question whether the State is a party plaintiff or defendant.[1]

[1] Minnesota *v.* Hitchcock, 185 U. S. 373, 388 [1902].

Limited by the Constitutional Grant of Judicial Power.

The original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the Federal courts; not to those cases in which an original suit might not be instituted in a Federal court. Of the last description is every case between a State and its citizens, and, perhaps, every case in which a State is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction.[1] It must appear that the case is one to which by the first paragraph the judicial power of the United States extends.[2] A bill by one State against another for the perpetuation of testimony may be entertained in aid of litigation pending, or to be begun in the Supreme Court.[3]

[1] Cohens *v* Virginia, 6 Wheat. 264, 398 [1821]. *See also* United States *v.* Texas, 143 U. S. 621, 643 [1892]; California *v.* Southern P. Co., 157 U. S. 229 [1895]; United States *v.* West Virginia, 295 U. S. 463 [1935].

[2] Minnesota *v.* Hitchcock, 185 U. S. 383 [1902].

[3] Arizona *v.* California, 292 U. S. 341 [1934], leave was denied in this case because Arizona failed to show that the testimony sought to be perpetuated "could conceivably be material or competent evidence bearing upon the" article of the Colorado River compact upon which proposed litigation would depend.

In accordance with the principle here laid down, it has been held that the original jurisdiction of the Supreme Court did not extend to the following cases:

(1) Where a State sought to enforce by original action in the Supreme Court a judgment recovered by it in one of its own courts against a corporation of another State for a pecuniary penalty for violation of its municipal law.[1]

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(2) Where a State sought by bill in equity to enjoin a railway company from introducing liquor into the State in violation of its law.[2]

(3) Where the United States sought to enjoin construction (by a corporation under State license) of a dam as part of a hydro-electric project on a stream alleged to be a navigable water; and the United States joined the State on the ground it was denying the claim of navigability, asserting a right to license use for power purposes, and challenging the validity of the Federal Water Power Act (41 Stat. 1063). *Held*, that since the grant of license, which was the only action on the part of the State, was not in derogation of the powers of the Federal Government, acting through the Power Commission, there was no justiciable controversy between the Government and West Virginia.[3]

(4) Where a State makes itself a party plaintiff of record and seeks, not to protect its own property, but only to vindicate the wrongs of some of its people[4] by restraining the railroad from charging unreasonable rates within the State limits.[5]

(5) Where a dispute involved the right of soil in certain lands as between private citizens, the fact that the jurisdiction was also in dispute (whether New York or Connecticut) was held not to make the case one to which the State was a party. It is not sufficient that a State may be consequently affected.[6]

(6) Suits brought against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States, even where such suits arise under the Constitution, laws, and treaties of the United States, because the judicial power of the United States does not extend to suits of individuals against States.[7]

[1] Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265 [1888].

[2] Oklahoma ex rel. West *v.* Gulf, C. & S. F. R. Co., 220 U. S. 290 [1911].

[3] United States *v.* West Virginia, 295 U. S. 463 [1935].

[4] Oklahoma *v.* Atchison, T. & S. F. R. Co., 220 U. S. 277 [1911].

[5] Louisiana *v.* Texas, 176 U. S. 1 [1900], holding that Louisiana could not maintain an original action to restrain enforcement of certain quarantine regulations claimed to be injurious to some of its citizens.

[6] Fowler *v* Lindsey, 3 Dall. 411 [1799].

[7] Hans *v.* Louisiana, 134 U. S. 1 [1890].

The original jurisdiction of the Court has been upheld in the following cases:

(1) Where the State of Pennsylvania, having constructed certain canals and railroads, claimed that its revenues would be affected by the proposed construction of a bridge over the Ohio, at Wheeling, under act of Virginia, it showed a sufficiently direct interest to support a bill in equity to enjoin the obstruction to navigation.[1]

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(2) Cases brought by the United States against a State, and arising under the Constitution, laws, and treaties of the United States. So held, in the case of a suit against North Carolina upon certain bonds issued by the State where the jurisdiction was not questioned [2] and to determine boundary between Texas and a Territory of the United States.[3]

(3) Interstate boundaries. "It is settled, by repeated decisions", that a question of boundary between States is within the original jurisdiction.[4] The jurisdiction was maintained in Rhode Island *v.* Massachusetts,[5] over objection that the question thus involved was purely political. The Court held that the fact that settlement of the boundary settled also the territorial limits of the jurisdiction of the States did not defeat the jurisdiction. In Virginia *v.* West Virginia,[6] the jurisdiction was upheld, although the decision necessitated consideration and construction of agreements between the States.

(4) Where the State of Missouri sought to enjoin the pouring of sewage by artificial arrangements from Chicago into the Mississippi River, to the alleged detriment of the State of Missouri and its inhabitants.[7]

(5) Suit to settle the equitable proportion of the public debt of the original State of Virginia due from the State of West Virginia. Jurisdiction is not affected by the question of whether or how judgment can be enforced.[8]

(6) Where the State of Kansas sought to restrain the State of Colorado from wholly preempting the waters of the Arkansas River, accustomed to flow through Kansas, to the injury of the State as an individual owner, and of the inhabitants of Kansas generally.[9]

[1] Pennsylvania *v.* Wheeling & B. Bridge Co., 13 How. 518 [1852].
[2] United States *v.* North Carolina, 136 U. S. 211 [1890].
[3] United States *v.* Texas, 143 U. S. 621 [1892].
[4] Florida *v.* Georgia, 17 How. 478, 491 [1855].
[5] 12 Pet. 657, 724 [1838].
[6] 11 Wall. 39 [1871]. *See also* Missouri *v.* Iowa, 7 How. 660 [1849]; Louisiana *v.* Mississippi, 202 U. S. 1, 36 [1906].
[7] Demurrer for want of jurisdiction overruled, Missouri *v.* Illinois, 180 U. S. 208 [1901], upon answer and taking of proof, bill dismissed without prejudice, 200 U. S. 496 [1906].
[8] Demurrer to the jurisdiction overruled without prejudice, Virginia *v.* West Virginia, 206 U. S. 290 [1907]; for later proceedings in the same cause, *see* 246 U. S. 565 [1918].
[9] Demurrer to the jurisdiction overruled without prejudice, Kansas *v.* Colorado, 185 U. S. 125 [1902].

Appellate Jurisdiction.

IN ALL OTHER CASES BEFORE MENTIONED.

It was early held that the appellate jurisdiction of the Supreme Court was "capable" of embracing every case enumerated in the

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Constitution which is not exclusively to be decided by way of original jurisdiction, and therefore extends to cases pending in State courts.[1] It may "in accordance with the Constitution" be extended to cover the judicial action of all inferior courts established by Congress.[2] Where, on the other hand, a lower court does not exercise an essentially judicial power, as, where the "judgment" of the original court of claims was subject to review by the Secretary of the Treasury and an appropriation by Congress before payment, the Supreme Court cannot be vested with appellate jurisdiction.[3]

[1] Martin *v.* Hunter, 1 Wheat. 304, 351 [1816], sustaining sec. 25 of the Judiciary Act of 1789, which authorized writ of error to State courts in specific cases, as within the letter and spirit of the Constitution. *See also* Matthews *v.* Zane, 4 Cr. 382 [1808]; Cohens *v.* Virginia, 6 Wheat. 264, 416 [1821]; Dodge *v.* Woolsey, 18 How. 331, 355 [1856]; Ableman *v.* Booth, 21 How. 506, 518 [1859].

[2] United States *v.* Coe, 155 U. S. 76 [1894], sustaining an appeal from the Court of Private Land Claims, although conceding that that court was not established under art. III. The particular case involved property in a Territory, and the Court pointed out that "wherever the United States exercise the power of government, whether under specific grant, or through the dominion and sovereignty of plenary authority as over the Territories, that power includes the ultimate executive, legislative, and judicial power."

[3] Gordon *v.* United States, 117 U. S. 697 [1864]. The opinion here given, in the appendix to the volume, is the draft prepared by Chief Justice Taney which was designed as the basis for an opinion to be subsequently delivered in the case reported in 2 Wall. 561 [1865]. The precise language may perhaps, therefore, itself lack the finality of a considered opinion of the Court; and this should be taken into account in considering the following statement (p. 704): "And it is very clear that this Court * * * cannot under the Constitution, take jurisdiction of any decision, on appeal, unless it was made by an inferior court, exercising independently the judicial power granted to the United States."

See also United States *v.* Ferreira, 13 How. 40 [1852], dismissing an appeal from the action of a district judge proceeding as a commissioner for examination of Florida claims under treaty with Spain; United States *v.* Evans, 213 U. S. 297 [1909], refusing review of judgment dismissing an appeal taken by the United States in a criminal case, under District of Columbia Code, sec. 935, where defendant had been found not guilty; Muskrat *v.* United States, 219 U. S. 346 [1911], dismissing appeals, by certain Indians, specifically authorized by act of Congress, to determine the validity of certain acts relating to the Cherokees; Keller *v.* Potomac Electric Power Co., 261 U. S. 428 [1923], dismissing appeal, under the Public Utilities Act of the District of Columbia, from a valuation order of the Utilities Commission, where the jurisdiction of the courts, on appeal, was not limited to questions of law but extended to revision of the legislative discretion of the Commission by considering the evidence and entering the order which ought to have been made.

"The doctrine of the Constitution and of the cases thus far [*i. e.* 1869] may be summed up in these propositions: (1) The original jurisdiction of this court cannot be extended by Congress to any other cases than those expressly defined by the Constitution; (2) the appel-

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late jurisdiction of this court, conferred by the Constitution,[1] extends to all other cases within the judicial power of the United States; (3) this appellate jurisdiction is subject to such exceptions and must be exercised under such regulations as Congress, in the exercise of its discretion, has made or may see fit to make." [2]

[1] "The appellate jurisdiction [of the Supreme Court] is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred 'with such exception and under such regulations as Congress shall make'" (Ex parte McCardle, 7 Wall. 506, 512 [1869], a case involving the validity of "reconstruction" measures. After this case had been argued and taken under advisement by the Supreme Court, Congress repealed the act of February 5, 1867 (14 Stat. 385), conferring appellate jurisdiction upon the Court in certain habeas corpus proceedings. The Court thereupon dismissed the appeal for want of jurisdiction.) The affirmative description of jurisdiction by act of Congress "has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it" (Durousseau *v.* United States, 6 Cr. 307, 312 [1810]. *See also* United States *v.* More, 3 Cr. 171 [1805]); and "it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction and not as acts making exceptions to the constitutional grant of it" (Ex parte McCardle, *supra*, p. 513).

[2] Re Yerger, 8 Wall. 85, 98 [1869], holding that where a circuit court had in its original jurisdiction caused a prisoner to be brought before it, and after inquiry into the cause of detention caused him to be remanded to custody, the Supreme Court, in the exercise of its appellate jurisdiction, may by writ of habeas corpus, aided by certiorari, revise the decision and relieve the prisoner from the unlawful restraint to which remanded. This appellate jurisdiction is conferred by the Constitution, and is not to be considered repealed by the terms of an act of Congress repealing "so much of a given act as authorizes an appeal" to the Supreme Court.

REGULATION BY CONGRESS.

Although the appellate powers of the Supreme Court are given by the Constitution, they are limited and regulated by acts of Congress.[1] In Duncan *v.* The "Francis Wright",[2] the Court was considering an act of 1875 limiting the appellate jurisdiction of the Supreme Court in admiralty causes to questions of law appearing on the record, and stated: "Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not. To our minds it is no more unconstitutional to provide that issues of fact shall not be retried in any case, than that neither issues of law nor fact shall be retried in cases where the value of the matter in dispute is less than $5,000. The general power to regulate implies power to regulate in all things. The whole of a civil law appeal may be given, or a part. The constitutional requirements are all satisfied if one opportunity is had for the trial

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of all parts of a case. Everything beyond that is matter of legislative discretion."

[1] Wiscart *v.* Dauchy, 3 Dall. 321, 327 [1796]. *See also* Barry *v.* Mercein, 5 How. 103, 119 [1847]; Crawford *v.* Points, 13 How. 11 [1851]; National Exchange Bank *v.* Peters, 144 U. S. 570 [1892]; American Constr. Co. *v.* Jacksonville, T. & K. W. R. Co., 148 U. S. 372 [1893]; Colorado, Cent. Consol. Min. Co. *v.* Turck, 150 U. S. 138 [1893]; St. Louis, I. M. & S. R. Co. *v.* Taylor, 210 U. S. 281 [1908]; Luckenbach S. S. Co. *v.* United States, 272 U. S. 533 [1926].

[2] 105 U. S. 381, 386 [1882].

Regulation by Congress must have "of course due regard to all the provisions of the Constitution." [1] It is within the constitutional power of Congress to grant to the United States a direct review in the Supreme Court of a judgment sustaining a demurrer to an indictment on the ground of invalidity or construction of the statute on which based, without allowing at the same time to the defendant a writ of error from the overruling of a demurrer to the indictment before final determination of the case.

[1] United States *v.* Bitty, 208 U. S. 393, 400 [1908].

NATURE OF APPELLATE JURISDICTION.

Appellate jurisdiction necessarily implies some judicial determination, some judgment, decree, or order of an inferior tribunal, from which an appeal has been taken.[1] The jurisdiction may, however, be invoked as well through the instrumentality of writs of error as of appeal.[2] An appeal, as distinguished from a writ of error, is a process of civil law origin and removes a cause entirely, subjecting the fact, as well as the law, to a review and retrial.[3] It is an essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause; issue of mandamus to an officer of the Government to deliver a paper is equivalent to an original suit for that paper.[4] Similarly, motion for a mandamus to a register of a public land office was denied in a case where the State supreme court had refused it, and the argument advanced was that it thus became a matter of appellate jurisdiction in the Supreme Court.[5]

[1] The "Alicia" *v.* United States, 7 Wall. 571 [1869], holding transfer of a prize cause to the Supreme Court from a circuit court in which no proceedings had been taken, was not an appeal and could not validly be required by Congress.

[2] Duncan *v.* The "Francis Wright", 105 U. S. 381, 386 [1882].

[3] Wiscart *v.* Dauchy, 3 Dall. 321 [1796].

[4] Marbury *v.* Madison, 1 Cr. 137 [1803].

[5] McCluny *v.* Silliman, 2 Wheat. 369 [1817].

HABEAS CORPUS.*

So, a writ of habeas corpus may be issued by the Supreme Court in aid of its original jurisdiction,[1] but otherwise only for the review of

* *See also* pp. 275, 417.

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a judicial decision of some inferior officer or court,[2] and upon a showing that the Court has power to award the writ in the particular case.[3] In accordance with this principle, the Court has allowed a habeas corpus where prisoners were in custody under an order of commitment of a circuit court,[4] or of a district judge,[5] where commitment was for want of giving a recognizance as awarded by a circuit court [6] or under a *capias ad satisfaciendum*,[7] where prisoner was remanded by a circuit court to custody of military officers.[8]

[1] Ex parte Watkins, 7 Pet. 568 [1833].
[2] Ex parte Hung Hang, 108 U. S. 552 [1883]; Ex parte Barry, 2 How. 65 [1844].
[3] Ex parte Milburn, 9 Pet. 704 [1835].
[4] Re Bollman, 4 Cr. 75 [1807]; Ex parte Siebold, 100 U. S. 371 [1880].
[5] United States *v.* Hamilton, 3 Dall. 17 [1795].
[6] Re Burford, 3 Cr. 448 [1806].
[7] Ex parte Watkins, 7 Pet. 568 [1833].
[8] Re Yerger, 8 Wall. 85 [1869].

The Court will issue the writ and examine the proceedings below so far as necessary to ascertain whether the lower court has exceeded its authority.[1] But it will not on this writ review the legality of proceedings below when the lower court has full jurisdiction of the person, place, and cause; to do so would be "to convert that writ into a mere writ of error, and to assume an appellate power which has never been conferred upon this court." [2] Nor will the writ issue where the commitment is ordered by a judge in chambers for extradition by the Executive under a treaty [3] nor where it is ordered for contempt of court.[4]

[1] Ex parte Lange, 18 Wall. 163 [1874].
[2] Ex parte Parks, 93 U. S. 18, 23 [1876].
[3] Re Metzger, 5 How. 176 [1847].
[4] Re Kearney, 7 Wheat. 38 [1822].

Article III. Sec. 2. Jurisdiction. Cl. 3. Places of trial of crimes by jury.

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.*

In General.

This clause applies only to criminal proceedings in the Federal courts and does not govern trials in State courts.[1] While it provides for trial by jury in criminal cases according to settled common-law rules, the Sixth Amendment declares what those rules are, and the two provisions are not conflicting.[2] When the question arises whether the case is one wherein the accused is entitled to a jury, recourse must

* *See also* Amendment VI, p. 679.

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be had to the principles of the common law, which are determinative of that question.[3] The guaranty of a jury accrues to an accused person the moment he is put on trial.[4]

[1] Eilenbecker v. District Court, 134 U. S. 31, 35 [1890]; Nashville C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 101 [1888].
[2] Callan v. Wilson, 127 U. S. 540 [1888].
[3] Schick v. United States, 195 U. S. 65, 69 [1904]; District of Columbia v. Colts, 282 U. S. 63 [1930].
[4] Callan v. Wilson, 127 U. S. 540, 557 [1888]; Capital Traction Co. v. Hof, 174 U. S. 1, 13 [1899].

The framers of the Constitution were in this clause simply intent upon preserving the right of trial by jury primarily for the protection of the accused; they had no purpose to establish the jury for the trial of crimes as an integral and inseparable part of the court, but only as one of its instrumentalities.[1]

[1] Patton v. United States, 281 U. S. 276, 297 [1930].

The constitutional guaranty of a jury trial applies to the people of the Territories [1] and to the District of Columbia.[2] But it does not extend to ceded territory not made a part of the United States by congressional action, without legislation by Congress to that effect.[3]

[1] Thompson v. Utah, 170 U. S. 343, 346 [1898].
[2] Callan v. Wilson, 127 U. S. 540, 550 [1888].
[3] Dorr v. United States, 195 U. S. 138 [1904].

A citizen in civil life in nowise connected with the military service cannot be tried by a military commission so long as the courts are open to hear criminal accusations and redress grievances.[1]

[1] Ex parte Milligan, 4 Wall. 2, 123 [1866].

What Constitute Crimes.

There are no common-law offenses against the United States; Congress must first make an act a crime, affix the penalty, and declare the court having jurisdiction.[1]

[1] United States v. Hudson, 7 Cr. 32, 33 [1812]; United States v. Coolidge, 1 Wheat. 415 [1816]; United States v. Britton, 108 U. S. 199, 206 [1883]; Benson v McMahon, 127 U. S. 457 [1888]; United States v. Eaton. 144 U. S. 677, 687 [1892].

"The word 'crime', in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offences of a serious or atrocious character. In our opinion, the provision [of art. III] is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offences punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty

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of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a 'crime' within the meaning of the third article * * *." [1]

[1] Callan v. Wilson, 127 U. S. 540, 549 [1888], holding conspiracy an offense within the meaning of this clause.

The nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors. So, a penalty of $50 for violating a revenue statute indicates only a petty offense, and the fact that other sections of the act define more serious offenses does not raise it to the dignity of a crime. It is not one necessarily involving any moral delinquency; the violation may have been the result of ignorance or thoughtlessness.[1]

[1] Schick v. United States, 195 U. S. 65, 68 [1904].

A charge of driving an automobile recklessly, so as to endanger life and property is a "grave offense" within the constitutional provision guaranteeing jury trial;[1] while the offense of selling unused portions of railway excursion tickets without a license" is at most but an infringement of local police regulations, and its moral quality is relatively inoffensive." [2]

[1] District of Columbia v. Colts, 282 U. S. 63 [1930].
[2] District of Columbia v. Clawans, 300 U. S. 617 [1937].

Contempt proceedings by a circuit court to enforce obedience to its injunction against the obstruction of interstate commerce, and in aid of the protection of property, were not in execution of criminal laws nor an invasion of the right to trial by jury.[1]

[1] Re Debs, 158 U. S. 564 [1895].

Upon the ratification of the Twenty-first Amendment, the Eighteenth Amendment became inoperative, and neither the Congress nor the courts could give it continued validity; a pending prosecution under the National Prohibition Act cannot be continued after the essential constitutional support is withdrawn.[1]

[1] United States v. Chambers, 291 U. S. 217, 222 [1934].

What Constitutes Trial by Jury.

The trial here referred to is the examination of the accused before a competent tribunal, according to the law of the land; it is the hearing and deciding on a criminal charge, and can take place only after that charge has been legally made.[1]

[1] United States v. Patterson, 150 U. S. 65, 68 [1893].

The phrase "trial by jury", as used in the Federal Constitution, means a trial by jury as understood and applied at common law, and

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includes all the essential elements as they were recognized in this country and England when the Constitution was adopted; viz: (1) That the jury should consist of 12 men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.[1]

[1] Patton *v.* United States, 281 U. S. 276, 290 [1930], citing as to (1) Thompson *v.* Utah, 170 U. S. 343, 350 [1898]; as to (2) Capital Traction Co. *v.* Hof, 174 U. S. 1, 13 [1899]; as to (3) American Pub. Co. *v.* Fisher, 166 U. S. 464, 468 [1897]; Springville *v.* Thomas, 166 U. S. 707 [1897]; Maxwell *v.* Dow, 176 U. S. 581, 586 [1900].

This clause is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. Before such waiver can become effective, there must be had, in addition to the express and intelligent consent of the defendant, the consent of Government counsel and the sanction of the court. Such waiver is not opposed to public policy. There is no distinction between a complete waiver of a jury, and consent to be tried by a less number than 12.[1]

[1] Patton *v.* United States, 281 U. S. 276 [1930], holding that in a trial for a crime (there being no express statutory authority in point) where one of the jurors becomes incapacitated, defendant may waive his right to trial by a jury of 12, and both sides may consent to the trial proceeding to a finality with 11 jurors. The decision substantially overruled Dickinson *v.* United States, 159 Fed. 801 [1908] and Low *v.* United States, 169 Fed. 86 [1909].

Waiver of jury by a person charged with a petty offense was upheld in Schick *v.* United States.[1] The Court there stated, "In such a case there is no constitutional requirement of a jury."

[1] 195 U. S. 65, 67 [1904].

It was held in Jabczynski *v.* United States,[1] following the Patton case, that the waiver of jury in a criminal case, although preferably to be in writing and signed by defendant personally, may be made orally.

[1] 53 F. (2d) 1014 [1931].

An act (27 Stat. 261, ch. 236) expressly authorizing waiver of jury in criminal cases in the District of Columbia was upheld by the District of Columbia Court of Appeals[1]; and the Supreme Court of the United States refused to review that action on habeas corpus.[2] This decision was held to be "out of harmony with the notion that the presence of a jury is a constitutional prerequisite to the jurisdiction of the court in a criminal case."[3]

[1] Belt *v.* United States, 4 App. D. C. 25 [1894].
[2] Ex parte Belt, 159 U. S. 95 [1895].
[3] Patton *v.* United States, 281 U. S. 276, 300 [1930].

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Where the Said Crimes Shall Have Been Committed.

The provision as to place of trial has reference only to trials in the Federal courts.[1] Congress has the sole power to prescribe the place of trial for offenses against Federal laws not committed within any State; such an offense is not local and may be tried at such place as Congress may designate.[2] An offense committed on the high seas is contemplated by this clause, and an act of Congress providing for the punishment of murder on the high seas or in any bay, etc., out of the jurisdiction of any State means that the bay, etc., must be out of the jurisdiction, and not the offense itself.[3] Under the act of March 3, 1825 (4 Stat. 115), a person is triable for an offense on the high seas in the district into which he is brought, and for this purpose the district in which he is delivered to the marshal is the district into which he is brought, although he is first delivered to State officers in another district for safekeeping.[4]

[1] Nashville, C. & St. L. R. Co. *v.* Alabama, 128 U. S. 96, 101 [1888].

[2] Jones *v.* United States, 137 U. S. 202, 211 [1890]; United States *v.* Dawson, 15 How. 467, 488 [1854].

[3] United States *v.* John, 1 Black 487 [1862]; United States *v.* Bevans, 3 Wheat. 336, 387 [1818].

[4] Jones *v.* United States, 137 U. S. 211 [1890]; United States *v.* Arwo, 19 Wall. 486, 490 [1874].

The place of trial may be directed by Congress after the offense has been committed and before proceedings have been commenced.[1] Congress has the power to enact laws for the arrest, commitment, and custody of persons committing offenses against the United States, and persons thus committed are in the exclusive custody of the United States, and not subject to State process or warrant.[2]

[1] Cook *v.* United States, 138 U. S. 157, 182 [1891].

[2] Logan *v.* United States, 144 U. S. 263 [1892].

The jurisdiction of a court is not affected by the manner in which an accused person is brought before it.[1] The Constitution does not require any preliminary hearing before removal of an accused person for trial to the Federal court having jurisdiction of the charge.[2]

[1] Mahon *v.* Justice, 127 U. S. 700, 708 [1888]; Putnam *v.* United States, 162 U. S. 687, 710 [1896].

[2] Hughes *v.* Gault, 271 U. S. 142, 149 [1926].

Any person sending nonmailable matter through the mail may be proceeded against by indictment and tried and punished, either in the district in which he (1) knowingly deposited or caused to be deposited such forbidden matter in the mails; (2) sent such matter or caused it to be sent by mail; or (3) knowingly caused such matter to be delivered by mail. These are three different offenses and an indictment in a State or district other than the State or district in which the particular crime was committed, should not be enforced.[1]

[1] United States *v.* Conrad, 59 Fed. 458 [1894].

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A conviction in the District of Columbia upon an indictment charging a scheme to defraud a corporation by mail, the letter being posted in Pennsylvania, was upheld because of the presumption that the letter was delivered in the District of Columbia—the indictment to be considered accordingly as charging an offense committed within the District.[1]

[1] Hagner v. United States, 285 U. S. 427, 429 [1932].

The physical absence of the accused from the State of Missouri when the acceptance by a St. Louis corporation of his offer to render services in consideration of the compensation forbidden by Revised Statutes, section 1782 (U. S. C. 18: 203), was dispatched by mail or telegram, does not deprive the Circuit Court of the United States for the Eastern District of Missouri of jurisdiction of the offense on the theory that the crime was not committed in that State.[1]

[1] Burton v. United States, 202 U. S. 344 [1906].

An indictment cannot be found in one State of the Union for an offense committed in another State.[1] But there is no principle of constitutional law which entitled one to be tried for a criminal offense in the district where he resides.[2]

[1] Re Rosdeitscher, 33 Fed. 657 [1888].
[2] Haas v. Henkel, 216 U. S. 462 [1910].

Article III. Sec. 3. Treason. Cl. 1. Treason defined.

SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.*

Definition.

STATUTORY ORIGIN.

The two species of treason mentioned in the Constitution are described in it in language borrowed from that of the English statute of treasons.[1]

[1] United States v. Burr, 25 Fed. Cas. No. 14693 [1807]; United States v. Greiner, 26 Fed. Cas. No. 15262 [1861], wherein the court said that the phrase "levying war" is understood and applied in the United States in the sense in which it has been used in England. Charge to Grand Jury, 30 Fed. Cas. No. 18271 [1861].

CONSTITUTIONAL DEFINITION EXCLUSIVE.

The definition of treason by the Constitution itself prohibits Congress from making any other acts of the citizen than those specified treason.[1] No other acts than those defined in the Constitution can be

*See also pp. 117, 403, 509, 533 on the subject of treason.

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declared to constitute the offense. Congress can neither extend, nor restrict, nor define the crime. Its power over the subject is limited to prescribing the punishment.[2]

[1] Charge to Grand Jury, 30 Fed. Cas. No. 18271 [1861].
[2] United States v. Greathouse, 26 Fed. Cas. 15254 [1863].

LEVYING WAR.

To constitute the specific crime of treason, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the Government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offenses. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. To complete the crime of levying war against the United States there must be an actual assemblage of men for the purpose of executing a treasonable design.[1]

[1] Re Bollman, 4 Cr. 75, 126 [1807], discharging on a writ of *habeas corpus* parties who had been committed on a charge of treason in the case of United States v. Bollman, 24 Fed. Cas. No. 14622 [1807]. *See also* United States v. Greathouse, 26 Fed. Cas. No. 15254 [1863]; United States v. Burr, 25 Fed. Cas. No. 14693 [1807], where it was said that an assemblage of men in condition to make war, and for that purpose is the levying of war, although no actual violence committed.

The commission of acts of violence by a number of persons, with the intention to suppress an office of excise and to compel the resignation of the excise officer, so as to render an act of Congress in effect null and void, constitutes the crime of high treason in the contemplation of the Constitution and law of the United States.[1]

[1] United States v. Vigol, 2 Dall. (C. C.) 346 [1795]; United States v. Mitchell, 2 Dall. (C. C.) 348 [1795]. *See also* Charge to Grand Jury, 30 Fed. Cas. Nos. 18273 [1861], 18274 [1863].

It is "levying war against the United States" for persons to oppose or prevent, by force, numbers or intimidation, a public and general law of the United States, with intent to prevent its operation or compel its repeal. Force is necessary to complete the crime; but the *quantum* of force is immaterial.[1]

[1] United States v. Fries, 3 Dall. 515 [1799], 9 Fed. Cas. No. 5126 [1799]. *See also* Charge to Grand Jury, 30 Fed. Cas. Nos. 18275 [1842], 18276 [1851].

Successfully to instigate treason is to commit it.[1]

[1] Charge to Grand Jury, 30 Fed. Cas. No. 18276 [1851].

GIVING AID AND COMFORT.

There is more difficulty in determining what constitutes the overt act under the second clause—namely, adhering to the enemy, giving

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him aid and comfort (than under the clause as to levying war). Questions arising under this clause must depend very much upon the facts and circumstances of each particular case. There are some acts of the citizen, in his relations with the enemy, which leave no room for doubt—such as, giving intelligence, with intent to aid him in his acts of hostility—sending him provisions or money—furnishing arms, or troops, or munitions of war—surrendering a military post, etc., all with a like intent. These and kindred acts are overt acts of treason, by adhering to the enemy.[1]

[1] Charge to Grand Jury, 30 Fed. Cas. No. 18271 [1861].

He who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or a misprision thereof.[1]

[1] Hanauer *v.* Doane, 12 Wall. 342, 347 [1871].

WHO MAY BE GUILTY.

If war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.[1]

[1] Re Bollman, 4 Cr. 75, 126 [1807]. *See also* United States *v.* Greiner, 26 Fed. Cas. No. 15262 [1861].

An alien, while domiciled in the United States, owes a local and temporary allegiance, which continues during the period of his residence, and he is amenable to the laws of the United States prescribing punishment for treason and for giving aid and comfort to rebellion.[1] Treason is a breach of allegiance and can be committed by him who owes allegiance either perpetual or temporary.[2]

[1] Carlisle *v.* United States, 16 Wall. 147 [1873].
[2] United States *v.* Wiltberger, 5 Wheat. 76, 97 [1820].

The Confederate Government was never acknowledged by the United States as a *de facto* Government in the sense that adherents to it in war against the Government *de jure* did not incur the penalties of treason. From a very early period of the Civil War to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States.[1]

[1] Thorington *v.* Smith, 8 Wall. 1 [1869], holding that contracts made in aid of insurrection cannot be enforced through the courts of the United States; Sprott *v.* United States, 20 Wall. 459, 464 [1875], holding that the government of the Confederate States had no existence, except as a conspiracy to overthrow lawful authority; its foundation was treason against the existing Federal Government. *See also* White *v.* Hart, 13 Wall. 643, 650 [1872], where it was stated: "The doctrine of secession is a doctrine of treason, and practical secession is practical treason, seeking to give itself triumph by revolutionary violence."

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Evidence Required by the Constitution.

Of the overt act of treason there must be proof by two witnesses, and if there be testimony by four witnesses that the defendant was at a certain place, at a great distance from his home, and that he was armed, that the conspiracy was formed at that place, and that the defendant was actually passed on the march to the place where the treasonable acts were to be carried out, the evidence is sufficient, even if there be testimony of only one witness as to his actual presence at the place of attack.[1]

[1] United States *v.* Mitchell, 2 Dall. (C. C.) 348 [1795].

When a confession is made out of court it is not itself sufficient to convict although proved by two witnesses, but may be given in evidence as corroboratory proof of the intent. Intent may be proved by one witness, collected from circumstances, or even by a single fact.[1]

[1] United States *v.* Fries, 3 Dall. 515; 9 Fed. Cas. No. 5126 [1799].

Article III. Sec. 3. Treason. Cl. 2. Punishment of treason.

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.

Power of Congress.

The power to declare the punishment for treason is exclusively in Congress, but in those cases in which this exclusive right of legislation exists it rests with Congress to determine whether the General Government shall exercise its power to punish exclusively or give to the States a concurrent power.[1]

[1] Houston *v.* Moore, 5 Wheat. 1, 34 [1820].

Necessity for the Provision.

In England attainders of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted, to the disinheritance of his heirs or of those who would otherwise be his heirs. Thus innocent children were made to suffer because of the offense of their ancestor. When the Federal Constitution was framed, this was felt to be a great hardship, and even rank injustice. For this reason it was ordained that no attainder of treason should work corruption of blood or forfeiture except during the life of the person attainted.[1]

[1] Wallach *v.* Van Riswick, 92 U. S. 202 [1876].

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Definitions.

ATTAINDER OF TREASON.

Attainder of treason is the extinction of civil rights and capacities which takes place whenever a person who has committed treason receives sentence of death or other punishment for his crime.[1]

[1] 1 Bouvier's Law Dict. 278.

CORRUPTION OF BLOOD.

Corruption of blood is the incapacity to inherit or pass an inheritance, in consequence of an attainder to which the party has been subject.[1]

[1] Ex parte Lange, 18 Wall. 163, 176 [1874].

FORFEITURE.

The prohibition against corruption of blood or forfeiture beyond the life of the person attainted was inserted for the benefit of the children and heirs of such person. Only a life estate terminating with the death of the offender could be sold under the Confiscation Act of 1862 (12 Stat. 589), and children of the person whose estate was condemned under that act at his death take the fee simple, by descent as his heirs, and do not derive any title from the United States. The Confiscation Act was an exercise of the war power and not a criminal proceeding.[1]

[1] Wallach *v.* Van Riswick, 92 U. S. 202, 213 [1876]; Page *v.* United States, 11 Wall. 268, 305 [1871]; Bigelow *v.* Forrest, 9 Wall. 339, 350 [1870]; Day *v.* Micou, 18 Wall. 156 [1874]; Pike *v.* Wassell, 94 U. S. 711, 714 [1877]; Avegno *v.* Schmidt, 113 U. S. 293 [1885]; Shields *v.* Schiff, 124 U. S. 351, 356 [1888]; Illinois Cent. R. Co. *v.* Bosworth, 133 U. S. 92, 101 [1890]. *See also* Ex parte Lange, 18 Wall. 163, 176 [1874].

A full pardon by the President of all offenses committed by the owner of property confiscated relieves the owner from forfeiture so far as any right of the Government is concerned, but a pardon cannot operate to devest the interest acquired by third persons during the lifetime of the person attainted.[1]

[1] Armstrong's Foundry *v.* United States, 6 Wall. 766, 769 [1868]; Semmes *v.* United States, 91 U. S. 21 [1875]; Wallach *v.* Van Riswick, 92 U. S. 202, 214 [1876]; Knote *v.* United States, 95 U. S. 149 [1877]; Jenkins *v.* Collard, 145 U. S. 546 [1892].

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ARTICLE IV

STATES' RELATIONS

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ARTICLE IV

Article IV. States' relations.
Sec. 1. Full faith and credit given in each State.

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

In General.

By the act of March 27, 1804 (2 Stat. 298), Congress extended the rights under this clause to the public acts, records, judicial proceedings, etc., of the Territories of the United States and countries subject to the jurisdiction thereof.[1]

[1] Atchison, T. & S. F. R. Co. *v.* Sowers, 213 U. S. 55 [1909].

Public Acts and Records.

The duty to give full force and effect to the constitution of another State is as obligatory as the similar duty in respect to the judicial proceedings of that State.[1]

[1] Smithsonian Institution *v.* St. John, 214 U. S. 19 [1909].

A statute is a public act entitled to full faith and credit.[1] But the Supreme Court does not take judicial notice of the statutes of a State even under this clause unless by the local law it is judicially noticed by the courts of the State.[2] Even if it be assumed that the word "acts" includes "statutes", the clause has nothing to do with the conduct of individuals or corporations.[3]

[1] Bradford Electric Light Co. *v.* Clapper, 286 U. S. 145 [1932], holding that a provision in a workmen's compensation act precluding resort to common-law remedies must be given effect in another State. *See also* John Hancock Ins. Co. *v.* Yates, 299 U. S. 178 [1936].

[2] Renaud *v.* Abbott, 116 U. S. 277 [1886]. *See also* Chicago & A. R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 622 [1887]; Gasquet *v.* La Peyre, 242 U. S. 367 [1917].

[3] Minnesota *v.* Northern Securities Co., 194 U. S. 72 [1904].

Where, in a State court, the validity of an act of the legislature of another State is not in question, and the controversy turns merely

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upon its interpretation or construction, no question arises under the "full faith and credit" clause.[1]

[1] Western Life Indemnity Co. *v.* Rupp, 235 U. S. 261 [1914], citing Glenn *v.* Garth, 147 U. S. 360 [1893]; Lloyd *v.* Matthews, 155 U. S. 227 [1894]; Banholzer *v.* New York L. Ins. Co., 178 U. S. 402 [1900]; Allen *v.* Alleghany Co., 196 U. S. 465 [1905]; Louisville & N. R. Co. *v.* Melton, 218 U. S. 36 [1910]; Texas & N. O. R. Co. *v.* Miller, 221 U. S. 408 [1911]. *See also* National Mut. Bldg. & Loan Asso. *v.* Brahan, 193 U. S. 635 [1904]; Johnson *v.* New York L. Ins. Co., 187 U. S. 495 [1903]; Pennsylvania F. Ins. Co. *v.* Gold Issue Min. & Mill. Co., 243 U. S. 93 [1917].

Judicial Proceedings.

IN GENERAL.

No right, privilege, or immunity is conferred by the Constitution in respect to the judgments of foreign States or nations.[1]

[1] Aetna Life Ins. Co. *v.* Tremblay, 223 U. S. 185 [1912].

This provision confers no new jurisdiction on the courts of any State.[1] It declares the attributes and qualities which judicial proceedings and records of one State shall have when offered in evidence in the courts of another, and it implies that they shall be given the same effect in the courts of another State as they have by the law and usage at home.[2] A judgment of a State court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court of another State, as it has in the State in which it was rendered.[3] But no greater effect can be given than is given in the State where rendered; that is to say, as to whether a judgment is a final or an interlocutory one.[4]

[1] Huntington *v.* Attrill, 146 U. S. 657, 685 [1892], holding that it did not authorize a State court to take jurisdiction of a prosecution for a penalty of such nature that it cannot by the settled rules of public and international law be entertained by the judiciary of any State other than that in which the penalty was incurred. *See also* Atchison, T. & S. F. R. *v.* Nichols, 264 U. S. 348 [1924].

[2] Chicago & A. R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 622 [1887].

[3] Hanley *v.* Donoghue, 116 U. S. 1, 3 [1885]. *See also* Bigelow *v.* Old Dominion Copper Min. & S. Co., 225 U. S. 111 [1912]; Green *v.* Van Buskirk, 7 Wall. 139, 140 [1869]; Roche *v.* McDonald, 275 U. S. 449 [1928]; Ohio *v.* Chattanooga Boiler & Tank Co., 289 U. S. 439 [1933].

[4] Board of Public Works *v.* Columbia College, 17 Wall. 521 [1873]; Robertson *v.* Pickrell, 109 U. S. 608, 610 [1883].

This clause, and the laws giving it effect, establish a rule of evidence, and not of jurisdiction; they do not operate to make records and judgments domestic for all purposes but only to give them a general validity and credit as evidence.[1] Foreign judgments enjoy, not the right of priority or privilege or lien which they have in the

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Sec. 1.—Faith and Credit—Judicial Proceedings

State where they are pronounced, but that only which the *lex fori* gives them by its own laws, in their character of foreign judgments.[2] No execution can be issued in one State on the judgment of a court of another State without a new suit thereon in the tribunals of the former State.[3]

[1] Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 292 [1888].

[2] Cole *v.* Cunningham, 133 U. S. 107, 112 [1890]. *See also* Stacy *v.* Thrasher use of Sellers, 6 How. 44, 61 [1848]; Milwaukee County *v.* M. E. White Co., 296 U. S. 268 [1935].

[3] Cole *v.* Cunningham, 133 U. S. 107 [1890]. *See also* McElmoyle *v.* Cohen, 13 Pet. 312, 324 [1839]; Hanley *v.* Donoghue, 116 U. S. 1 [1885]; Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373, 374 [1903].

The full faith and credit demanded is only that faith and credit which the judicial proceedings had in the other State in and of themselves require.[1] To entitle a judgment of a sister State to full faith, it must have been rendered with jurisdiction of the person of the defendant.[2] But it does not demand that a judgment rendered by a court which has jurisdiction of the person but which is in no way responsive to the issues tendered by the pleadings, and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other State.[1] And judicial proceedings which are wanting in the due process enjoined by the fundamental law are not entitled to full faith in the tribunals of other jurisdictions.[3]

[1] Reynolds *v.* Stockton, 140 U. S. 254, 264 [1891].

[2] D'Arcy *v.* Ketchum, 11 How. 165 [1850]. *See also* Owens *v.* McCloskey, 161 U. S. 642 [1896]; German Sav. & L. Soc. *v.* Dormitzer, 192 U. S. 125 [1904].

[3] Old Wayne Mut. L. Asso. *v.* McDonough, 204 U. S. 8, 15 [1907]. *See also* Wetmore *v.* Karrick, 205 U. S. 141 [1907].

UNITED STATES COURTS.

Jurisdiction of the Supreme Court of the United States.*

The Supreme Court has jurisdiction under this clause when a State supreme court has decided against the effect which it was claimed proceedings in another State had, by the law and usage in that State.[1] This provision does not require the Supreme Court to assume jurisdiction of a case for the purpose of giving effect to a judgment obtained by a State suing, when the suit was of such a nature that the Supreme Court could not have taken original jurisdiction.[2] The Supreme Court must judge for itself of the true nature and effect of the order relied on.[3]

[1] Green *v.* Van Buskirk, 7 Wall. 139, 145 [1869]. *See also* Andrews *v.* Andrews, 188 U. S. 14, 28; [1903]; Crapo *v.* Kelly, 16 Wall. 610, 621 [1873].

[2] Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 293 [1888], partially overruled by Milwaukee County *v.* M. E. White Co., 296 U. S. 268 [1935].

[3] Great Western Teleg. Co. *v.* Purdy, 162 U. S. 329, 335 [1896]. *See also* Huntington *v.* Attrill, 146 U. S. 657, 684 [1892].

* *See also* p. 491 relating to the jurisdiction of the Supreme Court.

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Sec. 1.—Faith and Credit—Judicial Proceedings

Effect of Proceedings of United States Courts.

The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the Government of the United States, and which declare the supremacy of the authority of the National Government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgments of its courts is coextensive with its territorial jurisdiction.[1]

[1] Embry *v.* Palmer, 107 U. S. 3, 9 [1883]. *See also* Northern Assur. Co. *v.* Grand View Bldg. Assn., 203 U. S. 106 [1906]; Atchison, T. & S. F. R. Co. *v.* Sowers, 213 U. S. 55 [1909]; Knights of Pythias *v.* Meyer, 265 U. S. 30, 33 [1924]; Louisville & N. R. Co. *v.* Central Stockyards Co., 212 U. S. 132 [1909]; West Side Belt R. Co. *v.* Pittsburgh Constr. Co., 219 U. S. 92 [1911].

Effect to be Given in United States Courts.

The courts of the United States are bound to give to the judgments of the State courts the same faith and credit that the courts of one State are bound to give to the judgments of the courts of her sister States.[1] Thus, where suits to enforce laws of one State are entertained in courts of another on principles of comity, Federal district courts sitting in that State may entertain them, and should, if they do not infringe Federal law or policy.[2]

[1] Cooper *v.* Newell, 173 U. S. 555, 567 [1899]. *See also* Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 291 [1888]; Swift *v.* McPherson, 232 U. S. 51 [1914]; Pennington *v.* Gibson, 16 How. 65, 81 [1854]; Cheever *v.* Wilson, 9 Wall. 108, 123 [1870]; Bradford Electric Light Co. *v.* Clapper, 286 U. S. 145 [1932]; Baldwin *v.* Iowa State Traveling Men's Asso., 283 U. S. 522 [1931]; American Surety Co. *v.* Baldwin, 287 U. S. 156 [1932]; Sanders *v.* Armour Fertilizer Works, 292 U. S. 190 [1934].

[2] Milwaukee County *v.* M. E. White Co., 296 U. S. 268 [1935], holding that a Federal district court in Illinois, having jurisdiction of the parties, must entertain jurisdiction of action brought by a county of Wisconsin to recover upon a valid judgment for income tax due from defendant to the State, which judgment had been rendered by a court of competent jurisdiction in Wisconsin.

But a judgment in a State court which has not been rendered on personal service of process is not one to which Federal courts will give effect.[1] The decision of the supreme court of a State on a question arising upon the local law, while entitled to respect by a Federal court, cannot have conclusive force in the courts of the United States unless it has become a rule of property.[2] The refusal of a Territorial court in Hawaii, having jurisdiction of the action, which was on a policy issued by a New York insurance company, to admit evidence that an administrator had been appointed and a suit brought by him on a

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bond in the Federal court in New York wherein no judgment had been entered, did not violate this clause.[3]

[1] Pennoyer *v.* Neff, 95 U. S. 714 [1878].
[2] Burgess *v.* Seligman, 107 U. S. 20 [1883]. *See also* Carroll County *v.* Smith, 111 U. S. 556 [1884].
[3] Equitable L. Assur. Soc. *v.* Brown, 187 U. S. 308 [1902]. *See also* Gibson *v.* Lyon, 115 U. S. 439 [1885].

HOW PROTECTION TO BE CLAIMED.

The claim of the protection of the full faith and credit clause is without merit when nowhere in its petition for interpleader or in the proceedings had thereunder in the State courts did the intervener set up rights, specifically based on a foreign State judgment, claim for that judgment an effect which if denied to it would have impaired its force and effect, nor predicate any right to the relief demanded upon the effect due to the foreign-State judgment.[1]

[1] Wabash R. Co. *v.* Flannigan, 192 U. S. 29, 37 [1904]. *See also* American Exp. Co. *v.* Mullins, 212 U. S. 311 [1909].

When the plaintiff alleges his cause of action fully on the merits and on the grounds of the defendant's alleged liability, and the reference to the judgment obtained in another State is primarily if not solely as fixing the amount of the plaintiff's claim, the provisions of this clause have not been involved and relied on.[1] By defending on the merits, after pleading and relying upon a foreign judgment, a party does not waive the benefits of an alleged estoppel arising from the foreign judgment.[2]

[1] Bagley *v.* General Fire Extinguisher Co., 212 U. S. 477 [1909].
[2] Harding *v.* Harding, 198 U. S. 317, 330 [1905].

The burden is upon the party asserting it to establish the failure of a court to give to decrees of a Federal court and the court of another State the due effect to which they are entitled.[1]

[1] Commercial Pub. Co. *v.* Beckwith, 188 U. S. 567, 573 [1903].

Conclusiveness of Judgments.

LIMITED TO SAME PARTIES AND PRIVIES.

This clause relates only to the conclusiveness of such judgments as between the parties to them and their privies. It does not require that judgments in one State shall be followed by the courts of other States as matter of authority in other similar cases. The Constitution does not deal with the question of the effect of such judgments as precedents, nor with the opinions of the courts rendering them. It does not require the courts of one State to follow those of another upon any question, whether upon the construction of local statutes or otherwise.[1] There is not such relation between the executor and an administrator with the will annexed appointed in another State as will make a decree against the latter binding upon the former, or the

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estate in his possession. While a judgment against a party may be conclusive, not merely against him but also against those in privity with him, there is no privity between two administrators appointed in different States.[2]

[1] Wiggins' Ferry Co. *v.* Chicago & A. R. Co., 11 Fed. 381 [1882], affirmed in 108 U. S. 18 [1883]. *See also* Mitchell *v.* Lenox, 14Pet. 49 [1840].

[2] Brown *v.* Fletcher, 210 U. S. 82, 90 [1908]. *See also* Stacy *v.* Thrasher use of Sellers, 6 How. 44, 58 [1848]; McLean *v.* Meek, 18 How. 16, 18 [1856].

Judgment against a corporation which, by the laws of the State in which it is rendered, is binding on the stockholders, must be given by a court of another State the same conclusive effect against a stockholder who is sued therein; and the only defenses which he can make against it are those which he could make in the courts of the State in which it was rendered.[1] But where a judgment of dismissal was entered in a Federal court in an action against one of two joint tort-feasors, in a State in which such a judgment would constitute an estoppel in another action in the same State against the other tort-feasor, such judgment is not entitled to full faith and credit in an action brought against the other tort-feasor in another State.[2]

[1] Hancock Nat. Bank *v.* Farnum, 176 U. S. 640 [1900].

[2] Bigelow *v.* Old Dominion Copper Min. & S. Co., 225 U. S. 111 [1912].

EXTENT OF CONCLUSIVENESS.

When duly pleaded and proved, judgments of other States have the effect of being not merely *prima facie* evidence but conclusive proof of the rights thereby adjudicated.[1] Judgment recovered in one State is conclusive evidence of the debt in another.[2] A judgment cannot be impeached either in or out of the State by showing that it was based on a mistake of law.[3]

[1] Huntington *v.* Attrill, 146 U. S. 657, 685 [1892]. *See also* Everett *v.* Everett, 215 U. S. 203 [1909]; Mutual L. Ins. Co. *v.* Harris, 97 U. S. 331 [1878].

[2] Mills *v.* Duryee, 7 Cr. 481, 484 [1813]. *See also* Hilton *v.* Guyot, 159 U. S. 113 [1895], holding that a judgment obtained in a foreign country is but *prima facie* evidence of indebtedness.

[3] American Exp. Co. *v.* Mullins, 212 U. S. 311, 312 [1909]; Fauntleroy *v.* Lum, 210 U. S. 230 [1908].

CONCLUSIVENESS, VEL NON, IN PARTICULAR CASES.

Where statute and policy of the forum are set up as a defense to a suit brought under a statute of another State or territory, or where the foreign statute is set up as a defense to a suit or proceedings under local statute, conflict is to be resolved, not by giving automatic effect to the full faith and credit clause and thus compelling courts of each State to subordinate its own statutes to those of others, but by appraising governmental interest of each jurisdiction and deciding accordingly.[1]

[1] Alaska Packers Asso. *v.* Industrial Acci. Commission, 294 U. S. 532 [1935]; Bradford Electric Light Co. *v.* Clapper, 286 U. S. 145 [1932].

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Sec. 1.—Faith and Credit—Judicial Proceedings

So, a State court, in sustaining a demurrer to a complaint in a cause of action based upon the decision and judgments of the courts of another State and upon the statutes of that State, has not failed to give full faith and credit to the laws and judgments of that State and its courts, when it holds that no cause of action is set forth in the pleading and that it is against the public policy of the State to permit an action for such a purpose.[1]

[1] Finney v. Guy, 189 U. S. 335, 340 [1903].

In illustration of this principle it has been held that—

(1) The laws of the State under which a fraternal association is chartered must be resorted to in order to ascertain the significance of that charter.[1]

(2) Where a decree is rendered for alimony, payable in future installments, the right to such installments becomes absolute and vested on becoming due, provided no modification of the decree has been made prior to the maturity of the installments.[2]

(3) Devolution of real property is controlled solely by the law of the State where situated, and a decree of another State deciding otherwise is not binding.[3] The passing of property by will is not affected by a statute of another State legitimatizing children born out of wedlock,[4] and the law of descents excluding children adopted in other States does not deny full faith and credit to those proceedings.[5] The probate of a will in one State, while conclusive therein, does not take the place of provisions necessary to its validity as a will of real property in other States.[6] A judgment in a probate proceeding which was merely ancillary to probate proceedings in another State ordering the residue of the estate to be assigned to the legatee and discharging the executor from further liability does not prevent a creditor not a resident of the State in which the judgment was rendered from setting up his claim in the State probate court having the primary administration of the estate.[7]

(4) A State may, as to its own residents, impose án excise on tax-exempt obligations issued by another State.[8]

(5) Suit may be had in a State court under a statute of another State, although the statute in terms limited actions thereunder to courts of the enacting State.[9]

(6) A consent decree which under the law of the State has the same force and effect as a decree *in invitum*, must be given the same effect in the courts of another State.[10] However, where a State court decides that the validity of a clause in a contract between two railway companies was not in controversy or passed on in causes relating to the same contract in which decrees by consent were rendered in the courts of another State, and that therefore it has authority to pass on the validity of such clause, it does not refuse to give due effect to the final judgment of a court of another State.[11] Similarly, though a confession of judgment upon a note, with warrant of attorney annexed,

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in favor of the holder, is in conformity with a State law and usage as declared by the highest court of the State in which the judgment is rendered, the judgment may be collaterally attacked upon the ground that the party in whose behalf it was rendered was not in fact the holder without doing violence to this clause.[12]

(7) A judgment obtained by a receiver to enforce the legal liability of the stockholders is entitled to full faith and credit in the courts of another State.[13]

(8) A New Jersey statute forbidding action at law to enforce stockholders' liability arising under laws of another State, and providing that such liability could be enforced only in equity, and that in such case the corporation, its legal representatives, all its creditors, and stockholders, should be necessary parties, was held not to preclude an action at law in New Jersey, by the superintendent of banks of the State of New York, against 557 New Jersey stockholders in an insolvent New York bank, to recover assessments made under the laws of New York; the power of a State to determine the jurisdiction of its courts and the character of controversies which shall be heard therein is subject to the limitations imposed by the Constitution.[14]

(9) A State statute, as construed by the State courts, excluding foreign corporations from suing upon judgments obtained in another State, is not objectionable as denying to those judgments full faith and credit.[15]

(10) A foreign receiver, at least so far as Federal courts are concerned, may maintain a suit to recover the value of property to which he has title by conveyance or statute.[16]

(11) A decree of the Montana Supreme Court, insofar as permitting judgment creditors of a dissolved Iowa insurance corporation to take out and levy execution against local assets to satisfy judgment, as against title to such assets of the Iowa insurance commissioner as statutory liquidator and successor to the dissolved corporation, on the theory that the insurance commissioner was merely a chancery receiver deriving title through judicial proceedings, was held to deny full faith and credit to statutes of Iowa, and therefore invalid.[17] But this was subsequently held not to prevent Montana from deciding that irrespective of the status of the receiver, local judgment creditors had priority with respect to property in Montana.[18]

(12) A judgment for taxes in general is not to be denied full faith and credit in State and Federal courts merely because it is for taxes.[19]

(13) Judicial proceedings in one State, under which inheritance taxes have been paid and the administration upon the estate has been closed, are denied full faith and credit by the action of a probate court in another State in assuming jurisdiction and assessing inheritance taxes against the beneficiaries of the estate, when under the law of the former State the order of the probate court barring all creditors who had failed to bring in their demand from any further claim against the executors was binding upon all.[20]

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(14) Judgment based on an award of arbitration of controversy growing out of a gambling contract held entitled to credit in a sister State.[21]

(15) A decree of the home State of a life insurance company issuing benefit certificates on the assessment plan, by which it was adjudged that it was proper and reasonable for the company to hold a fund collected in advance in order to enable it to pay losses promptly, and that any excess in the fund above the average of the four preceding quarterly assessments should be distributed to certificate holder in diminution of assessments by crediting the excess on account of the next succeeding assessment, is denied the full faith and credit to which it is entitled, where the court of another State holds that a benefit certificate issued by such company was not forfeited by nonpayment of an assessment because such assessment, together with the fund on hand, exceeded the quarterly average.[22]

(16) Conflicting decisions of two State courts upon the same issue of fact, e. g., on the question of domicil for purposes of taxation, do not necessarily connote erroneous judicial action. When one State refuses to accept the decision of another State on the matter of domicil for purposes of taxation, the full faith and credit clause is not necessarily infringed. That clause does not require "uniformity in the decisions of the courts of different States as to place of domicil, where the exertion of State power is dependent upon domicil within its boundaries."[23]

[1] Royal Arcanum *v.* Green, 237 U. S. 531 [1915]. *See also* Modern Woodmen *v.* Mixer, 267 U. S. 544 [1925].

[2] Sistare *v.* Sistare, 218 U. S. 1, 11 [1910]. *See also* Barber *v.* Barber, 21 How. 582 [1859]; Lynde *v.* Lynde, 181 U. S. 183, 186, 187 [1901]; Bates *v.* Bodie, 245 U. S. 520 [1918]; Audubon *v.* Shufeldt, 181 U. S. 575, 577 [1901]; Yarbrough *v.* Yarbrough, 290 U. S. 202 [1933]; Loughran *v.* Loughran, 292 U. S. 216 [1934].

[3] Clarke *v.* Clarke, 178 U. S. 186 [1900].

[4] Olmsted *v.* Olmsted, 216 U. S. 386 [1910].

[5] Hood *v.* McGehee, 237 U. S. 611 [1915].

[6] Robertson *v.* Pickrell, 109 U. S. 608, 611 [1883]. *See also* Darby *v.* Mayer, 10 Wheat. 465 [1825]; Burbank *v.* Ernst, 232 U. S. 162 [1914]; Tilt *v.* Kelsey, 207 U. S. 43 [1907]; Gasquet *v.* Fenner, 247 U. S. 16 [1918].

[7] Borer *v.* Chapman, 119 U. S. 587, 599 [1887].

[8] Bonaparte *v.* Appeal Tax Court, 104 U. S. 592, 594 [1882].

[9] Tennessee Coal, I. & R. Co. *v.* George, 233 U. S. 354 [1914].

[10] Harding *v.* Harding, 198 U. S. 317 [1905].

[11] Texas & P. R. Co. *v.* Southern P. Co., 137 U. S. 48 [1890].

[12] National Exchange Bank *v.* Wiley, 195 U. S. 257, 265 [1904]. *See also* Grover & B. Sewing-Mach. Co. *v.* Radcliffe, 137 U. S. 287 [1890].

[13] Converse *v.* Hamilton, 224 U. S. 243 [1912]. *See also* Marin *v.* Augedahl, 247 U. S. 142 [1918].

[14] Broderick *v.* Rosner, 294 U. S. 629 [1935]. *See also* Thormann *v.* Frame, 176 U. S. 350, 356 [1900]; Reynolds *v.* Stockton, 140 U. S. 264 [1891].

[15] Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373 [1903].

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[16] Oakes *v.* Lake, 290 U. S. 59 [1933].
[17] Clark *v.* Williard, 292 U. S. 112 [1934].
[18] Clark *v.* Williard, 294 U. S. 211 [1935].
[19] Milwaukee County *v.* M. E. White Co., 296 U. S. 299 [1935].
[20] Tilt *v.* Kelsey, 207 U. S. 43 [1907]. *Cf.* Blodgett *v.* Silberman, 277 U. S. 1, 18 [1928].
[21] Fauntleroy *v.* Lum, 210 U. S. 230 [1908].
[22] Hartford L. Ins. Co. *v.* Barber, 245 U. S. 146 [1917]. *See also* Hartford L. Ins. Co. *v.* Ibs, 237 U. S. 662 [1915].
[23] Worcester County Trust Co. *v.* Riley, 302 U. S. 292 [1937], citing Thormann *v.* Frame, 176 U. S. 350 [1900]; Overby *v.* Gordon, 177 U. S. 214 [1900]; Burbank *v.* Ernst, 232 U. S. 162 [1914]; Baker *v.* Baker, Eccles & Co., 242 U. S. 394 [1917]; Iowa *v.* Slimmer, 248 U. S. 115, 120, 121 [1920]; Tilt *v.* Kelsey, 207 U. S. 43 [1907]. *See also* Dorrance's Estate, 309 Pa. 151 [1932]; In re Estate of Dorrance, 115 N. J. Eq. 268 [1934]; 116 N. J. Eq. 204 [1934]; New Jersey *v.* Pennsylvania, 287 U. S. 580 [1933]; Dorrance *v.* Pennsylvania, 287 U. S. 660 [1932]; Hill *v.* Martin, 296 U. S. 393 [1935].

Defenses to Suits on Foreign Judgments.

IN GENERAL.

In Milwaukee County *v.* M. E. White Co.,[1] the Supreme Court said "A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a specialty. Recovery upon it can be resisted only on the grounds that the court which rendered it was without jurisdiction * * * or that it has ceased to be obligatory because of payment or other discharge * * * or that it is a cause of action for which the State of the forum has not provided a court * * * unless it is compelled to do so by the privileges and immunities clause * * * or possibly because procured by fraud * * *."

[1] 296 U. S. 268, 275–276 [1935].

WANT OF JURISDICTION.

This clause applies to the records and proceedings of courts only so far as they have jurisdiction. Whenever they want jurisdiction the records are not entitled to credit.[1] But a denial of faith and credit to a judgment rendered in another State, upon a mere suggestion of want of jurisdiction, without evidence to warrant the finding, is a violation of the constitutional requirement.[2]

[1] Board of Public Works *v.* Columbia College, 17 Wall. 521, 528 [1873]. *See also* Spokane & I. E. R. Co. *v.* Whitley, 237 U. S. 487 [1915]; Bigelow *v.* Old Dominion Copper Min. & S. Co., 225 U. S. 111 [1912]; Brown *v.* Fletcher, 210 U. S. 82 [1908]; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 291 [1888]; Huntington *v.* Attrill, 146 U. S. 657, 685 [1892].
[2] Rogers *v.* Alabama, 192 U. S. 226, 231 [1904]. *See also* Laing *v.* Rigney, 160 U. S. 531, 542 [1896]; Wells Fargo & Co. *v.* Ford, 238 U. S. 503 [1915].

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Sec. 1.—Faith and Credit—Judicial Proceedings

When the subject matter of a suit is merely the determination of the defendant's liability, it is necessary that it should appear from the record that the defendant had been brought within the jurisdiction of the court by personal service of process, or his voluntary appearance, or that he had in some manner authorized the proceeding.[1]

[1] Grover & B. Sewing-Mach. Co. *v.* Radcliffe, 137 U. S. 287 [1890]. *See also* Brown *v.* Fletcher, 210 U. S. 82 [1908]; Renaud *v.* Abbott, 116 U. S. 277, 287 [1886]; Galpin *v.* Page, 18 Wall. 350 [1874]; Old Wayne Mut. L. Asso. Co. *v.* McDonough, 204 U. S. 8 [1907].

If there be a law of a State providing for the attachment of a debt, then, if the garnishee be found in that State and process be personally served upon him therein, the court thereby acquires jurisdiction over him and can garnish a debt and condemn it, provided the garnishee could himself be sued by his creditor in that State, and such a judgment is entitled to full faith and credit in the courts of another State.[1] Even where service of process was made on a person while in the State for the purpose of attending the taking of a deposition, according to notice alleged to have been given for the purpose of enticing the defendant into the State, a judgment obtained on such service was entitled to full faith and credit in another State.[2]

[1] Baltimore & O. R. Co. *v.* Hostetter, 240 U. S. 620 [1916]. *See also* Chicago, R. I. & P. R. Co. *v.* Sturm, 174 U. S. 710 [1899]; King *v.* Cross, 175 U. S. 396, 399 [1899]; Harris *v.* Balk, 198 U. S. 215, 222 [1905]; Louisville & N. R. Co. *v.* Deer, 200 U. S. 176 [1906].

[2] Jaster *v.* Currie, 198 U. S. 144, 146 [1905].

It has also been settled by the Federal decisions that three conditions are necessary to give a court jurisdiction in *personam* over a foreign corporation: First, it must appear that the corporation was carrying on its business in the State where process was served on its agent; second, that the business was transacted or managed by some agent or officer appointed by or representing the corporation in such State; third, the existence of some local law making such corporation amenable to suit there as a condition, express or implied, of doing business in the State.[1]

[1] Riverside & Dan River Cotton Mills *v.* Menefee, 237 U. S. 189 [1915]; Goldey *v.* Morning News, 156 U. S. 518 [1895].

The constitutional provision does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered or into the facts necessary to give such jurisdiction.[1] That jurisdiction may be questioned in a collateral proceeding in another State notwithstanding the averments contained in the record of the judgment itself.[2]

[1] Simmons *v.* Saul, 138 U. S. 439, 448 [1891].

[2] Thompson *v.* Whitman, 18 Wall. 457 [1874]. *See also* Brown *v.* Fletcher, 210 U. S. 82 [1908]; German Sav. & L. Soc. *v.* Dormitzer, 192 U. S. 125, 128 [1904]; Grover & B. Sewing-Mach. Co. *v.* Radcliff, 137 U. S. 287, 294 [1890].

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Sec. 1.—Faith and Credit—Judicial Proceedings

JURISDICTION FOR DIVORCE.

No valid decree of divorce can be granted by the courts of a State in which neither party is domiciled.[1] Where the plaintiff has not a *bona fide* domicile in the State, a court cannot render a decree binding in other States even if the nonresident defendant voluntarily enters a personal appearance.[2] A divorce decree rendered by a court at the matrimonial domicile, i. e., where the parties last lived as husband and wife, must be recognized in another State under the full faith and credit clause as against a nonresident defendant who was not served with process within the State and did not personally appear to defend the suit; [3] however, a decree rendered at the separate domicile of one of the parties, against a defendant who remained domiciled at the matrimonial domicile, but was not served with process and did not appear, need not be so recognized.[4]

[1] Bell *v.* Bell, 181 U. S. 175 [1901]. *See also* Streitwolf *v.* Streitwolf, 181 U. S. 179 [1901].

[2] Andrews *v.* Andrews, 188 U. S. 14 [1903].

[3] Atherton *v.* Atherton, 181 U. S. 155 [1901].

[4] Haddock *v.* Haddock, 201 U. S. 562 [1906]. *See also* Thompson *v.* Thompson, 226 U. S. 551 [1913].

FRAUD.

A number of cases seem to hold that under the full faith and credit clause a sister-State judgment cannot be impeached for fraud, but such attack must be made in the State where the judgment was rendered.[1] Dicta are found in the Supreme Court cases to the effect that a judgment by a State may not be impeached for fraud,[2] and contrariwise.[3]

[1] Christmas *v.* Russell, 5 Wall. 290 [1866]; Maxwell *v.* Stewart, 21 Wall. 77 [1875]; Simmons *v.* Saul, 138 U. S. 439 [1891].

[2] Hanley *v.* Donoghue, 116 U. S. 1, 4 [1885]; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265 [1888].

[3] Cole *v.* Cunningham, 133 U. S. 107, 112 [1890]; American Exp. Co. *v.* Mullins, 212 U. S. 311 [1909].

DISCONTINUANCE OF SUIT IN ANOTHER STATE.

In permitting a party to show that the entry of discontinuance in a case in another State "was not intended by the parties as a release and satisfaction of the cause of action, but was the result of a promissory agreement on the part of the defendant company which was never complied with," full faith and credit was not refused to the judgment in the other State. Such evidence was properly allowed, not to contradict the necessary legal import of that judgment, but to show the real meaning of the parties to that suit in agreeing upon its discontinuance.[1]

[1] Jacobs *v.* Marks, 182 U. S. 583, 593 [1901].

DECREE OF DISMISSAL.

A decree of dismissal, not on the merits, is not a bar to a subsequent suit in a court of another jurisdiction.[1]

[1] Swift *v.* McPherson, 232 U. S. 51 [1914].

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Sec. 1.—Faith and Credit—Judicial Proceedings

Enforcement of Foreign Judgments.

A judgment enforceable in the State where rendered must be given effect in another State, under this clause, although the modes of procedure to enforce its collection may not be the same in both States.[1] If the court has acquired jurisdiction, the judgment is entitled to full faith and credit though the court may not be able to enforce it by execution in the State in which it was rendered, as where the defendant left the State after service upon him and took all his property with him. While the want of power to enforce a judgment or decree may afford a reason against entertaining jurisdiction, it has nothing to do with the validity of a judgment or decree when made.[2]

[1] Sistare *v.* Sistare, 218 U. S. 1 [1910].

[2] Michigan Trust Co. *v.* Ferry, 228 U. S. 346 [1913]. *See also* Fall *v.* Eastin, 215 U. S. 1 [1909].

A joint judgment recovered in one State against two joint defendants only one of whom was served with process will support an action in another State against the one served, although the judgment would have been invalid if rendered in the latter State.[1]

[1] Renaud *v.* Abbott, 116 U. S. 277 [1886]; Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373 [1903].

There is no direct constitutional inhibition upon the States nor any clause in the Constitution from which it can be plausibly inferred that the States may not legislate upon the remedy in suits upon the judgments of other States, exclusive of all interference with their merits. It being settled that the statute of limitations may bar recoveries upon foreign judgments—that the effect intended to be given under our Constitution to judgments is that they are conclusive only as regards the merits—the common-law principle then applies to suits upon them, that they must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred.[1]

[1] Bacon *v.* Howard, 20 How. 22, 25 [1858]. *See also* McElmoyle *v.* Cohen, 13 Pet. 312, 328 [1839]; Bank of Alabama *v.* Dalton, 9 How. 522, 528 [1850]; Great Western Teleg. Co. *v.* Purdy, 162 U. S. 329 [1896]; Christmas *v.* Russell, 5 Wall. 290, 301 [1866].

A State may adopt such system of courts and form of remedy as it sees fit, but it cannot, under guise of merely affecting the remedy, deny enforcement of claims otherwise within protection of the full faith and credit clause when its courts have general jurisdiction of the subject matter and the parties.[1] The courts of one State have no jurisdiction to enjoin the enforcement of judgments at law obtained in another State, when the same reasons assigned for granting the restraining order were passed upon on a motion for a new trial in the action at law and the motion denied.[2]

[1] Broderick *v.* Rosner, 294 U. S. 629 [1935]

[2] Embry *v.* Palmer, 107 U. S. 3, 13 [1883].

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SECTION 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*

Article IV. Sec. 2. Citizens. Cl. 1. Privileges and immunities.

In General.

The United States is without power to forbid and punish infractions by individuals of the right of citizens to reside peacefully in the several States, and to have free ingress into and egress from such States. Authority to deal with such wrongs is exclusively within the power reserved by the Federal Constitution to the States.[1] Similarly, Revised Statutes, section 5519, prohibiting conspiracies to deprive any person of rights or privileges secured by State laws, is beyond the legislative power of the United States and is void.[2]

[1] United States *v.* Wheeler, 254 U. S. 281 [1920].

[2] United States *v.* Harris, 106 U. S. 629, 643 [1883]. *See also* Baldwin *v.* Franks, 120 U. S. 678 [1887].

Who Are Citizens.

Corporations are not citizens within the meaning of this clause.† The term "citizens" as there used applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature has prescribed.[1] A corporation does not have the rights of its personal members, and cannot invoke the provision of this section by virtue of the privileges and immunities enjoyed by its members hereunder.[2] A Massachusetts common-law trust is a corporation without right to rely on the constitutional privileges of individuals.[3]

[1] Paul *v.* Virginia, 8 Wall. 168, 177 [1869]. *See also* Blake *v.* McClung, 172 U. S. 239, 259 [1898]; Sully *v.* American Natl. Bank, 178 U. S. 289 [1900]; Norfolk & W. R. Co. *v.* Pennsylvania, 136 U. S. 114, 118 [1890].

[2] Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 45 [1900]. *See also* Bank of Augusta *v.* Earle, 13 Pet. 519, 586 [1839].

[3] Hemphill *v.* Orloff, 277 U. S. 537 [1928].

Prior to the Fourteenth Amendment free Negroes whose ancestors were brought to this country and sold as slaves were not entitled to the privileges and immunities of citizens in the several States.

[1] Scott *v.* Sandford, 19 How. 393, 403 [1857].

Privileges and Immunities of Citizens.

IN GENERAL.

The privileges and immunities secured by this provision to citizens of each State in the several States are those privileges and immunities

* *See* Amendment 14, p. 764, for privileges and immunities of citizens of the United States.

† *See also* pp. 487, 766, 772, 952 for other discussions of corporations as citizens and persons.

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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,[1] nor rights attached by law to contracts by reason of the place where such contracts are made or executed, wholly irrespective of the citizenship of the parties to those contracts.[2] This provision did not create those rights which it calls privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.[3]

[1] Paul *v.* Virginia, 8 Wall. 168, 180 [1869].
[2] Conner *v.* Elliot, 18 How. 591, 593 [1856].
[3] Slaughter-House Cases, 16 Wall. 36, 77 [1873]. *See also* Detroit *v.* Osborne, 135 U. S. 492 [1890]; Bradwell *v.* Illinois, 16 Wall. 130, 138 [1873]; McKane *v.* Durston, 153 U. S. 684, 687 [1894]; Kirtland *v.* Hotchkiss, 100 U. S. 491, 498 [1879].

If a privilege or immunity has been by the State conferred upon its citizens, and not in terms upon the citizens of other States, such privilege and immunity is not for that reason declared void, but the protecting arm of the Constitution is thrown around the citizens of every other State, who thus are embraced within the privilege granted. The converse of the proposition is this, that when a State has sought to impose a burden upon citizens of other States not imposed upon citizens of its own State, such effort is always held to be void.[1]

[1] In re Johnson's Estate, 139 Calif. 532 [1903], discussing Blake *v.* McClung, 172 U. S. 239 [1898].

DEFINITION AND ENUMERATION.

In Corfield *v.* Coryell,[1] Mr. Justice Washington gave a general definition of the phrase which the courts have, without hesitation, accepted and followed.[2] In his opinion he says: "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. * * * What these fundamental principles are * * * may, however, be all comprehended under the following general heads: protection by the Government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole; the right of a citizen of one State to pass through, or to reside in any other State * * * to claim the benefit of the writ of *habeas corpus;* to institute and maintain

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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; * * * the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised."

[1] 4 Wash. (U. S.) 371, 380 [1823].
[2] *See* Slaughter-House Cases, 16 Wall. 36, 97 [1873].

Within the meaning of this clause it has been held that there was no infringement of the "privileges of a citizen" in the following circumstances:

(1) Where a State, by rule uniform in its operation as to citizens of the several States, requires residence within its limits for a given time before a citizen of another State who becomes a resident shall exercise the right of suffrage or become eligible for office.[1]

(2) Ohio statute prohibiting the sale in the open market of prison-made goods from other States, where the statute also prohibited sale in the open market of goods made in Ohio by convict labor.[2]

(3) State statute providing that no foreign corporation which does not employ capital within the State shall have an office therein without license first obtained.[3]

(4) Legislation imposing conditions upon doing of business by foreign insurance corporations, or other corporations whose business is of a local and domestic nature, including express companies whose business is confined wholly to places within the State.[4]

(5) Where a State statute provided that only persons may be licensed thereunder as insurance brokers who are residents of the State and have been licensed insurance agents of the State for at least 2 years.[5]

(6) State law limiting dower rights of a nonresident to lands which the husband died seised of, instead of to land held during the marriage.[6]

(7) Law of Louisiana leaving the rights of nonresident married persons in respect to property in the State to be governed by the laws of their domicile, although further providing that a contract of marriage made in that State, or the residence of persons there in the relation created by marriage, shall give rise to certain communal rights on the part of each in property acquired in that State during the marriage.[7]

(8) Statute prohibiting citizens of other States from planting oysters in a navigable stream of the State when its own citizens have that privilege.[8]

(9) State law prohibiting the grazing of sheep on the Federal public domain upon a range previously occupied by cattle.[9]

(10) Statute authorizing action against a foreign corporation by another foreign corporation or by a nonresident only in case the foreign corporation is doing business within the State, when con-

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strued as using "resident" in the strict primary sense of one actually living in the place for a time irrespective of domicile.[10]

(11) State statute authorizing service of process on agent, where business is carried on in a county other than that of the residence of the principal (which, by construction of State court, was held to mean allowance of a personal judgment against a nonresident) as applied in case of a business subject to special State regulation (dealing in securities).[11]

(12) Where a State court (in which proceedings had been commenced against an insolvent resident) enjoins the proceeding to judgment and execution in a suit against the insolvent in another State, by a creditor, also a citizen and subject to the jurisdiction of the enjoining court.[12] The Court stated generally (p. 113): "The intention (of this provision) was to confer on the citizens of the several States a general citizenship and to communicate all the privileges and immunities which the citizens of the same State should be entitled to under like circumstances, and this includes the right to institute actions."

(13) Uniform tax imposed by a municipal corporation on all sales made in it, whether the goods sold are the produce of the State within which the municipal ordinance was passed or some other State, is valid.[13]

(14) State legislation in respect to the taxation of shares of stock in a local corporation held by nonresidents, by which the nonresident pays a certain tax direct to the State and the resident pays the local tax, although in a given year the actual workings of the system may result in a larger burden on the nonresident.[14]

(15) State tax upon the net income derived by nonresidents from property owned within the State, and from any business, trade, or profession carried on within its borders.[15]

(16) State inheritance tax law under which the tax on the transfer by will or intestacy of the estate of a nonresident decedent, consisting of property both within and without the State, is first ascertained on the entire estate as though it were the estate of a resident, situated entirely within the State, and is then apportioned and assessed in the proportion that the taxable estate within the State bears to the entire estate, wherever situated, although by reason of the graduation of the tax the application of the apportionment formula fixed by the statute may result in a greater tax on property of nonresidents.[16]

(17) A State statute taxing (without discrimination between the citizens of other States and the citizens of the taxing State) the business of hiring persons to labor outside the State limits.[17]

(18) An act of a territorial legislature imposing an annual poll tax and license tax on nonresident fishermen within the territory.[18]

(19) Taxation of a debt due from a nonresident secured by real estate situated where the debtor resided.[19]

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(20) State statute of limitation which provides that when the defendant is out of the State the statute shall not run against the plaintiff if the latter resides in the State, but shall if he resides out of the State.[20]

(21) An Ohio statute providing that no action can be maintained in the courts of that State for wrongful death occurring in another State except where the deceased was a citizen of Ohio, the restriction operating equally upon representatives of the deceased whether they are citizens of Ohio or other States.[21]

[1] Blake *v.* McClung 172 U. S. 239, 256 [1898].

[2] Whitfield *v.* Ohio, 297 U. S. 431 [1936].

[3] Pembina Consol. Silver Min. & Mill. Co. *v.* Pennsylvania, 125 U. S. 181, 182 [1888]. *See also* Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 45 [1900]; Norfolk & W. R. Co. *v.* Pennsylvania, 136 U. S. 114, 118 [1890].

[4] Crutcher *v.* Kentucky, 141 U. S. 47, 59 [1891]. *See also* Allgeyer *v.* Louisiana, 165 U. S. 578 [1897]; Doyle *v.* Continental Ins. Co. 94 U. S. 535, 540 [1877]; Ducat *v.* Chicago, 10 Wall. 410 [1871]; Liverpool & L. Life & F. Ins. Co. *v.* Oliver, 10 Wall. 566, 573 [1871]; American F. Ins. Co. *v.* King Lumber & Mfg. Co., 250 U. S. 2 [1919]; Chalker *v.* Birmingham & N. W. R. Co., 249 U. S. 522 [1919].

[5] La Tourette *v.* McMaster, 248 U. S. 465 [1919].

[6] Ferry *v.* Spokane P. & S. R. Co., 258 U. S. 314 [1922], followed in Ferry *v.* Corbett, 258 U. S. 609 [1922].

[7] Conner *v.* Elliot, 18 How. 591, 593 [1856].

[8] McCready *v.* Virginia, 94 U. S. 391, 394 [1877]. For further cases regulating interests in the common property *see* Corfield *v.* Coryell, 4 Wash. (U. S.) 371 [1823]; Chambers *v.* Church, 14 R. I. 398 [1884]; State *v.* Corson, 67 N. J. Law 178 [1901]; State *v.* Smith, 71 Ark. 478 [1903].

[9] Omaechevarria *v.* Idaho, 246 U. S. 343 [1918].

[10] Douglas *v.* New York, N. H. & H. R. Co., 279 U. S. 377 [1929].

[11] Henry L. Doherty & Co. *v.* Goodman, 294 U. S. 623 [1935].

[12] Cole *v.* Cunningham, 133 U. S. 107 [1890]. *See also* Ward *v.* Maryland, 12 Wall. 418, 430 [1871]; Missouri P. R. Co. *v.* Clarendon Boat Oar Co., 257 U. S. 533 [1922].

[13] Woodruff *v.* Parham, 8 Wall. 123 [1869].

[14] Travelers' Ins. Co. *v.* Connecticut, 185 U. S. 364, 371 [1902].

[15] Shaffer *v.* Carter, 252 U. S. 37 [1920]. *See also* Travis *v.* Yale & T. Mfg. Co., 252 U. S. 60 [1920].

[16] Maxwell *v.* Bugbee, 250 U. S. 525 [1919]. *See also* Smith *v.* Loughman, 245 N. Y. 486 [1927], cert. den. 275 U. S. 560 [1927].

[17] Williams *v.* Fears, 179 U. S. 270, 274 [1900].

[18] Haavik *v.* Alaska Packers' Asso., 263 U. S. 510 [1924].

[19] Kirtland *v.* Hotchkiss, 100 U. S. 491, 499 [1879].

[20] Chemung Canal Bank *v.* Lowery, 93 U. S. 72, 76 [1876]. *See also* Canadian Northern R. Co. *v.* Eggen, 252 U. S. 553 [1920].

[21] Chambers *v.* Baltimore & O. R. Co. 207 U. S. 142 [1907].

Conversely, it has been held that there was an infringement of the "privileges of a citizen" in the following circumstances:

(1) A State statute, the manifest purpose of which is to give all creditors who are citizens of the State priority over all creditors residing out of the State, whether the latter were citizens or only residents of some other State or country, infringes the rights protected by this provision.[1]

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(2) An act passed by the Confederate Government and enforced by a State as a law of that Commonwealth sequestrating the property held by an alien enemy.[2]

(3) A State statute prohibiting nonresidents from selling within a certain district any goods whatever other than agricultural products and articles manufactured in the State without first obtaining a license to do so on payment of an amount higher than that required of resident merchants.[3]

(4) A State income and franchise tax statute taxing income from interest-bearing securities but exempting from taxation interest received on account of money loaned within the State at not more than 5 percent interest violates this clause, since the classification was based on a difference having no substantial relation to the object of the act.[4]

(5) A State statute which imposes an annual license tax of $100 in each county upon a person engaged in railway-construction work in the State who has his chief office outside the State, while a person engaged in the same business, but having his chief office within the State, pays an annual tax of but $25, violates this clause.[5]

[1] Blake *v.* McClung, 172 U. S. 239, 247 [1898], 176 U. S. 59 [1900].
[2] Williams *v.* Bruffy, 96 U. S. 176, 184 [1878].
[3] Ward *v.* Maryland, 12 Wall. 418, 424 [1871]. *See also* Downham *v.* Alexandria, 10 Wall. 173, 175 [1870].
[4] Colgate *v.* Harvey, 296 U. S. 404 [1935].
[5] Chalker *v.* Birmingham & N. W. R. Co., 249 U. S. 522 [1919].

Article IV. Sec. 2. Citizens. Cl. 2. Fugitives from Justice.

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.

In General.*

The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several States—an object of the first concern to the people of the entire country, and which each State is bound, in fidelity to the Constitution, to recognize.[1] Though the District of Columbia is not included in the constitutional provision, persons charged with having committed offenses in the District may be arrested wherever found and returned for trial, under Revised Statutes, section 1014.[2] Similarly, the power to extradite fugitive criminals as between State and territory is as complete as between one State and another.[3] But the Cherokee Nation was neither a

* *See* p. 391 for extradition under treaties.

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State nor a Territory in the sense to be attached to the words when used in the Constitution.[4]

[1] Appleyard *v.* Massachusetts, 203 U. S. 222 [1906]. *See also* Illinois ex rel. McNichols *v.* Pease, 207 U. S. 100 [1907]; Innes *v.* Tobin, 240 U. S. 127 [1916]; Kentucky *v.* Dennison, 24 How. 66 [1861].

[2] Price *v.* McCarty, 89 Fed. 84 [1898].

[3] Ex parte Reggel, 114 U. S. 642, 650 [1885]. *See also* New York ex rel. Kopel *v.* Bingham, 211 U. S. 468 [1909].

[4] Ex parte Morgan, 20 Fed. 298 [1883], holding that the governor of a State could not honor the requisition of the principal chief of the Cherokee Nation.

There is no express grant to Congress of legislative power to execute this provision, and it is not, in its nature, self-executing; but a contemporary construction, contained in the act of 1793 (1 Stat. 302) ever since continued in force and now embodied in Revised Statutes, sections 5278 and 5279 (U. S. C. 18: 662, 663) has established the validity of its legislation on the subject.[1]

[1] Roberts *v.* Reilly, 116 U. S. 80, 94 [1885]. *See also* Innes *v.* Tobin, 240 U. S. 127 [1916].

Treason, Felony, or Other Crime.

The words "treason, felony, or other crime" in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the State. The word "crime" of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called, "misdemeanors" as well as treason and felony.[1] Every violation of the criminal laws of a State is within the meaning of the Constitution, and may be made the foundation of a requisition.[2]

[1] Kentucky *v.* Dennison, 24 How. 66, 99 [1861]. *See also* Appleyard *v.* Massachusetts, 203 U. S. 222 [1906]; Innes *v.* Tobin, 240 U. S. 127 [1916].

[2] Taylor *v.* Taintor, 16 Wall. 366, 375 [1873].

Who Is a Fugitive From Justice.

To be a fugitive from justice within the meaning of this clause it is not necessary that the party charged should have left the State after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that the accused, having within a State committed a crime and left the jurisdiction before being subjected to criminal process, is found within another State.[1] The motive which induced the departure is immaterial.[2] A contention that a person whose deportation is sought had no belief when he left the State in which he is alleged to have committed a criminal offense, that he had violated its criminal laws, and therefore could not be deemed a fugitive from its justice, cannot be sustained.[3] A person indicted a second time for the same offense is none the less a fugitive from justice because after the dismissal of the first indictment, on

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which he was originally extradited, he left the State with the knowlege of, or without objection by, the State authorities.[4]

[1] Roberts *v.* Reilly, 116 U. S. 80 [1885]. *See also* Hyatt *v.* New York, ex rel. Corkran, 188 U. S. 691 [1903]; Strassheim *v.* Daily, 221 U. S. 280 [1911].

[2] Drew *v.* Thaw, 235 U. S. 432, 439 [1914].

[3] Appleyard *v.* Massachusetts, 203 U. S. 222 [1906]. *See also* Ex parte Reggel 114 U. S. 642, 650 [1885].

[4] Bassing *v.* Cady, 208 U. S. 386 [1908].

Procedure for Removal.

No person may be lawfully removed from one State to another by virtue of this provision, unless: First, he is charged in one State with treason, felony, or other crime; second, he has fled from justice; third, a demand is made for his delivery to the State wherein he is charged with crime. If either of these conditions is absent the Constitution affords no warrant for a restraint of the liberty of any person.[1]

[1] Pierce *v.* Creecy, 210 U. S. 387 [1908].

The governor of a State is not authorized to make a demand unless the party is charged in the regular course of judicial proceedings, and he cannot lawfully issue a warrant of arrest without a law of the State or an act of Congress to authorize it.[1]

[1] Kentucky *v.* Dennison, 24 How. 66, 104 [1861]. *See also* Marbles *v.* Creecy, 215 U. S. 63 [1909]; Pettibone *v.* Nichols, 203 U. S. 192 [1906]; Strassheim *v.* Daily, 221 U. S. 280 [1911]; Re Strauss, 197 U. S. 324, 325 [1905].

The right given to "demand" implies that it is an absolute right, and it follows that there must be a correlative obligation to deliver without any reference to the character of the crime charged or to the policy or laws of the State to which the fugitive has fled.[1] However, the duty to surrender is not absolute and unqualified, but depends on circumstances. If the laws of the State have been put in force against the fugitive, and he is imprisoned there, the demands of those laws may first be satisfied. The duty of obedience to a requisition then arises and not before.[2]

[1] Kentucky *v.* Dennison, 24 How. 66, 107 [1861]. In denying a mandamus in this case to compel the Governor of Ohio to surrender a fugitive to the State of Kentucky, the Court said: "* * * looking to the subject matter of this law [act of February 12, 1793, R. S. 5278, making it the duty of State executives to surrender fugitives on proper demand], and the relations which the United States and the several States bear to each other, the Court is of the opinion, that the words 'it shall be the duty' were not used as mandatory or 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. * * * 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."

[2] Taylor *v.* Taintor, 16 Wall. 366, 371 [1873].

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The person demanded has no constitutional right to be heard before the governor on the question, whether he has been substantially charged with a crime and is a fugitive from justice, and if the State law makes no provision for a hearing, it is not error for the governor to refuse one. The issue of warrant by the governor must be regarded as sufficient until the presumption of legality and regularity are overthrown in a legal proceeding to review the governor's action. In habeas corpus proceedings for that purpose, the court will discharge defendant where his arrest is sought on the ground only of a constructive presence in the demanding State at the time of the commission of the crime charged. But if the evidence is conflicting, habeas corpus is not the proper proceeding to try the question of alibi.[1] The Supreme Court will not approve a discharge unless it appears from the record that defendant "succeeded in showing by clear and satisfactory evidence" that he was outside the demanding State at the time of the crime, and consequently could not be a fugitive from justice.[2]

[1] Munsey *v.* Clough, 196 U. S. 364 [1905]; Hyatt *v.* New York ex rel. Corkran, 188 U. S. 691 [1903]. *See also* Pettibone *v.* Nichols, 203 U. S. 192 [1906].

[2] South Carolina *v.* Bailey, 289 U. S. 412, 421 [1933], citing Munsey *v.* Clough, 196 U. S. 364 [1905]; Illinois ex rel. McNichols *v.* Pease, 207 U. S. 100 [1907].

The constitutionally required surrender is not to be interfered with by habeas corpus upon speculations as to what ought to be the result of a trial; the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried.[1] Nor is it proper thereby to inquire into the motives controlling the action of the governors of the demanding and surrendering States.[2] Matters of defense, e. g., the running of the statute of limitations, cannot be heard on habeas corpus, but must be heard and decided at the trial, by the courts of the demanding State.[3] The Federal courts have discretion whether to discharge a person upon habeas corpus in advance of his trial,[4] especially when it is not an urgent case involving either the authority and operations of the General Government or the obligations of this country to or its relations with foreign nations.[5]

[1] Drew *v.* Thaw, 235 U. S. 432 [1914]. *See also* South Carolina *v.* Bailey, 289 U. S. 412 [1933].

[2] Pettibone *v.* Nichols, 203 U. S. 192 [1906].

[3] Biddinger *v.* Police Comm. 245 U. S. 128 [1917]. *See also* Rodman *v.* Pothier, 264 U. S. 399 [1924].

[4] Ex parte Royall, 117 U. S. 241 [1886]. *See also* Ex parte Fonda, 117 U. S. 516 [1886].

[5] Cook *v.* Hart, 146 U. S. 183 [1892].

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Effect of Removal by Abuse of Process.

Except in the case of a fugitive surrendered by a foreign government [1] there is nothing in the Constitution, treaties, or laws of the United States which exempts an offender, brought before the courts of a State for an offense against its laws, from trial and punishment, even though brought from another State by unlawful violence, or by abuse of legal process.[2]

[1] United States *v.* Rauscher, 119 U. S. 407 [1886].

[2] Lascelles *v.* Georgia, 148 U. S. 537, 543 [1893], citing Ker *v.* Illinois, 119 U. S. 436, 444 [1886]; Mahon *v.* Justice, 127 U. S. 700, 707, 708, 712, 715 [1888]; Cook *v.* Hart, 146 U. S. 183, 190, 192 [1892]; Pettibone *v.* Nichols, 203 U. S. 192 [1906].

Article IV. Sec. 2. Citizens. Cl. 3. Fugitives from labor.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Object of the Clause.

The object of this clause was to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves as property in every State in the Union into which they might escape. Historically it is known that without this provision the Constitution would not have been adopted, and the Union could not have been formed.[1]

[1] Osborn *v.* Nicholson, 13 Wall. 654, 661 [1872].

Exclusive Power of Congress.

This clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave which no State law or regulation could in any way qualify, regulate, control, or restrain. The slave was not to be discharged from service or labor in consequence of any State law or regulation.[1] The act of Congress known as the fugitive-slave law was held constitutional.[2]

[1] Prigg *v.* Pennsylvania, 16 Pet. 539 [1842]. *See also* Jones *v.* Van Zandt, 5 How. 215, 229 [1847].

[2] Ableman *v.* Booth, 21 How. 506 [1859].

Powers of States.

A State statute providing a penalty for harboring a slave fugitive from service was held not to conflict with this clause. As the statute does not impede the master in the exercise of his rights, so neither does it interfere to aid and assist him.[1]

[1] Moore *v.* Illinois, 14 How. 13, 17 [1853].

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Article IV.
Sec. 3. New States and government of Territory, etc.
Cl. 1. Admission of States.

SECTION 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Power of Congress in General.

The power given to Congress by this clause is to admit new States to the Union—States equal in power, dignity, and competency to exert the residuum of sovereignty not delegated to the Federal Government. Congress cannot embrace in an enabling act conditions relating wholly to matters under States control, as, e. g., the location of the seat of State government.[1] But conditions against the introduction of liquor into Indian country contained in the Enabling Act for New Mexico, were valid, deriving their force from the power of Congress over the subject matter.[2] The constitutional authority of Congress to regulate commerce with Indian tribes is paramount to the State authority and not inconsistent with the equality due new States on admission.[3]

[1] Coyle *v.* Smith, 221 U. S. 559 [1911], holding invalid a restriction in the enabling act for Oklahoma on change of location of the State capital.
[2] United States *v.* Sandoval, 231 U. S. 28 [1914].
[3] Dick *v.* United States, 208 U. S. 340 [1908]; Ex parte Webb, 225 U. S. 663 [1912].

In Louisiana *v.* Mississippi,[1] the Court construed the enabling acts for the two States as not inconsistent in the matter of territory included, but stated that if they were repugnant, "it is enough to say that Congress, after the admission of Louisiana, could not take away any portion of that State and give it to the State of Mississippi."

[1] 202 U. S. 1, 40 [1906].

Where Congress in the Nevada Enabling Act of 1864 (13 Stat. 30) neglected to make provision for disposal of cases pending in the Supreme Court on appeal from the territorial courts, a subsequent act of 1865 (13 Stat. 440) supplying the omission was valid.[1]

[1] Freeborn *v.* Smith, 2 Wall. 160 [1865].

In the original draft of this section as reported by the Committee of Detail, there was included a clause as follows: "But the legislature may make conditions with the new States concerning the public debt which shall be then subsisting." This was stricken out "upon the view that wide latitude ought to be given to the Congress, and the denial of any attempt to impede the growth of the western country."[1]

[1] Boyd *v.* Nebraska ex rel. Thayer, 143 U. S. 135, 163 [1892].

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Effect of Admission.

SOVEREIGNTY IN GENERAL.*

The right of every new State to exercise all the powers of government which belong to and may be exercised by the original States of the Union must be admitted and remain unquestioned except so far as they are temporarily deprived of control over the public lands.[1] A new State doubtless acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property, throughout its limits, except where it has ceded exclusive jurisdiction to the United States.[2] When the enabling act contains no exclusion of jurisdiction as to crimes committed on Indian reservations by other than Indians, State courts are vested with jurisdiction.[3]

[1] Pollard *v.* Hagan, 3 How. 212, 223 [1845]. *See also* Permoli *v.* Municipality No. 1 of New Orleans, 3 How. 589, 609 [1845]; Coyle *v.* Smith, 221 U. S. 559 [1911]; McCabe *v.* Atchison, T. & S. F. R. Co. 235 U. S. 151 [1914]; Illinois Central R. Co. *v.* Illinois, 146 U. S. 387, 434 [1892]; Knight *v.* United Land Asso. 142 U. S. 161, 183 [1891]; Escanaba & L. M. Transp. Co. *v.* Chicago, 107 U. S. 678, 688 [1883]; Weber *v.* State Harbor Commrs. 18 Wall. 57, 65 [1873]; Texas *v.* White, 7 Wall. 700, 722 [1869]; Hawkins *v.* Bleakley, 243 U. S. 210, 217 [1917].

[2] Van Brocklin *v.* Anderson, 117 U. S. 151, 167 [1886].

[3] Draper *v.* United States 164 U. S. 240 [1896], following United States *v.* McBratney, 104 U. S. 621 [1882].

The States formed out of the Northwest Territory entered the Union unrestricted by the terms of the Northwest Territory Ordinance of 1787, except as adopted by State law.[1]

[1] Sands *v.* Manistee River Improv. Co., 123 U. S. 288, 296 [1887], holding that Michigan upon admission, possessed full sovereignty over its navigable waters except as restrained by the Constitution and laws of the United States. *See also* Withers *v.* Buckley, 20 How. 84, 92 [1858]; Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 9, [1888]; Cincinnati *v.* Louisville & N. R. Co., 223 U. S. 390 [1912]; Huse *v.* Glover, 119 U. S. 543 [1886].

Texas was admitted as a State on December 29, 1845, the date of the resolution (9 Stat. 108) admitting it to the Union and seizure of goods thereafter under the revenue laws of the old republic was without authority of law.[1]

[1] Calkin *v.* Cocke, 14 How. 227 [1852].

EFFECT ON EXISTING TREATY RIGHTS.

The admission of a Territory as a State does not extinguish fishing rights vested by treaty, as the United States, while it holds the country as a Territory, has power to create rights which will be binding on the States.[1] But a treaty with an Indian tribe give hunting rights on un-

* This clause as reported by the Committee of Detail (art. XVII) contained an express provision, that new States "shall be admitted on the same terms with the original States" which was struck out by a vote of 9 to 2 (see Documents on Formation of the Union, p. 480, 638).

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occupied lands of the United States, was held repealed by a statute passed by the State after admission regulating the killing of game.[2]

[1] United States *v.* Winans, 198 U. S. 371, 378 [1905]. *See also* New York ex rel. Kennedy *v.* Becker, 241 U. S. 556 [1916].
[2] Ward *v.* Racehorse, 163 U. S. 504 [1896].

CITIZENSHIP OF INHABITANTS.

Admission on an equal footing with the original States, in all respects whatever, involves the adoption as citizens of the United States of those whom Congress makes members of the political community, and who are recognized as such in the formation of the new State with the consent of Congress.[1]

[1] Boyd *v.* Nebraska ex rel. Thayer, 143 U. S. 135, 170 [1892].

JUDICIAL PROCEEDINGS.

Whenever a Territory is admitted into the Union as a State, the cases pending in the Territorial courts of a Federal character or jurisdiction are transferred to the proper Federal court, but all such as are not cognizable in the Federal courts are transferred to the tribunals of the new State. Pending cases, where the Federal and State courts have concurrent jurisdiction, may be transferred either to the State or Federal courts by either party possessing that option under the existing laws.[1]

[1] Baker *v.* Morton, 12 Wall. 150, 153 [1871]. But compare Benner *v.* Porter, 9 How. 235, 247 [1850], where the Court said: "It is to be regretted that proper provision has not always been made by Congress, upon a change of Government, in respect to the pending business in the Territorial tribunals, so as to remove all embarrassment and perplexity on the subject." *See also* Glaspell *v.* Northern P. R. Co., 144 U. S. 211, 218 [1892].

The concurrence of both Federal and State Governments would seem to be required in the transfer of the records, in cases of appropriate State legislation, from the old to the new government.[1] On the admission of Florida as a State, the State had no authority to enact that the records of the former Territorial court of appeals, existing by virtue of Federal laws, should become records of its own courts, or to provide by law for proceedings based thereon.[2] But where a case, begun in a United States Court of a Territory, is transferred to a State court under the operation of the enabling act and the new State constitution, the appellate procedure is governed by the State statutes and practice.[3]

[1] Benner *v.* Porter, 9 How. 235, 246 [1850].
[2] Hunt *v.* Palao, 4 How. 589 [1846].
[3] John *v.* Paullin, 231 U. S. 583 [1914].

TITLE TO AND CONTROL OF PROPERTY.

Unless otherwise declared by Congress, the title to every species of property owned by a Territory passes to the State upon admission.[1]

[1] Brown *v.* Grant, 116 U. S. 207, 212 [1886].

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Title to beds of rivers, if navigable, within a State, passed to the State on its admission to the Union. But title to beds of rivers not then navigable remained in the United States.[1]

[1] United States *v.* Utah, 283 U. S. 64 [1931], citing Shively *v.* Bowlby, 152 U. S. 1, 26, 27 [1894]; Scott *v.* Lattig, 227 U. S. 229, 242, 243 [1913]; Donnelly *v.* United States, 228 U. S. 243 260 [1913]; Oklahoma *v.* Texas, 258 U. S. 574, 583 [1922]; United States *v.* Holt State Bank, 270 U. S. 49, 55 [1926]; Massachusetts *v.* New York, 271 U. S. 65, 89 [1926].

New States have the same rights, sovereignty, and jurisdiction over the shores of navigable waters and the soils thereunder as the original States, and an act of Congress admitting a State into the Union providing "that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State, and of the United States, without any tax, duty, impost, or toll therefor, imposed by said State," conveys no more power over the navigable waters of such State to the Government of the United States than it possesses over the navigable waters of other States under the provisions of the Constitution.[1]

[1] Pollard *v.* Hagan, 3 How. 212, 223 [1845]. *See also* Coyle *v.* Smith, 221 U. S. 559 [1911]; Goodtitle ex dem. Pollard *v.* Kibbe, 9 How. 471 [1850]; Doe ex dem. Hallett & Waller *v.* Beebe, 13 How. 25 [1851].

Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no right or title below high-water mark.[1]

[1] Shively *v.* Bowlby, 152 U. S. 1 [1894]. *See also* Joy *v.* St. Louis, 201 U. S. 332 [1906].

Within the Jurisdiction of Another State.

This clause was article XVII of the draft submitted to the Constitutional Convention by the Committee of Detail on August 6, 1787. As reported it was limited to the admission of States "lawfully constituted or established within the limits of the United States", and further provided that "if a new State shall arise within the limits of any of the present States, the consent of the legislatures of such States shall be also necessary to its admission."

When this article was considered in the convention on August 29, Mr. Gouverneur Morris moved a substitute in the following language: "New States may be admitted by the legislature into this Union; but no new State shall be erected within the limits of any of the present States, without the consent of the legislature of such State, as well as of the general legislature." The case of Vermont which was already an independent State, although within the asserted limits of New York, was given consideration; one proposal was to insert the word "hereafter" in the Morris substitute after the words "shall be", and a second, to change "limits" to "jurisdiction"—both adopted. The case of Virginia, North Carolina, and Georgia, all of which claimed

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extensive western lands, and of Massachusetts which included the district of Maine, raised a question on the last clause of the Morris substitute, as to the propriety of requiring the consent of the original State to a separation, but the substitute with the amendments noted passed by a vote of 8 to 3. In the Committee of Style, the provision became article IV, section 3, in its present form and no question was raised upon consideration on September 15, beyond a suggestion to insert the words "or a State and part of a State" which was negatived as a mere verbal refinement. (See Documents on Formation of the Union, p. 480, 638–645, 711, 734.)

It may be noted that the punctuation of the final form might not unreasonably be construed to alter the recognized meaning and intention of the Morris substitute which went to the Committee of Style. The insertion of a semicolon before the language "nor any State be formed by the junction of two or more States, or parts of States" (added by the Committee) would normally restrict the phrase "without the consent of the legislatures of the States concerned" to the last and immediately adjacent clause "nor any State be formed by the junction", etc. In practice, however, such has not been the interpretation. Congress by act of February 4, 1791 (1 Stat. 189), specifically consented to the formation of the State of Kentucky "within the jurisdiction of the Commonwealth of Virginia", to which that State had agreed. Vermont was admitted on petition, ignoring the territorial claims of New York (1 Stat. 191). Tennessee was admitted in 1796 in accordance with the terms of the deed by which the Territory had been ceded to the United States in 1790 by North Carolina. Maine was admitted in 1819 (3 Stat. 544) following separation from Massachusetts under an act of that State. In the case of West Virginia the admission (12 Stat. 633) was based formally upon the consent of the legislature of Virginia, by act of May 13, 1862. The legislature referred to was the reorganized or "Pierpont Government" recognized by the President and Congress as the true State government of Virginia. (*See* Virginia *v.* West Virginia, 11 Wall. 39 [1871].)

Article IV.
Sec. 3. New States and government of Territory, etc.
Cl. 2. Control of territory or other public property.

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.

Territory or Other Property.

IN GENERAL.

Literally, the word "territory", as here used, signifies property, since the language is not "territory or property", but "territory or

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other property." There thus arises an evident difference between the words "the territory" and "a territory" of the United States. The former merely designates a particular part or parts of the earth's surface—the imperially extensive real estate holdings of the Nation; the latter is a governmental subdivision which happened to be called a "territory", but which quite as well could have been called a "colony" or a "province." [1]

[1] O'Donoghue v. United States, 289 U. S. 516, 537 [1933].

The express power of Congress under the Constitution to dispose of property belonging to the United States is not abridged or withdrawn by the Ninth or Tenth Amendment.[1] In legislating for the protection of its own property situated within the several States, the Government has power, analogous to the police power of a State, and may declare what are nuisances, as affecting such property, and provide for their abatement.[2]

[1] Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 330 [1936].
[2] Camfield v. United States, 167 U. S. 518 [1897].

ELECTRIC ENERGY.

The power of Congress to dispose of hydroelectric energy generated at the Wilson Dam (Tennessee Valley Authority) which had been constructed for national defense and navigation purposes under act of 1916 (39 Stat. 215, sec. 124), was held not limited to the small amount of surplus energy unavoidably created in the course of making munitions of war or of operating the navigation works, but extended to all energy available at the dam in excess of the Government's needs. The water power which was an inevitable incident of the construction of the dam, the right to convert it into electric energy, and the energy thus produced, constitute property belonging to the United States. The method adopted by Congress for its disposal must be appropriate to the particular property and must be adopted in the public interest as distinguished from private and personal ends.[1]

[1] Ashwander v. Tennessee Valley Authority, 297 U. S. 288 [1936].

PUBLIC LANDS.

Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States. Conquered territory, however, is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined; but if a nation is entirely subdued, or in case it be destroyed and ceases to exist, the right of occupation becomes permanent and the title vests absolutely in the conqueror.[1]

[1] United States v. Huckabee, 16 Wall. 414, 434 [1873], holding that purchasers from the United States of property bought by the Confederate Government and captured by the United States obtained a good title.

No appropriation of public lands can be made for any purpose but by authority of Congress;[1] but Congress may delegate to State

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legislature the making of additional regulations respecting the disposal of and acquiring title to public lands.[2]

[1] United States *v.* Fizgerald, 15 Pet. 407, 521 [1841]. *See also* California *v.* Deseret Water, Oil & Irrig. Co., 243 U. S. 415 [1917]; Utah Power Light Co., *v.* United States 243 U. S. 389 [1917].

[2] Butte City Water Co. *v.* Baker, 196 U. S. 119, 126 [1905].

The power of Congress over the public lands has been held further to extend to and include—

(1) Power to prescribe the times, conditions, and mode of transferring such land or any part of it, and designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise.[1] For many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may acquire rights in them. A State cannot, consistently with this provision, exercise the power of eminent domain over lands of the United States within the State [2] or tax property of the United States.[3]

(2) Power to declare the dignity and effect of titles emanating from the United States; the whole legislation of the Federal Government, in reference to public lands, declares the patent the superior and conclusive evidence of legal title; upon its issuance the fee passes to the grantee and he is entitled to recover the possession in ejectment.[4] A State has no power to declare any title less than a patent valid against a claim of the United States to the land, or against a title held under a patent granted by the United States.[5]

(3) Determination of the validity of grants obtained prior to the acquisition of territory by the United States; the courts are concluded by the action of Congress.[6]

(4) Power to exempt from prior-contracted debts lands acquired under the homestead laws.[7]

(5) Power to make grants of land below high-water mark of navigable waters in a Territory, when necessary in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.[8]

(6) Power to withdraw land from settlement, without consent of the State in which located, and to prohibit grazing thereon.[9] The power of the President to withdraw public lands from entry has been so long exercised and recognized by Congress as to be equivalent to a grant of power.[10]

(7) Power to revest in the United States title to lands granted to railroad companies, upon violation of conditions of grant.[11]

(8) Power to prevent unlawful occupation.[12]

(9) Reclamation.[13]

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(10) Lease; the words "dispose of" are not limited to sale. Disposal must be left to discretion of Congress.[14]

[1] Gibson *v.* Chouteau, 13 Wall. 92, 99 [1872]. *See also* Irvine *v.* Marshall, 20 How. 558 [1858]; Emblem *v.* Lincoln Land Co., 184 U. S. 660, 664 [1902].

[2] Utah Power & Light Co. *v.* United States, 243 U. S. 389 [1917]. *See also* United States *v.* Chicago, 7 How. 185, 194 [1849].

[3] Wisconsin C. R. Co. *v.* Price County, 133 U. S. 496 [1890]. *See also* Pollard *v.* Hagan, 3 How. 212, 224 [1845]; McGoon *v.* Scales, 9 Wall. 23 [1870]; Gillespie *v.* Oklahoma, 257 U. S. 501 [1922].

[4] Bagnell *v.* Broderick, 13 Pet. 435, 450 [1839]. *See also* Field *v.* Seabury, 19 How. 323, 332 [1857].

[5] Wilcox *v.* Jackson ex dem. M'Connel, 13 Pet. 498, 516 [1839].

[6] Tameling *v.* United States Freehold & Emigration Co., 93 U. S. 644 663 [1877]. *See also* United States *v.* Maxwell Land-Grant Co., 121 U. S. U. S. 325, 366 [1887].

[7] Ruddy *v.* Rossi, 248 U. S. 104 [1918], upholding R. S. 2296.

[8] Shively *v.* Bowlby, 152 U. S. 1, 48 [1894]. *See also* McGilvra *v.* Ross, 215 U. S. 70 [1909].

[9] Light *v.* United States, 220 U. S. 523 [1911]. *See also* Hutchins *v.* Low, 15 Wall. 77 [1873].

[10] United States *v.* Midwest Oil Co., 236 U. S. 459 [1915].

[11] Oregon & C. R. Co. *v.* United States, 243 U. S. 549 [1917].

[12] Camfield *v.* United States, 167 U. S. 518, 525 [1897]. *See also* Jourdan *v.* Barrett, 4 How. 169 [1846]; United States *v.* Waddell, 112 U. S. 76 [1884].

[13] United States *v.* Hanson, 167 Fed. 881 [1909]. *See also* Kansas *v.* Colorado, 206 U. S. 46, 91 [1907].

[14] United States *v.* Gratiot, 14 Pet. 526, 538 [1840].

Territories.

IN GENERAL.

While it has been said that the power of governing and of legislating for a Territory is the inevitable consequence of the right to acquire and to hold territory,[1] this clause has been considered the foundation upon which the Territorial governments rest.[2]

[1] Serè *v.* Pitot, 6 Cr. 332, 336 [1810].

[2] United States *v.* Gratiot, 14 Pet. 526, 537 [1840]. *See also* Downes *v.* Bidwell, 182 U. S. 244, 267 [1901]; De Lima *v.* Bidwell, 182 U. S. 1, 196 [1901]. *Cf.* United States *v.* Kagama, 118 U. S. 375, 380 [1886].

In the Territories, Congress has the entire dominion and sovereignty, national and local, Federal and State, and has full legislative power over all subjects upon which the legislature of a State might legislate within the State.[1] It may legislate directly in respect to the local affairs of a Territory, or it may transfer the power to a legislature elected by the citizens thereof.[2]

[1] Simms *v.* Simms, 175 U. S. 162, 168 [1899]. *See also* United States *v.* McMillan, 165 U. S. 504, 510 [1897]; El Paso & N. E. R. Co. *v.* Gutierrez, 215 U. S. 87 [1909]; First Nat. Bank of Brunswick *v.* Yankton County, 101 U. S. 129, 133 [1880].

[2] Binns *v.* United States, 194 U. S. 486, 491 [1904]. *See also* Serè *v.* Pitot, 6 Cr. 332, 336 [1810]; Murphy *v.* Ramsey, 114 U. S. 15, 44 [1885].

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Without any express reservation, Congress has the power to amend the acts of the Territorial legislatures. Such a power is an incident of sovereignty, and continues until granted away. 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.[1] There can be no annulment of a Territorial statute by implication.[2]

[1] First Nat. Bank of Brunswick *v.* Yankton County, 101 U. S. 129, 133 [1880]. *See also* United States *v.* McMillan, 165 U. S. 504, 510 [1897]; Snow *v.* United States ex rel. Hempstead, 18 Wall. 317, 319 [1873]; Miners' Bank *v.* Iowa, 12 How. 1 [1852]; Atchison, T. & S. F. R. Co. *v.* Sowers, 213 U. S. 55 [1909]; Utter *v.* Franklin, 172 U. S. 416, 423 [1899]; Church of Jesus Christ of L. D. S. *v.* United States, 136 U. S. 1, 47 [1890]; Thompson *v.* Utah, 170 U. S. 343 [1898].

[2] Cope *v.* Cope, 137 U. S. 682, 686 [1891].

APPLICATION OF FEDERAL CONSTITUTION.

The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of Congress.[1] Where the Constitution has been once formally extended by Congress to the Territories, neither Congress nor the Territorial legislature can enact laws inconsistent therewith.[2]

[1] Murphy *v.* Ramsey, 114 U. S. 15, 44 [1885].

[2] Downes *v.* Bidwell, 182 U. S. 244, 271 [1901]. *See also* Rassmussen *v.* United States, 197 U. S. 516 [1905]; Interstate Commerce Commission *v.* United States ex rel. Humboldt S. S. Co. 224 U. S. 474 [1912].

But the power to govern territory does not require that Congress enact for ceded territory, not made a part of the United States by congressional action, a system of laws which shall include the right of trial by jury; and the Constitution does not, without legislation and of its own force, carry such right to territory so situated.[1]

[1] Dorr *v.* United States, 195 U. S. 138, 149 [1904]. *See also* Balzac *v.* Porto Rico, 258 U. S. 298 [1922]. *Cf.* Rassmussen *v.* United States, 197 U. S. 516 [1905].

LEGISLATIVE POWER OF A TERRITORY.*

A Territorial legislature has all the legislative power except as limited by the Constitution of the United States and the organic act and the laws of Congress appertaining thereto.[1] Congress by act of 1886 (24 Stat. 170), prohibited the passage by Territorial legislatures of local or special laws on enumerated subjects. Aside from these, the legislative power covers the domestic relations, the settlement

* With the admission of Arizona and New Mexico in 1912, the general legislation of Congress relating to the Territories ceased to have much practical application. Specific legislation has been enacted with reference to the existing territories of Alaska and Hawaii.

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of estates, and all other matters which, within the limits of a State, are regulated by the laws of the State only.[2] It includes the right to pass uniform laws for the assessment and collection of taxes, and a Territorial statute under which it is competent for the taxing authorities of an organized county to levy and collect taxes on personal property situated within the attached reservations of Indians, and belonging to other persons than Indians, is valid.[3]

[1] Walker *v.* New Mexico & S. P. R. Co., 165 U. S. 593, 604 [1897]. *See* R. S. 1851.

[2] Simms *v.* Simms, 175 U. S. 162, 163 [1899].

[3] Wagoner *v.* Evans, 170 U. S. 588, 591 [1898]. *See also* Thomas *v.* Gay, 169 U. S. 264 [1898].

TERRITORIAL COURTS.

These 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 is conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States.[1] It is within the competency of Congress either to define directly, by their own act, the jurisdiction of the courts created by them or to delegate the authority requisite for that purpose to the Territorial government; and by either proceeding to permit or to deny the transfer of any legitimate power or jurisdiction previously exercised by the courts of the provisional government to the tribunals of the government they were about to substitute for the Territory in lieu of the temporary or provisional government.[2] The Territorial governments are legislative governments, and their courts legislative courts; Congress, in the exercise of its powers in the organization and government of the Territories, combines the powers of both the Federal and State authorities.[3]

American Ins. Co. *v.* Canter, 1 Pet. 511, 546 [1828]. *See also* United States *v.* McMillan, 165 U. S. 504, 510 [1897]; Clinton *v.* Englebrecht, 13 Wall. 434, 447 [1872]; The "Coquitlam" *v.* United States, 163 U. S. 346 [1896]. O'Donoghue *v.* United States, 289 U. S. 516, 535 [1933].

[2] Leitensdorfer *v.* Webb, 20 How. 176, 182 [1858].

[3] Benner *v.* Porter, 9 How. 235, 242 [1850].

Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the General and of a State government.[1]

[1] American Ins. Co. *v.* Canter, 1 Pet. 511, 545 [1828].

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Sec. 4.—Form of State Government

Article IV. Sec. 4. Form of State government.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Republican Form of Government.

IN GENERAL.

It is well settled that questions arising under the present clause are political, not judicial, in character and thus are for the consideration of the Congress and not the courts.[1]

[1] Ohio ex rel. Bryant *v.* Akron Metropolitan Park District, 281, U. S. 74, 80 [1930], citing Pacific States Teleph. & Teleg. Co. *v.* Oregon, 223 U. S. 118 [1912]; O'Neill *v.* Leamer, 239 U. S. 244, 248 [1915]; Ohio ex rel. Davis *v.* Hildebrandt, 241 U. S. 565 [1916]; Mountain Timber Co. *v.* Washington, 243 U. S. 219, 234 [1917]. *See also* Marshall *v.* Dye, 231 U. S. 250 [1914]; Highland Farms Dairy *v.* Agnew, 300 U. S. 608 [1937].

The clause cannot be availed of, in connection with the Fourteenth Amendment, to give the courts jurisdiction to revise the determination of the General Assembly of a State in an election contest when such function is by the State constitution and laws committed to the legislature exclusively.[1]

[1] Taylor *v.* Beckham, 178 U. S. 548 [1900].

In the exercise of this power, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no act be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.[1]

[1] Texas *v.* White, 7 Wall. 700, 729 [1869].

No particular government is designated by the clause as republican. Neither is the exact form to be guaranteed, in any manner especially designated. The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner especially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is therefore to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable

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evidence of what was republican in form, within the meaning of that term as employed in the Constitution.[1]

[1] Minor v. Happersett, 21 Wall. 162, 175 [1875].

The distinguishing feature of a republican form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.[1]

[1] Duncan v. McCall 139 U. S. 449, 461 [1891].

DELEGATION OF LEGISLATIVE FUNCTIONS AS AFFECTING REPUBLICAN FORM.

The question whether the initiative and referendum preserve to a State a republican form of government is a political one and not judicial, and is for Congress and not for the courts to determine.[1]

[1] Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118 [1912]. *See also* Kiernan v. Portland, 223 U. S. 151 [1912]; Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565 [1916].

The determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts and taking it entirely away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which the United States are bound to guarantee to every State in the Union.[1] The propriety of the delegation of authority to a district court in the matter of the formation of a drainage district is a State question.[2] A statute changing the boundaries of a school district, giving to the new district the property which had belonged to the former district, and requiring the new district to assume and pay the debts and obligations of the old district, is compatible with a republican form of government, even if it be admitted that this section applies to the creation of, or the powers or rights of property of, the subordinate municipalities of the State.[3]

[1] Forsyth v. Hammond, 166 U. S. 506, 519 [1897].

[2] O'Neill v. Leamer, 239 U. S. 244 [1915]. *See also* Houck v. Little River Drainage Dist., 239 U. S. 254 [1915]; Michigan C. R. Co. v. Powers, 201 U. S. 245 [1906].

[3] Attorney General ex rel. Kies v. Lowrey, 199 U. S. 233 [1905].

CONFLICTING CLAIMS TO OFFICE OF GOVERNOR.

The enforcement of the guaranty to every State of a republican form of government belongs to the political department, and cannot

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be said by the courts to have been denied by the action of the general assembly in a contest for the office of governor.[1]

[1] Taylor v. Beckham, 178 U. S. 548, 578 [1900].

Protection Against Domestic Violence.

It rests with Congress to determine upon the means proper to be adopted to protect a State against domestic violence. The act of February 28, 1795 (1 Stat. 424), was valid, which conferred the power of deciding whether an exigency had arisen in which the Government of the United States is bound to interfere, on the President.[1]

[1] Luther v. Borden, 7 How. 1, 42 [1849].

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ARTICLE V

MODE OF AMENDMENT

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ARTICLE V

Article V. Mode 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.

In General.

This article does not purport to delegate any governmental power to the United States, nor to withhold any from it; it is a grant of authority by the people to Congress, and not to the United States.[1]

[1] United States v. Sprague, 282 U S. 716 733 [1931].

The adoption by both Houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution, sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. None of the resolutions whereby prior amendments were proposed contained such a declaration.[1]

[1] Rhode Island v. Palmer (National Prohibition Cases), 253 U. S. 350 [1920].

* Art. I, sec. 9, 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. Art. I, sec. 9, clause 4: No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

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Art. V.—Mode of Amendment

Scope of Amending Power.

The equal representation clause of this article constitutes a limitation upon the power of amendment and has no relation to a case of exercise by the Senate of its power to judge of elections.[1]

[1] Barry *v.* United States ex rel. Cunningham, 279 U. S. 597, 615 [1929].

In the case of the Nineteenth Amendment the argument was advanced that the subject matter of the amendment was beyond the amending power intended by this article, in that so great an addition to the electorate, if made without a State's consent, would destroy its autonomy as a political body. The argument was summarily rejected, on the basis of the Fifteenth Amendment, which had been recognized and acted on for half a century.[1]

[1] Leser *v.* Garnett, 258 U. S. 130 [1922].

Proposals.

The two-thirds vote in each House which is required in proposing an amendment is a vote of two-thirds of the Members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent.[1]

[1] Rhode Island *v.* Palmer (National Prohibition Cases), 253 U. S. 350 [1920], citing Missouri P. R. Co. *v.* Kansas, 248 U. S. 276 [1919], which held to like effect with respect to the two-thirds vote required to override a veto.

"An examination of article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments. Passing a provision long since expired, it subjects this power to only two restrictions: one that the proposal shall have the approval of two-thirds of both Houses, and the other excluding any amendment which will deprive any State, without its consent, of its equal suffrage in the Senate. A further mode of proposal—as yet never invoked—is provided, which is, that on the application of two-thirds of the States Congress shall call a convention for the purpose." [1]

[1] Dillon *v.* Gloss, 256 U. S. 368, 373 [1921].

The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition or adoption of amendments to the Constitution.[1]

[1] Hollingsworth *v.* Virginia, 3 Dall. 378 [1798], holding the 11th Amendment validly proposed though the resolution was not presented to the President.

Duration of Proposals.

"The proposal for the Eighteenth Amendment is the first in which a definite period for ratification was fixed. Theretofore 21 amendments had been proposed by Congress and 17 of these had been ratified by the legislatures of three-fourths of the States—some within a single year after their proposal and all within 4 years. Each

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of the remaining four had been ratified in some of the States, but not in a sufficient number. Eighty years after the partial ratification of one, an effort was made to complete its ratification, and the Legislature of Ohio passed a joint resolution to that end, after which the effort was abandoned. Two, after ratification in one less than the required number of States, had lain dormant for a century. * * *" [The other proposing an amendment to protect slavery, was generally forgotten after the Thirteenth Amendment.]

"We do not find anything in the article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. * * * We conclude that the fair inference or implication from article V is that the ratification must be within some reasonable time after the proposal."[1]

[1] Dillon v. Gloss, 256 U. S. 368, 371, 374 [1921], holding that Congress could validly declare, in the resolution proposing the 18th Amendment, that it should be inoperative unless ratified within 7 years.

Ratification.

Under this article, a proposed amendment can be ratified by two methods only—by the legislatures of three-fourths of the States or by conventions in three-fourths of the States.[1] Congress functions as the delegated agent of the people and the choice between the two modes of ratification is placed solely in it, and this article cannot be construed as requiring that changes detracting from the liberty of the citizen, distinguished from changes in the character of Federal means or machinery, shall be referred to conventions.[2]

[1] Hawke v. Smith, 253 U. S. 221, 226 [1920].

[2] United States v. Sprague, 282 U. S. 716 [1931]; Hawke v. Smith, 253 U. S. 221, 226 [1920].

"When proposed in either mode amendments to be effective must be ratified by the legislatures, or by conventions, in three-fourths of the States, 'as the one or the other mode of ratification may be proposed by the Congress.' Thus the people of the United States,

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by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several States and be ratified in three-fourths of them. The plain meaning of this is (*a*) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (*b*) that ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all." [1]

[1] Dillon *v.* Gloss, 256 U. S. 368, 374 [1921].

State legislatures in ratifying amendments to the Federal Constitution act, *quoad hoc*, as Federal agencies; their function transcends any limitation sought to be imposed by the people of a State.[1]

[1] Hawke *v.* Smith (no. 1), 253 U. S. 221 [1920]; Rhode Island *v.* Palmer (National Prohibition Cases), 253 U. S. 350 [1920]; Leser *v.* Garnett, 258 U. S. 130 [1922]. *See also* Smiley *v.* Holm, 285 U. S. 355, 365 [1932].

The term "legislature" as used here means the deliberative, representative bodies that make the laws for the people of the respective States; and (as to the ratification of the Nineteenth Amendment) the Ohio constitution in requiring a referendum is inconsistent with the Constitution.[1]

[1] Hawke *v.* Smith (nos. 1 and 2), 253 U. S. 221, 231 [1920].

It was suggested in Leser *v.* Garnett,[1] that any possible doubt as to the valid adoption of an amendment, because of alleged violation of legislative procedure in two States, would be rendered immaterial by a subsequent ratification by two other States. But it was further stated that the official notice of ratification to the Secretary of State was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts.

[1] 258 U. S. 130 [1922].

Effective Date of Amendment.

The date of the consummation of the ratification of an amendment to the Federal Constitution, which is, by its own terms, to go into effect 1 year after being ratified, and not the date of the proclamation of the Secretary of State, is controlling upon the question when such amendment becomes operative.[1]

[1] Dillon *v.* Gloss, 256 U. S. 368 [1921], holding that the 18th Amendment became a part of the Constitution on January 16, 1919—not January 29, when ratification was proclaimed—and therefore effective on January 16, 1920.

Challenge by Private Individuals.

Fairchild *v.* Hughes,[1] was a proceeding to have the Nineteenth Amendment declared void, which the court held could not be instituted by a private citizen in the Federal courts.

[1] 258 U. S. 126 [1922].

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ARTICLE VI

MISCELLANEOUS PROVISIONS

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MISCELLANEOUS PROVISIONS

ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

Article VI. Miscellaneous provisions. Cl. 1. Validity of debts and engagements.

Nothing is more clear upon reason or general law than the doctrine that revolutions in government have, or rather ought to have, no effect whatsoever upon private rights or contracts, or upon the public obligations of nations.[1]

[1] Story, Const. v. 2, sec. 1833, citing Terrett *v.* Taylor, 9 Cr. 43, 50 [1815].

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.

Article VI. Cl. 2. Supreme law.

Supremacy of the Constitution.

IN GENERAL.

The Constitution was formed mainly to secure union and harmony and for this purpose it was necessary that in the sphere of action assigned to the National Government it should be supreme.[1] It was intented to frame a paramount government, sovereign in its sphere, as distinguished from a league or compact.[2] To this end it was necessary to make the Constitution the paramount law of the land.[3] This necessity, arising from the nature of the Federal Government, is reenforced by the specific declaration of article VI.[4] The Constitution is supreme over all the departments of the National Government and, to the extent of the powers delegated there, over all who made themselves parties to it, States as well as persons.[5]

[1] Ableman *v.* Booth, 21 How. 506, 517 [1859].
[2] Legal Tender Cases, 12 Wall. 457, 533 [1871].
[3] Prigg *v.* Pennsylvania, 16 Pet. 539, 628 [1842].
[4] McCulloch *v.* Maryland, 4 Wheat. 316, 405 [1819].
[5] Martin *v.* Hunter, 1 Wheat. 304, 363 [1816]; Dodge *v.* Woolsey, 18 How. 331 [1856]. *See also* New Jersey *v.* Wilson, 7 Cr. 164 [1812]; Terrett

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v. Taylor, 9 Cr. 43 [1815]; Pollard v. Kibbe, 14 Pet. 353, 417 [1840]; United States ex rel. Von Hoffman v. Quincy, 4 Wall. 535 [1867]; Taylor v. Taintor, 16 Wall. 366 [1873]; Kohl v. United States, 91 U. S. 367, 372 [1876]; Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29 [1875]; Farrington v. Tennessee, 95 U. S. 679, 685 [1878]; Pensacola Teleg. Co. v. Western U. Teleg. Co., 96 U. S. 1 [1878]; In re Debs, 158 U. S. 564, 578 [1895].

Nonuser, for a considerable length of time, of a power under the Constitution does not weaken that power when asserted by Congress.[1]

[1] Pollock v. Farmers' Loan & T. Co., 158 U. S. 601, 629 [1895].

CONFLICT WITH FEDERAL LAWS.

"It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

"Between these alternatives, there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. * * *

"It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank." [1]

[1] Marbury v. Madison, 1 Cr. 137, 177, 180 [1803].

No act of Congress is of any validity which does not rest on authority conferred by the Constitution.[1]

[1] United States v. Germaine, 99 U. S. 508, 510 [1879].

The laws of the United States are supreme within the meaning of this clause only when made in conformity with the Constitution, and an act of Congress repugnant to the Constitution is void. While the presumption is always in favor of the constitutionality of a legislative act, and the power to declare a statute void will never be exercised except in a very clear case, yet it is not only the right, but the duty, of the judiciary to pass upon the validity of statutes and to declare them void when their repugnancy to the Constitution is apparent.[1]

[1] Marbury v. Madison, 1 Cr. 137, 176 [1803]; Hylton v. United States, 3 Dall. 171, 175 [1796]; Ableman v. Booth, 21 How. 506, 520 [1859]; Legal Tender Cases, 12 Wall. 457, 531 [1871]; United States v. Harris, 106 U. S. 629, 635 [1883]; Hepburn v. Griswold, 8 Wall. 603, 610 [1870]; Fairbank v. United States, 181 U. S. 283, 285 [1901]; Scott v. Sandford, 19 How. 393 [1857]

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Cl. 2.—Supreme Law—The Constitution

For a list and statement of the several Federal laws held to have been in conflict with the Constitution, *see* page 1065.

CONFLICT WITH STATE LAWS.

In General.

It is to be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. This is a fundamental principle in our system of complex national polity.[1] The restraints of the Constitution upon the legislative powers of the States are effective only after they become members of the Union; acts passed by Texas before admission as a State cannot be questioned in the Supreme Court as repugnant to the Constitution.[2]

[1] Hauenstein *v.* Lynham, 100 U. S. 483, 490 [1880]; Prigg *v.* Pennsylvania, 16 Pet. 539, 628 [1842].
[2] League *v.* De Young, 11 How. 185, 203 [1851].

Where a State law is assailed as repugnant to the Constitution of the United States, and on its face such act is seemingly within the power of the State to adopt, but its necessary effect and operation is to usurp a power granted by the Constitution to the Government of the United States, it must follow, from the paramount nature of the Constitution that the act is void. In such a case the result of the test of necessary operation and effect is to demonstrate the want of power, because of the controlling nature of the limitations imposed on the States by the Constitution.[1]

[1] McCray *v.* United States, 195 U. S. 27, 60 [1904]; Northern Securities Co. *v.* United States, 193 U. S. 197, 344 [1904]; Ex parte Siebold, 100 U. S. 371, 398 [1880]; New York ex rel. Bank of Commerce *v.* Comrs. of Taxes & Assessments, 2 Black 620, 632 [1863]; Cohens *v.* Virginia, 6 Wheat. 260, 381 [1821]; McCulloch *v.* Maryland, 4 Wheat. 316, 405 [1819]; Gibbons *v.* Ogden, 9 Wheat. 1, 210 [1824].

The limitations and implied prohibitions upon the States, contained in the Constitution, must not be extended so far as to destroy the necessary powers of the State or prevent their efficient exercise,[1] the general principles in the Constitution being merely declaratory and directory and not intended to fetter and control.[2]

[1] Union P. R. Co. *v.* Peniston, 18 Wall. 5, 31 [1873].
[2] Cooper *v.* Telfair, 4 Dall. 14, 18 [1800].

Police Power.*

The mode or manner in which the police power may be exercised to safeguard the public health and the public safety is within the discretion of the State, subject, so far as the Federal power is concerned, only to the condition that no rules prescribed by a State, nor any regulation adopted by a local governmental agent acting under the sanction of State legislation, shall contravene the Constitution of

* *See also* pp. 149, 154, 174, 337, 719, 827, 969.

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the United States or infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures.[1]

[1] Jacobson *v.* Massachusetts, 197 U. S. 11, 25 [1905]; Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 556 [1902]; Lochner *v.* New York, 198 U. S. 45 [1905]. *See also* Olsen *v.* Smith, 195 U. S. 332, 344 [1904]; New York ex rel. Cutler *v.* Dibble, 21 How. 366 [1859]; Compagnie Française de Navigation à Vapeur *v.* State Board of Health, 186 U. S. 380, 393 [1902].

In determining the validity of such an enactment, the courts are bound to look at substance rather than form; and a police regulation found to be without a real and substantial relation to the objects properly within the police power, or a palpable invasion of constitutional rights, will be adjudged invalid.[1]

[1] Mugler *v.* Kansas, 123 U. S. 623, 661 [1887], upholding legislation prohibiting manufacture within the State of intoxicating liquors for beverage use. Specific instances of State laws found to be in conflict with the Constitution and therefore void, will be found under the pertinent sections, especially art. I, secs. 8 and 10, and amendment 14. *See also* cases, *infra*, p. 568 relating to conflicts between Federal law and State law.

EFFECT OF LAWS PASSED BY STATES IN INSURRECTION.

An ordinance of secession was, in point of law, an absolute nullity;[1] nor was any legislation of the Confederate Congress recognized as valid against the United States or against any of its citizens who, pending the war, resided outside the declared limits of the insurrectionary districts.[2] Efforts of States to depart from the Union, if successful, would have been, *pro tanto*, a destruction of the Constitution.[3] The invalidity of legislation in aid of the rebellion was a necessary consequence of its treasonable motive and purpose.[4]

[1] White *v.* Cannon, 6 Wall, 443, 450 [1868]. *See also* Hickman *v.* Jones, 9 Wall. 197 [1870]; Dewing *v.* Perdicaries, 96 U. S. 193, 195 [1878].
[2] Ford *v.* Surget, 97 U. S. 594, 604 [1878]; United States *v.* Keehler, 9 Wall. 83, 86 [1870].
[3] Keith *v.* Clark, 97 U. S. 454, 461 [1878].
[4] Daniels *v.* Tearney, 102 U. S. 415, 419 [1880].

As stated in Texas *v.* White,[1] "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 obligation 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."

[1] 7 Wall. 700, 726 [1869].

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Cl. 2.—Supreme Law—Acts of Congress

The distinction here suggested, as between laws passed in aid of the rebellion, and others, was further elaborated in Texas *v.* White,[1] "It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void." Again, in Horn *v.* Lockhart,[2] it was stated: "The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the National Government, and did not impair the rights of citizens under the Constitution."

[1] 7 Wall. 700, 733 [1869].

[2] 17 Wall. 570, 580 [1873].

See also Thomas *v.* Richmond, 12 Wall. 349, 357 [1871]; White *v.* Hart, 13 Wall. 646 [1872]; United States *v.* Home Ins. Co., 22 Wall. 99 [1875]; Taylor *v.* Thomas, 22 Wall. 479 [1875]; and Huntington *v.* Texas, 16 Wall. 402 [1873], where it was held that an act passed by Texas during the rebellion, repealing a requirement as to indorsement of State bonds by the governor, was valid as to bonds issued and used for a lawful purpose.

Supremacy of Laws of the United States.

IN GENERAL.

All constitutional laws are binding on the people of the United States, whether they consent to be bound by them or not. Every constitutional act of Congress is passed by the will of the people of the United States, expressed through their representatives, on the subject matter of the enactment, and when so passed it becomes the supreme law of the land and operates by its own force on the subject matter in whatever State or Territory it may happen to be. It cannot be successfully urged that such a law cannot operate upon the subject matter of its enactment without the express consent of the people of a new State where it may happen to be.[1]

[1] Pollard *v.* Hagan, 3 How. 212, 224 [1845]; Pensacola Teleg. Co. *v.* Western U. Teleg., 96 U. S. 1, 9 [1878]; Hepburn *v.* Griswold, 8 Wall. 603, 611 [1870]; Ableman *v.* Booth, 21 How. 506, 519 [1859].

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Cl. 2.—Supreme Law—Acts of Congress

CONFLICT WITH STATE LAWS.

In General.

The United States is a Government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.[1]

[1] Tennessee *v.* Davis, 100 U. S. 257, 263 [1880]; White *v.* Hart, 13 Wall. 646, 650 [1872]. *See also* Bunch *v.* Cole, 263 U. S. 250 [1923].

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 the unavoidable consequence of the supremacy declared by article VI.[1]

[1] McCulloch *v.* Maryland, 4 Wheat. 316, 436 [1819], holding unconstitutional the Maryland law taxing the operation in the State of a branch of the Bank of the United States.

The question whether a law be void for its repugnancy to the Constitution is at all times a question of great delicacy which ought seldom, if ever, to be decided in the affirmative in a doubtful case.[1] A State law will not be held unconstitutional if it can upon any other principle be correctly explained.[2] It is presumed that the legislature acts advisedly and with full knowledge of the situation.[3]

[1] Fletcher *v.* Peck, 6 Cr. 87, 128 [1810]; United States ex rel. Von Hoffman *v.* Quincy, 4 Wall. 535, 549 [1867].
[2] Butler *v.* Pennsylvania, 10 How. 402, 415 [1850]; Hooper *v.* California, 155 U. S. 648, 657 [1895].
[3] Chesapeake & P. Teleph. Co. *v.* Manning, 186 U. S. 238, 245 [1902].

"It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt."[1] The whole burden of proof lies on him who denies its constitutionality.[2]

[1] Ogden *v.* Saunders, 12 Wheat. 213, 270 [1827]. *See also* Calder *v.* Bull, 3 Dall. 386, 395 [1798]; Dartmouth College *v.* Woodward, 4 Wheat. 518, 625 [1819].
[2] Brown *v.* Maryland, 12 Wheat 419, 436 [1827].

A State law is not to be regarded as inconsistent with an act passed in the execution of a clear power under the Constitution unless the

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repugnancy or conflict is so direct and positive that the two acts cannot be reconciled or stand together.[1]

[1] Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 623 [1898]; Sinnot v. Davenport, 22 How. 227, 242 [1859].

Whenever any conflict arises between the enactments of a State and of Congress, those of the National Government must have supremacy until the validity of the different enactments can be finally determined by the tribunals of the United States. This is essential to the preservation of order and peace and the avoidance of forcible collision between the two governments.[1]

[1] United States v. Tarble, 13 Wall. 397, 407 [1872].

Determination of Validity of State Laws.

"In argument * * * it has been contended, that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the Constitution, is produced by the declaration, that the Constitution is the supreme law."[1] And this is so, even in a case where, until Congress acts, the State has plenary power over a subject.[2]

[1] Gibbons v. Ogden, 9 Wheat. 1, 210 [1824]; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 683 [1883].

[2] Wilson v. The Blackbird Creek Marsh Co., 2 Pet. 245 [1829]; Gilman v. Philadelphia, 3 Wall. 713 [1866].

An act of Congress or a treaty is supreme in every case, and the law of a State, though enacted in the exercise of powers not controverted, must yield to it.[1]

[1] Gibbons v. Ogden, 9 Wheat. 1, 210 [1824]; New York v. Miln, 11 Pet. 102, 137 [1837]; Smith v. Turner (Passenger Cases), 7 How. 283, 533 [1849]; Foster v. Master & Wardens of Port of New Orleans, 94 U. S 246, 247 [1877]; Walling v. Michigan, 116 U. S. 446, 455 [1886].

Interference With Federal Instrumentalities.

In General.—National banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal Government to discharge the duties, for the performance of which they were created.[1] At the same time the banks are governed in

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their daily course of business far more by the laws of the State than of the Nation. It is only when the State law incapacitates the banks from discharging their duties to the Government [2]—or tends to impair the utility of national banks as agents or instrumentalities of the United States, or interferes with the purposes of their creation [3]—that it becomes unconstitutional.

[1] Davis *v.* Elmira Sav. Bank, 161 U. S. 275, 283 [1896]; Easton *v.* Iowa, 188 U. S. 220, 238 [1903].

[2] First National Bank *v.* Kentucky, 9 Wall. 353, 362 [1870]; McClellan *v.* Chipman, 164 U. S. 347, 357 [1896].

[3] Waite *v.* Dowley, 94 U. S. 527 [1877]; Farmers' & M. Nat. Bank *v.* Dearing, 91 U. S. 29, 33 [1875].

The principle of the railroad cases noted below, page 574,[1] viz, that local taxation could not be allowed to hinder the efficient exercise by Government agencies of their services to the Government—has been extended to State control by other means than taxation. In Reagan *v.* Mercantile Trust Co.,[2] it was held that the fact that the Texas Pac. Ry. Co. was organized under Federal statute did not remove it from State control in the matter not only of taxes but of rates and other police regulations so far as intrastate business was concerned.

[1] Thomson *v.* Union P. R. Co., 9 Wall. 579 [1870]; Union P. R. Co. *v.* Peniston, 18 Wall. 5 [1873].

[2] 154 U. S. 413 [1894].

Where oleomargarine was furnished by the Federal Government to be served as food to the inmates of a national soldiers' home, the governor of such institution, acting under valid Federal authority, is not amenable to the laws of the State in which it is located, regulating the use and sale of oleomargarine, since the State has no constitutional power to interfere with the internal management of Federal institutions located within its limits.[1]

[1] Ohio *v.* Thomas, 173 U. S. 276 [1899].

TAXATION.*—"Unquestionably the taxing power of the States is very comprehensive and pervading, but it is not without limits. State tax laws cannot restrain the action of the National Government, nor can they abridge the operation of any law which Congress may constitutionally pass. They may extend to every object of value within the sovereignty of the State, but they cannot reach the administration of justice in Federal courts, nor the collection of the public revenue, nor interfere with any constitutional regulation of commerce." [1]

[1] Society for Savings *v.* Coite, 6 Wall. 594, 605 [1868]. *See also* Ward *v.* Maryland, 12 Wall. 418, 426 [1871].

* *See also* pp. 124, 130 relating to taxation of Government instrumentalities.

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Cl. 2.—Supreme Law—State Laws

A State cannot, in the exercise of the power of taxation, tax obligations of the United States;[1] or of a Territorial municipality, even after admission as a State.[2] But it may include the value of United States bonds of a decedent in measuring an inheritance tax.[3]

[1] Weston *v.* Charleston, 2 Pet. 449 [1829]; New York ex rel. Bank of Commerce *v.* Comrs. of Taxes & Assessments, 2 Black 620 [1863]; Home Ins. Co. *v.* New York, 134 U. S. 594 [1890]; Hamilton Mfg. Co. *v.* Massachusetts, 6 Wall. 632, 639 [1868]; Home Sav. Bank *v.* Des Moines, 205 U. S. 503 [1907]; New York ex rel. Bank of New York *v.* New York County, 7 Wall. 26, 30 [1869].

[2] Farmers' & M. Sav. Bank *v.* Minnesota, 232 U. S. 516 [1914].

[3] Plummer *v.* Coler, 178 U. S. 115 [1900]; Blodgett *v.* Silberman, 277 U. S. 1, 12 [1928].

The principle of exemption is, that the States cannot control the National Government within the sphere of its constitutional powers, for there it is supreme; and cannot tax its obligations for payment of money, issued for purposes within that range of powers, because such taxation necessarily implies the assertion of the right to exercise such control.[1]

[1] New York ex rel. Bank of N. Y. Nat. Bkg. Asso. *v.* Connelly, 7 Wall. 16, 25 [1869].

In upholding a State tax on checks issued by the treasurer of the United States, for interest accrued upon certain registered bonds of the United States, the court said: "Had the Government, in the absence of money for the immediate payment of interest upon its bonds, issued new obligations for the payment of this interest at a future day, it might well be claimed that these were not taxable, as the taxation of such notes would, to the extent of the tax, impair their value and negotiability in the hands of the holder. This was practically the case in The Banks *v.* The Mayor, 7 Wall. 16 [1869], where certificates were issued at a time when the Government had no money to pay its obligations, and made use of its credit to obtain further time. But where checks are issued payable immediately they merely stand in the place of coin, which may be immediately drawn thereon." [1]

[1] Hibernia Sav. & L. Soc. *v.* San Francisco, 200 U. S. 310, 315 [1906].

When the principal is absolutely immune from taxation, no valid tax can be laid on income arising therefrom.[1] Nor can such a tax be imposed indirectly to the stockholders on that part of the corporate dividends corresponding to the corporation's income which is not assessed (i. e., the income from tax-exempt Government bonds).[2] A State government may constitutionally impose an excise tax on corporations for the privilege of doing business in the corporate form, and measure the tax by the property or net income of the corporation, including tax-exempt United States securities or income derived therefrom.[3] The fundamental question is whether the assessment is

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to be regarded as a tax on property or on the privileges or franchise of the corporation.[4] In determining this question the Court will inquire independently, and is not bound by the designation of the tax in the State act or by the opinion of the State court as to its nature.[5]

[1] Gillespie *v.* Oklahoma, 257 U. S. 501, 505 [1922].
[2] Miller *v.* Milwaukee, 272 U. S. 713 [1927].
[3] Provident Inst. for Savings *v.* Massachusetts, 6 Wall. 611 [1868]; Society for Savings *v.* Coite, 6 Wall. 594 [1868]; Hamilton Mfg. Co. *v.* Massachusetts, 6 Wall. 632 [1868]; Home Ins. Co. *v.* New York, 134 U. S. 594 [1890].
[4] Society for Savings *v.* Coite, 6 Wall. 594 [1868]; Home Ins. Co. *v.* New York, 134 U. S. 594 [1890].
[5] Macallen Co. *v.* Massachusetts, 279 U. S. 620, 625 [1929].

Thus, where a so-called "license tax" upon insurance companies was measured by gross income (with certain exceptions, but specifically including interest on Government bonds) it was held to amount to a tax on the bonds themselves, and to be unconstitutional.[1]

[1] Northwestern Mut. L. Ins. Co. *v.* Wisconsin, 275 U. S. 136 [1927].

So, where the Massachusetts Legislature, having provided for a tax on corporations measured in part by net income excluding interest on nontaxable securities, passed an amendment which had the effect of repealing this exemption and of thereby imposing a burden on such securities, it was held that the purpose of the change was to tax the income of the tax-exempt securities.[1]

[1] Macallen Co. *v.* Massachusetts, 279 U. S. 620 [1929], Justices Stone, Holmes, and Brandeis dissenting. And *cf.* Educational Films Corporation *v.* Ward, 282 U. S. 379 [1931], where a New York statute laying a franchise tax on corporations at a specified rate on entire net income, was upheld as applied to income from copyright royalties. The Court there found that the tax was not aimed at copyrights—that the statute before the defining amendment was in general language broad enough to have included income from copyrights within the measure of the tax, and the legislature could not have had in mind the addition of such income to the measure of the tax, in the challenged act. This case is distinguished from Fox Film Corporation *v.* Doyal, 286 U. S. 123 [1932], in that the tax in the latter case was based on gross receipts.

Limitations of Doctrine.—The principle of the immunity of Federal instrumentalities from State taxation has inherent limitations: it is aimed at the protection of the operations of government,[1] and is not extended to anything lying outside or beyond governmental functions and their exertions.[2]

[1] McCulloch *v.* Maryland, 4 Wheat. 316, 436 [1819].
[2] Indian Motocycle Co. *v.* United States, 283 U. S. 570, 576 [1931].

In accordance with this principle, the following agencies or functions have been held instrumentalities which were immune from taxation by the States:

(1) Income tax, as applied to official salaries of Federal officers.[1]

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Cl. 2.—Supreme Law—State Laws

(2) Flat rate tax on telegraphic messages, as applied to messages sent by public officers on official business.[2]

(3) Property tax on ores mined by a lessee of restricted Indian lands, and in mass at the mine before payment of the Indian royalties.[3]

(4) Gross receipts tax on royalty interest as applied to royalties received by Indians from lands allotted to them and exempt by the Atoka Agreement from all taxation, the tax in this case being a lien on the royalty interest and in lieu of all other taxes.[4]

(5) Tax on inheritance of restricted Indian lands—where the determination of heirs was, under act of Congress, made by the Secretary of the Interior according to the local law.[5]

(6) Special assessment against purchaser of property from United States, on account of improvements accruing during ownership by United States.[6]

(7) Tax on dealers in gasoline for the privilege of selling, and measured at so many cents per gallon sold, as applied to sales to a Coast Guard vessel or veterans' hospital.[7] Similarly, an Alabama statute taxing the sale, or withdrawal for any use, was held not to be a tax on storage alone; but it was stated that even assuming such a construction, a tax upon anything so essential to the sale of the gasoline to the United States is as objectionable as would be a tax upon the sale itself.[8]

[1] Dobbins *v.* Erie County, 16 Pet. 435 [1842], holding a local tax act, as applied to the compensation of the master of a revenue cutter, to be in conflict with the law fixing that compensation.

[2] Western U. Teleg. Co. *v.* Texas, 105 U. S. 460, 464 [1882].

[3] Jaybird Min. Co. *v.* Weir, 271 U. S. 609 [1926]. This case proceeds upon the principle of the following cited cases: Choctaw, O. & G. R. Co. *v.* Harrison, 235 U. S. 292 [1915], holding invalid an occupation tax upon one holding a mining lease made in furtherance of an agreement by the United States that certain Indian coal lands should be mined and the royalties used for the Indians; Indian Territory Illuminating Oil Co. *v.* Oklahoma, 240 U. S. 522 [1916], holding that oil leases made by the Osage tribe could not be taxed by the State either directly or as represented by the capital stock of the corporation owning them; Gillespie *v.* Oklahoma, 257 U. S. 501 [1922], holding immune from State taxation the net income of a lessee from sale of his share of oil and gas received under leases of restricted Indian lands. *See also* Howard *v.* Gypsy Oil Co., 247 U. S. 503 [1918], and Large Oil Co. *v.* Howard, 248 U. S. 549 [1919], per curiam.

[4] Carpenter *v.* Shaw, 280 U. S. 363 [1930].

[5] Childers *v.* Beaver, 270 U. S. 555 [1926].

[6] Lee *v.* Osceola & L. River Road Improv. Dist., 268 U. S. 643 [1925].

[7] Panhandle Oil Co. *v.* Mississippi ex rel. Knox 277 U. S. 218 [1928.]

[8] Graves *v.* Texas Co., 298 U. S. 393, 401 [1936].

On the other hand, it is within the taxing power of a State—

(1) To tax premiums received by a foreign surety company upon bonds required by the United States.[1]

(2) To lay a franchise tax on corporations, measured by net income from all sources, and applicable to income from copyright royalties.[2]

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(3) To impose a privilege tax based on gross income and applicable to royalties from copyrights. It was held to constitute a direct charge upon the copyright royalties; and the decision therefore overruled Long *v.* Rockwood, 277 U. S. 142 [1928], which held that a State could not tax as income royalties for use of a patent issued by the United States. "It is thus apparent that the mere fact that a property right is created by statute to fulfill a governmental purpose does not make it nontaxable when it is held in private ownership and exercised for private advantage." [3]

(4) To tax lands under water, the property of a licensee under the Federal Water Power Act [4], distinguishing between the license as such and property owned and used in the exercise of the privilege for private business advantage.

(5) To lay an excise tax on gasoline sold to a contractor with the Federal Government and used to operate machinery in the construction of levees in aid of navigation of the Mississippi River.[5] The tax was "not laid upon the choice of means, the making of the contracts, the contracts themselves or any transaction to which the Federal Government is a party or in which it is immediately or directly concerned. Nor is the exaction laid or dependent upon the amounts, gross or net, received by the contractor." Any effect of the tax upon the Federal Government was therefore at most "consequential and remote" and not "necessary, immediate, or direct."[5]

[1] Fidelity & D. Co. *v.* Pennsylvania, 240 U. S. 319 [1916].
[2] Educational Films Corporation *v.* Ward, 282 U. S. 379 [1931].
[3] Fox Films Corporation *v.* Doyal, 286 U. S. 123 [1932].
[4] Susquehanna Power Co. *v.* State Tax Commission, 283 U. S. 291 [1931].
[5] Trinityfarm Constr. Co. *v.* Grosjean, 291 U. S. 466 [1934].

Direct Prohibition of State Taxes.—Tax immunity of governmental agencies may be secured directly. Congress may, in the exercise of powers incidental to the express powers conferred, make or authorize contracts with individuals or corporations for services to the Government; may grant aids by money or land in preparation for such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution; and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede their performance.[1] But a tax on the property of a railroad organized under act of Congress, in common with other similar property in the State, is not invalid.[2]

[1] Thomson *v.* Union Pac. R. Co., 9 Wall. 579, 588 [1870]; Santa Clara County *v.* Southern Pac. Co., 18 Fed. 385 [1883], affirmed in 118 U. S. 394 [1886]; Baltimore Shipbuilding & Dry Dock Co. *v.* Baltimore, 195 U. S. 375 [1904].
[2] Union P. R. Co. *v.* Peniston, 18 Wall. 5, 31 [1873].

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Cl. 2.—Supreme Law—Treaties

It is within the power of Congress to exempt from State taxation United States notes issued under acts of Congress and intended to circulate as money.[1]

[1] New York ex rel. Bank of New York *v.* New York County, 7 Wall. 26, 30 [1869].

AUTHORIZATION OF STATE TAXES.—The States may validly be authorized by act of Congress to tax national banks;[1] but the banks, their property, and their shares cannot be taxed under State authority except as Congress consents and then only in conformity with the restrictions attached to its consent.[2] Congressional restriction on the taxation of national bank shares is aimed against clear discriminations, and is designed to prevent unfriendly [3] competition with the banks in favor of a relatively material part of other moneyed capital employed in substantial competition,[4] either through investments in State or private banks, or, by way of loan, discount or otherwise, in notes, bonds, or other securities with a view to sale or repayment and reinvestment.[5] With this limitation, such taxation may even take a different form as between National and State banks.[6]

[1] Churchill *v.* Utica, 3 Wall, 573 [1866].

[2] Des Moines Nat. Bank *v.* Fairweather, 263 U. S. 103, 106 [1923]; Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664, 669 [1899]; First Nat. Bank *v.* Adams, 258 U. S. 362 [1922].

[3] Mercantile Nat. Bank *v.* New York, 121 U. S. 138, 155 [1887]; Des Moines Nat. Bank *v.* Fairweather, *supra*.

[4] First Nat. Bank *v.* Anderson, 269 U. S. 341 [1926]; New York ex rel. Williams *v.* Weaver, 100 U. S. 539 [1880]; Boyer *v.* Boyer, 113 U. S. 689, 701 [1885]; First Nat. Bank *v.* Chapman, 173 U. S. 205, 216 [1899]. *See also* First Nat. Bank *v.* Hartford, 273 U. S. 548 [1927].

[5] Mercantile Nat. Bank, *supra*, 157; Palmer *v.* McMahon, 133 U. S. 660, 667 [1890]; Talbott *v.* Silver Bow County, 139 U. S. 438, 447 [1891].

[6] Clement Nat. Bank *v.* Vermont, 231 U. S. 120 [1914].

CONFLICT WITH TERRITORIAL LAWS.

An act of Congress undertaking to legislate for the District of Columbia and the Territories of the United States would necessarily supersede a local Territorial law on the same subject.[1]

[1] El Paso & N. E. R. Co. *v.* Gutierrez, 215 U. S. 87 [1909].

Supremacy of Treaties.*

IN GENERAL.

While it is often stated in general terms that a treaty is "supreme law of the land",[1] a distinction between a treaty as a compact between independent nations (depending for its enforcement on the interest and honor of the contracting parties) and those provisions of a treaty which are in the nature of municipal law and enforceable as between private parties in the courts, was adverted to in Foster *v.* Neilson,[2] as follows: "A treaty is, in its nature, a contract between

* *See also* pp. 294, 389, 455 on the subject of treaties.

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two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."

[1] *See*, e. g., Fairfax *v.* Hunter, 7 Cr. 603, 627 [1813]; American Ins. Co. *v.* Canter, 1 Pet. 511, 542 [1828]; Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464, 493 [1823]; Strother *v.* Lucas, 12 Pet. 410, 439 [1838].

[2] 2 Pet. 253, 314 [1829]. *Also* cited in Chew Heong *v.* United States, 112 U. S. 536, 540 [1884]. *See also* United States *v.* The "Peggy," 1 Cr. 103, 109 [1801]; Chae Chan Ping *v.* United States, 130 U. S. 581, 600 [1889]; Pollard *v.* Kibbe, 14 Pet. 353, 412 [1840].

The question was considered at length in Edye *v.* Robertson[1] (Head Money Cases), and the Court thus summarized its views: "A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

[1] 112 U. S. 580, 598–599 [1884]. *Also* cited in Ex parte Cooper, 143 U. S. 472, 502 [1892].

Such a treaty the courts are bound to take judicial notice of, and to enforce in any appropriate proceeding the rights of persons growing out of it;[1] it constitutes a rule of decision in all courts.[2]

[1] United States *v.* Rauscher, 119 U. S. 407, 419 [1886].

[2] Strother *v.* Lucas, 12 Pet. 410, 439 [1838].

Treaties made by proper authority being law, courts of justice have no right to annul or disregard any of their provisions, unless they violate the Constitution. It is their duty to interpret and administer them according to their terms;[1] and in a broad and liberal spirit calculated to make for perpetual amity, so far as it can be done without sacrifice of individual rights or essential principles of personal liberty.[2] Nor can the Court go behind a treaty, duly executed and ratified, for the purpose of annulling its operation.[3]

[1] Doe ex dem. Clark *v.* Braden, 16 How. 635, 657 [1853].

[2] Tucker *v.* Alexandroff, 183 U. S. 424, 437 [1902].

[3] Fellows *v.* Blacksmith, 19 How. 366, 372 [1857].

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Cl. 2.—Supreme Law—Treaties

A treaty binds the Nation in the aggregate and all its subordinate authorities and judges, State as well as Federal.[1]

[1] Ware *v.* Hylton, 3 Dall. 199, 236 [1797].

If a treaty is violated by a general statute, it is a matter of international concern, which must be determined by treaty or by such other means as enables one State to enforce upon another the obligations of a treaty. A court has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the Government of the United States as a sovereign power chooses to disregard.[1] Nor can a citizen set up the breach of a treaty to avoid an obligation arising under it. The power to declare it void rests with the Government.[2]

[1] Botiller *v.* Dominguez, 130 U. S. 238, 247 [1889]. So, where the Court was considering the treaty of 1819 with Spain, it stated: Undoubtedly Congress was bound to provide such a tribunal as the treaty described. But if they failed to fulfill that promise, it is a question between the United States and Spain—United States *v.* Ferreira, 13 How. 40, 46 [1852].

[2] Ware *v.* Hylton, 3 Dall. 199, 236 [1797].

TREATIES WITH INDIANS.

A treaty is a solemn agreement between nations. The words "treaty" and "nation", however, are words of our own language, and have been applied to Indian tribes, thus treating such tribes as distinct political communities. The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.[1]

[1] Worcester *v.* Georgia, 6 Pet. 515, 558 [1832]. *See also* Talton *v.* Mayes, 163 U. S. 376, 382 [1896]; Holden *v.* Joy, 17 Wall. 211, 242 [1872].

The sovereignty thus inhering in the Indian tribes by virtue of which they are recognized as capable of making treaties, is not full political sovereignty but that of a separate people with the power of regulating their internal and social relations.[1] "[The Choctaw Nation] stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose * * * to exert its legislative power." [2]

[1] United States *v.* Kagama, 118 U. S. 375, 379 [1886].

[2] Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 655 [1890]. *See also* Stephens *v.* Cherokee Nation, 174 U. S. 445, 483 [1899].

Accordingly, it was held that an act of Congress granting right-of-way for a railroad through Indian lands which had been ceded by

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treaty was valid.[1] A criminal statute applying to Indian country supersedes a prior treaty with the tribe in conflict therewith.[2]

[1] Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641 [1890].

[2] Boudinot *v.* United States (Cherokee Tobacco), 11 Wall. 616, 621 [1871].

A State cannot interfere with the treaty rights of Indians. Even where a statute specifically declared, after providing for the assessment of taxes upon Indian lands and sale for nonpayment, that such sale should not "affect the right of occupancy of the Indians", it was held invalid.[1]

[1] The New York Indians, 5 Wall. 761 [1867], following The Kansas Indians, 5 Wall. 737; 757 [1867], where it was said "As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws."

However, it was held in Ward *v.* Race Horse,[1] that admission of Wyoming as a State abrogated *pro tanto* a treaty with certain Indians guaranteeing them the "right to hunt on the unoccupied lands of the United States, so long as game may be found thereon" and brought hunting by the Indians within the police power of the State. The repeal was effected by the subsequent inconsistent act authorizing the admission of Wyoming.

[1] 163 U. S. 504 [1896].

A stipulation in a treaty with an Indian tribe that laws forbidding the introduction of liquors into Indian country should apply to ceded territory, was held operative without legislation and binding in the courts, though the ceded territory was within an organized county of the State.[1]

[1] United States *v.* Lariviere (Forty-Three Gallons of Whiskey), 93 U. S. 188, 196 [1876].

On February 28, 1877, by treaty with the Sioux Indians, the Black Hills Reservation in Dakota was ceded to the United States; and where a party was in possession of a mining claim on that day, under the mining laws and customs he could, by adopting what had been done, date his rights from that day, and such location and improvements would give him the right of possession.[1]

[1] Noonan *v.* Caledonia Gold Min. Co., 121 U. S. 393 [1887].

Where a treaty provides in respect to Indian reservations that with certain exemptions no persons shall be permitted to "pass over, settle upon, or reside in the territory described", the location of a mining claim therein and a relocation 2 years after the opening of the reservation cannot be made the basis of a mineral patent as against one who located the same claim 4 months after the opening of the reservation and otherwise complied with the law.[1]

[1] Kendall *v.* San Juan Silver Min. Co., 144 U. S. 658 [1892], distinguishing Noonan *v.* Caledonia Gold Min. Co., 121 U. S. 393 [1887].

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Cl. 2.—Supreme Law—Treaties

CONFLICT WITH FEDERAL LAWS.

This provision of our Constitution has made treaties part of our municipal law. But it has not assigned to them any particular degree of authority in our municipal law, nor declared whether laws so enacted shall or shall not be paramount to laws otherwise enacted. No such declaration is made, even in respect to the Constitution itself. It is named in conjunction with treaties and acts of Congress as one of the supreme laws, but no supremacy is in terms assigned to one over the other. And when it became necessary to determine whether an act of Congress repugnant to the Constitution could be deemed by the judicial power an operative law, the solution of the question was found by considering the nature and objects of each species of law, and the authority from which each emanated, and the consequences of allowing or denying the paramount effect of the Constitution.[1]

[1] Taylor *v.* Morton, 23 Fed. Cas. No. 13799 [1855], affirmed 2 Black 481 [1863]. *See also* United States *v.* Arredondo, 6 Pet. 691 [1832]; United States *v.* Percheman, 7 Pet. 51 [1833].

"The effect of legislation upon conflicting treaty stipulations was elaborately considered in The Head Money Cases, and it was there adjudged 'that so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.' 112 U. S. 580, 599. This doctrine was affirmed and followed in Whitney *v.* Robertson, 124 U. S. 190, 195." [1]

[1] Chae Chan Ping *v.* United States (The Chinese Exclusion Case), 130 U. S. 581, 600 [1889], holding that the act of October 1, 1888, abrogated provisions of existing treaties excluding Chinese laborers.

"It is well settled that in case of a conflict between an act of Congress and a treaty—each being equally the supreme law of the land—the one last in date must prevail." [1]

[1] Hijo *v.* United States, 194 U. S. 315, 324 [1904]. *See also* Kelly *v.* Hedden, 124 U. S. 196 [1888]; Horner *v.* United States, 143 U. S. 570, 578 [1892]; Thomas *v.* Gay, 169 U. S. 264 [1898]; Lone Wolf *v.* Hitchcock, 187 U. S. 553 [1903].

By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date

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will control the other, provided always the stipulation of the treaty on the subject is self executing.[1]

[1] Whitney v. Robertson, 124 U. S. 190, 194 [1888]; United States v. Lariviere (Forty-Three Gallons of Whiskey), 108 U. S. 491, 496 [1887]; Rainey v. United States, 232 U. S. 310 [1914]; United States v. Lee Yen Tai, 185 U. S. 213, 220 [1902]; Horner v. United States, 143 U. S. 570 [1892].

The provisions of an act of Congress, passed in the exercise of its constitutional authority, if clear and explicit, must be upheld by the courts even in contravention of express stipulations in an earlier treaty.[1] Since repeals by implication are never favored, a later treaty will not be regarded as repealing an earlier statute by implication unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty.[2]

[1] Fong Yue Ting v. United States, 149 U. S. 698, 720 [1893]; Lem Moon Sing v. United States, 158 U. S. 538, 549 [1895].
[2] Johnson v. Browne, 205 U. S. 309, 321 [1907].

SUPREMACY OVER STATE LAWS, ETC.

The treaty-making power has been surrendered by the States and given to the United States, and treaties are as binding within the territorial limits of the States as they are elsewhere throughout the domain of the United States.[1]

[1] Baldwin v. Franks, 120 U. S. 678, 682 [1887].

In Ware *v.* Hylton,[1] it was said by Chase, J., that "a treaty can totally annihilate any part of the constitution of any of the individual States, that is contrary to the treaty", and "a treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State legislature can stand in its way. If the constitution of a State * * * must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act of the State legislature, must not be prostrate?"

[1] 3 Dall. 197, 236, 242 [1797].

In Society for the Propagation of the Gospel *v.* New Haven,[1] the Court having decided that the Society as a corporation was not disabled by the Revolution to hold lands in Vermont and that rights existing under the treaty of peace of 1794 were not divested by the War of 1812, the question arose of the effect of an intermediate act of Vermont of 1794 and the Court held: "* * * if the court had been correct in its opinion upon the first two points, it will follow, that the above act was utterly void, being passed in contravention of the treaty of peace, which, in this respect, is to be considered as the supreme law."

[1] 8 Wheat. 464, 493 [1823].

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Cl. 2.—Supreme Law—Treaties

A treaty stipulation guaranteeing for the citizens of each country, in the territory of the other, equality with the natives of rights and privileges in respect of protection and security of person and property, was not violated by a State statute which denied to a nonresident alien *wife* of a person killed within the State, the right to sue for wrongful death, although such right was afforded to native resident *relatives*,[1] The treaty in question having been amended in view of this decision, the question arose whether the new provision covered the case of death without fault or negligence in which, by the Pennsylvania Workmen's Compensation Act, compensation was expressly limited to resident parents; and held, it did not.[2]

[1] Maiorano *v.* Baltimore & R. R. Co., 213 U. S. 268 [1909].
[2] Liberato *v.* Royer, 270 U. S. 535 [1926].

The appropriate application of the part of the clause which confers the same supremacy on laws and treaties is to such acts of the State legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with or are contrary to the laws of Congress, made in pursuance of the Constitution or some treaty made under the authority of the United States. In every case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.[1] Since the treaty-making power is independent of and superior to the legislative power of the States, the meaning of treaty provisions liberally construed is not restricted by any necessity of avoiding possible conflict with State legislation, and, when so ascertained, must prevail over inconsistent State enactments.[2]

[1] Gibbons *v.* Ogden, 9 Wheat. 1, 210 [1824].
[2] Nielson *v.* Johnson, 279 U. S. 47 [1929].

It was at one time the view that the treaties of the United States could not affect the operation of the laws of the several States of the Union with respect to the inheritance of land (1 Op. Atty. Gen. 275). This view is not now tenable.[1] But a State law will not be considered overriden by a treaty, where to do so would place aliens on a better footing than citizens, unless that purpose is plainly expressed in the treaty.[2]

[1] Hauenstein *v.* Lynham, 100 U. S. 483, 489 [1880]; De Geofroy *v.* Riggs, 133 U. S. 258, 266, 267 [1890]; Sullivan *v.* Kidd, 254 U. S. 433 [1921]; Nielson *v.* Johnson, 279 U. S. 47 [1929].
[2] Todok *v.* Union State Bank, 281 U. S. 449 [1930], holding that a law of Nebraska, enacted after a treaty had been entered into between the United States and Sweden and Norway, providing for the establishment of homesteads with special exemptions from execution and forced sale, and inhibiting conveyances of homestead property by any instrument not joined in by both husband and wife, is not invalidated by the treaty as applied to a citizen of Norway who established a homestead in that State.

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Cl. 3.—Oath of Office

Judges Shall be Bound Thereby.

This clause contemplates that cases within the judicial cognizance of the United States, not only might, but would, arise in the State courts, in the exercise of their ordinary jurisdiction. The obligation of the clause, "is imperative upon the State judges, in their official, and not merely in their private, capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the State, but according to the constitution, laws and treaties of the United States—'the supreme law of the land.'" [1]

[1] Martin *v.* Hunter, 1 Wheat. 304, 340–341 [1816].

Article VI, Cl. 3. Oath of office.

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.

This is the last and closing clause of the Constitution, and inserted when the whole frame of Government, with the powers hereinbefore specified, had been adopted by the convention; and it was in that form, and with these powers, that the Constitution was submitted to the people of the several States for their consideration and decision.[1]

[1] Ableman *v.* Booth, 21 How. 506, 524 [1859].

The oath which might be exacted—that of fidelity to the Constitution—is prescribed, and no other can be required. Yet the legislature may superadd to the oath directed by the Constitution such other oath of office as its wisdom may suggest.[1]

[1] McCulloch *v.* Maryland, 4 Wheat. 316, 416 [1819].

Congress may not prescribe a test oath as a qualification for holding office, such an act being in effect an *ex post facto* law, and this is equally true of the State governments.[1]

[1] Ex parte Garland, 4 Wall. 333, 377 [1867]; Cummings *v.* Missouri, 4 Wall. 277, 323 [1867].

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ARTICLE VII

RATIFICATION

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ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Art. VII. Ratification of the Constitution.

In General.

In Owings *v.* Speed,[1] the question at issue was whether the Constitution of the United States operated upon an act of Virginia passed in 1788. The Court held it did not, stating in part:

"The Conventions of nine States having adopted the Constitution*, Congress, in September or October, 1788, passed a resolution in conformity with the opinions expressed by the Convention, and appointed the first Wednesday in March of the ensuing year as the day, and the then seat of Congress as the place, 'for commencing proceedings under the Constitution.'

"Both Governments could not be understood to exist at the same time. The new Government did not commence until the old Government expired. It is apparent that the Government did not commence on the Constitution being ratified by the ninth State; for these ratifications were to be reported to Congress, whose continuing existence was recognized by the Convention, and who were requested to continue to exercise their powers for the purpose of bringing the new Government into operation. In fact, Congress did continue to act as a Government until it dissolved on the 1st of November, by the successive disappearance of its Members. It existed potentially until the 2d of March, the day preceding that on which the Members of the new Congress were directed to assemble.

"The resolution of the Convention might originally have suggested a doubt, whether the Government could be in operation for every purpose before the choice of a President; but this doubt has been long solved, and were it otherwise, its discussion would be useless, since it is apparent that its operation did not commence before the first Wednesday in March 1789 * * *."

[1] 5 Wheat. 420, 422–423 [1820].

* For dates of ratification by the several States, see Historical Note, p. 14

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AMENDMENTS TO THE CONSTITUTION

AMENDMENTS NOS. 1–10

Restricting Federal Powers

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AMENDMENTS TO THE CONSTITUTION

AMENDMENTS NOS. 1–10

Restricting Federal Powers.

IN GENERAL.

The first ten amendments, commonly known as the Bill of Rights, were adopted in order to quiet the apprehension that, without some such declaration, the Government would assume, and might be held to possess, the power to trespass upon those rights of persons and property, which by the Declaration of Independence were affirmed to be unalienable rights.[1] They "were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed."[2]

[1] Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 324 [1893].
[2] Robertson *v.* Baldwin, 165 U. S. 275, 281 [1897].

This interpretation of the first ten amendments was stated by the Supreme Court as early as 1833. In Barron *v.* Baltimore,[1] while the case involved only the Fifth Amendment, this broad language was used: "[These amendments] contain no expression indicating an intention to apply them to the State governments. This Court cannot so apply them." And later in the same year in Livingston *v.* Moore,[2] a case concerning the Ninth Amendment, the Court said: "it is now settled that those amendments do not extend to the States." By 1875, it was held "too late to question the correctness of this construction."[3]

[1] 7 Pet. 243, 250 [1833].
[2] 7 Pet. 469, 551 [1833].
[3] United States *v.* Cruikshank, 92 U. S. 542, 552 [1876].

The doctrine has been repeated in numerous cases, each involving some one or more specific amendments.

See e. g., Fox *v.* Ohio, 5 How. 410 [1847]; Smith *v.* Maryland, 18 How. 71, 76 [1855]; Withers *v.* Buckley, 20 How. 84, 90 [1858]; Twitchell *v.* Pennsylvania, 7 Wall. 321, 326 [1869]; Brown *v.* New Jersey, 175 U. S. 172, 174 [1899].

It will be noted that the general references to the first ten amendments in these several cases are broader than required by the actual decisions. They trace back to the dicta of Chief Justice Marshall in Barron *v.* Baltimore, where the Chief Justice was stating the historical basis for the group of amendments

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demanded by the States upon the adoption of the Constitution—ten of which were adopted. As a matter of fact, Amendments 9 and 10 are of a character distinctly different from the first eight, which enumerate certain specific rights and privileges and guarantee them against interference. Looking thus to the substance of the amendments rather than to their historical grouping, the Supreme Court has in several instances stated the doctrine applicable to the first eight. Thus, in Eilenbecker *v.* District Court [1] it said, "the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the States."*

[1] 134 U. S. 31, 34 [1890]. *See also* Brown *v.* Walker, 161 U. S. 591, 606 [1896]; Bolln *v.* Nebraska, 176 U. S. 83, 87 [1900].

*For the extent to which similar rights are protected against State legislation, see discussion under the Fourteenth Amendment, post p. 761.

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AMENDMENT 1

RELIGION, FREE SPEECH, ETC.

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AMENDMENT 1.—RELIGION, FREE SPEECH, ETC.

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AMENDMENT 1

Amdt. 1. Freedom of religion, of speech, and of peaceable assembly.

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

Religion.

Neither the original Constitution nor this amendment makes any provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws. Nor is there any inhibition imposed by the Constitution of the United States in this respect on the States.[1]

[1] Permoli v. New Orleans, 3 How. 589, 609 [1845].

The First Amendment was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted, by the governments of Europe for many ages, to compel parties to conform in their religious beliefs and modes of worship to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of this amendment.[1]

[1] Davis v. Beason, 133 U. S. 333, 342 [1890], holding that a Territorial statute which provided that no person should be entitled to vote at any election who was a member of any organization which encouraged its members to commit the crime of bigamy or polygamy, as a duty arising or resulting from membership in such organization, or which practiced bigamy or polygamy or plural or celestial marriage as a doctrinal rite of such organization, was not a law respecting an establishment of religion, in violation of this amendment. Polygamy is a crime by the laws of all civilized and Christian countries; to call the advocacy of it a tenet of religion is to offend the common sense of mankind.

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Amdt. 1.—Freedom of Religion, Speech, Press, etc.

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights is conceded to all. The right to organize voluntary religious associations and create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.[1]

[1] Watson *v.* Jones, 13 Wall. 679, 728 [1872], wherein the Court affirmed a decree of the Circuit Court for Kentucky relative to the use of the property of the Walnut Street Presbyterian Church of Louisville, where the appellant faction, by denying the authority, denouncing the action and refusing to abide by the judgments of the ecclesiastical tribunal which had passed on the question, had separated themselves from the church before the action was commenced in the civil courts.

One indicted for polygamy cannot set up this amendment as a defense.[1]

[1] Reynolds *v.* United States, 98 U. S. 145, 163 [1879], in which case the court said that the word "religion" is not defined in the Constitution. In giving the history of the adoption of this amendment, the court, as an aid to its interpretation, referred to the act of Virginia, "establishing religious freedom" in which religious freedom is defined, and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the State. *See also* Church of Jesus Christ of L. D. S. *v.* United States, 136 U. S. 1, 49 [1890].

An argument that the act of May 18, 1917 (40 Stat. 76), exempting ministers of religion and theological students from the draft, and exempting from strict military service members of sects whose tenets exclude the moral right to engage in war, was repugnant to this amendment, as establishing or interfering with religion, was held too unsound to require more than a mere statement.[1]

[1] Arver *v.* United States (Selective Draft Law Cases), 245 U. S. 366 [1918].

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Amdt. 1.—Freedom of Religion, Speech, Press, etc.

Notwithstanding the constitutional provision as to religious freedom, it is an offense to pretend to believe in supernatural powers for the purpose of procuring money and to use the mails in pursuance of such purpose.[1]

[1] New v. United States, 245 Fed. 710 [1917].

Where an act of Congress had chartered a corporation for the purpose of maintaining a hospital in the city of Washington for the care of "such sick and invalid persons as may place themselves under the treatment and care of the corporation", an agreement entered into between the District of Columbia commissioners and the directors of the hospital, under authority of a congressional appropriation, for the erection of an isolating building and treatment of poor patients at the expense of the District, is valid and does not result in an appropriation by Congress in conflict with this provision from the mere fact that the members of the corporation are actually members of a monastic order or sisterhood of the Roman Catholic Church.[1]

[1] Bradfield v. Roberts, 175 U. S. 291, 295 [1899].

Money appropriated by Congress under the obligations of treaties with the Indians are treaty and trust moneys which the Indians can lay claim to as a matter of right, and a contract made at the request of the Indians between the Commissioner of Indian Affairs and the Bureau of Catholic Indian Missions for the payment of such money for the support of Indian Catholic schools, does not violate the Constitution.[1]

[1] Quick Bear v. Leupp, 210 U. S. 50 [1908].

Freedom of Speech and the Press.*

The main purpose of constitutional provisions like the First Amendment was said to be, to prevent all such previous restraints upon publications as had been practiced by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.[1] Subsequently, this statement was somewhat expanded and clarified by Justice Holmes as follows: "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints * * *. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic * * *." Accordingly, it was held that statements in published circulars distributed to drafted men, some of which would have been within the constitutional rights of the publisher in ordinary times, were not to be endured in time of war and could be punished as a conspiracy to obstruct recruiting, under the Espionage Act. "The question in every case is whether the words used are used in such

* *See also* under 14th Amendment, p. 777.

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circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." [2] In a still later case, involving publication of a newspaper, of small circulation but not directed especially to persons subject to draft, it was said that language quite similar to that in the Schenck case perhaps "might be said or written even in time of war in circumstances that would not make it a crime"; but since on the record it was not shown that the publication might not have furnished the necessary spark to set off an evil result, the indictment was upheld.[3] The Court reiterated that "the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language"—citing Robertson *v.* Baldwin, 165 U.S. 275, 281 [1897], where the Court, by way of illustration stated that "the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation."

[1] Patterson *v.* Colorado, 205 U. S. 454, 462 [1907], citing Commonwealth (Mass.) *v.* Blanding, 3 Pick. (Mass.), 304, 313 [1825]; Respublica *v.* Oswald, 1 Dall. 319, 325 (Supr. Ct. of Pa.).

[2] Schenck *v.* United States, 249 U. S. 47, 52 [1919].

[3] Frohwerk *v.* United States, 249 U. S. 204 [1919]. For further cases emphasizing the importance of the "natural tendency and reasonably probable effect" of language in the circumstances under which uttered, *see* Debs *v.* United States, 249 U. S. 211 [1919], and Abrams *v.* United States, 250 U. S. 616 [1919], also arising under the Espionage Act. *See also* Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418, 439 [1911], where it was held that words (such as "unfair", etc.) used in the case of an unlawful conspiracy acquired a force not inhering in the words themselves, and amounted to "verbal acts" which might be enjoined by a court having jurisdiction of the parties and subject-matter.

Where a newspaper published statements concerning injunction proceedings pending in a district court, and tending in the circumstances to create the impression that a particular decision would evoke public suspicion of the judge's integrity and bring him into public odium and would be met by public resistance, and tending in the circumstances to provoke such resistance in fact, it was held liable in contempt of court. "It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing." [1]

[1] Toledo Newspaper Co. *v.* United States, 247 U. S. 402, 419 [1918].

Regulations against transporting in the mail printed matter which is open to examination cannot be enforced so as to interfere in any manner with the freedom of the press.[1]

[1] Ex parte Jackson, 96 U. S. 727 [1878].

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Amdt. 1.—Freedom of Religion, Speech, Press, etc.

A statute (R. S. 3894, as amended) under which an indictment is framed, charging the offense of mailing a newspaper containing an advertisement of a State lottery, is not obnoxious to this amendment. "The circulation of newspapers is not prohibited, but the Government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people." [1]

[1] In re Rapier, 143 U. S. 110, 134 [1892]; Horner v. United States (No. 1), 143 U. S. 207, 213 [1892]; Horner v. United States (No. 2), 143 U. S. 570 [1892].

The constitutional freedom of the press may protect criticism and agitation for modification or repeal of laws, but it does not extend to the protection of him who counsels and encourages the violation of the law as it exists. Newspaper publications denouncing certain (war time) laws as arbitrary and oppressive were designed to create hostility to, and encourage violation of, them, and were properly subject to suppression by the Postmaster General by a revocation of second-class privileges.[1]

[1] United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U. S. 407 [1921].

As a condition for the privilege of entry of publications as second-class mail matter, Congress may require the furnishing of certain information with respect to the ownership and circulation of the publication. Such conditions are merely incidental to the power of extending to newspapers the privilege of second-class classification—which in itself is legislation largely favoring newspapers at the expense of the public.[1]

[1] Lewis Publishing Co. v. Morgan, 229 U. S. 288 [1913].

The National Labor Relations Act (49 Stat. 449) empowered the National Labor Relations Board to require the restoration of employees discharged because of union activity. An order under this act, restraining the Associated Press from interfering with union activities of employees, was held not to constitute an infringement on freedom of the press, since it "in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the petitioner is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt." [1]

[1] Associated Press v. National Labor Relations Board, 301 U. S. 103, 133 [1937].

Right to Petition.

"[This amendment] assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroach-

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ments by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States." [1]

[1] United States *v.* Cruikshank, 92 U. S. 542, 552 [1876], holding a count in an indictment under the Enforcement Act of 1870 defective which did not aver an intent to prevent a meeting for consultation in respect to public affairs or to petition for redress of grievances.

Miscellaneous.

In United States ex rel. Turner *v.* Williams,[1] an argument that the Immigration Law of 1903 (32 Stat. 1213), in its provision for exclusion of anarchists was unconstitutional because in contravention of the First Amendment, was dismissed with a mere statement. The Court said: "It is, of course, true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from worshipping or speaking or publishing or petitioning in the country, but that is merely because of his exclusion therefrom. He does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law."

[1] 194 U. S. 279, 292 [1904].

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AMENDMENT 2

BEARING ARMS

AMENDMENT 3

QUARTERING SOLDIERS

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BEARING ARMS

AMENDMENT 2

Amdt. 2. The right to bear arms.

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.

In General.

This amendment means no more than that the right of bearing arms for a lawful purpose shall not be infringed by Congress. It is one of the amendments that has no other effect than to restrict the powers of the National Government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes to the State power of internal police. It was held, accordingly, that an indictment under the Enforcement Act of 1870 (16 Stat. 140), charging a conspiracy to prevent Negroes from bearing arms for lawful purposes, was defective.[1]

[1] United States *v.* Cruikshank, 92 U. S. 542, 553 [1876]; Miller *v.* Texas, 153 U. S. 535 [1894].

The Cruikshank case was held conclusive on the point in Presser *v.* Illinois,[1] where was involved an Illinois statute directed against drilling or parading under arms, in cities or towns, by "any body of men" other than regular volunteer militia, etc. The Court would apparently have been satisfied to rest the case on its facts, for it said: "We think it clear that the sections under consideration [i. e., the State law] which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms." [1]

[1] 116 U. S. 252, 264 [1886].

In Robertson *v.* Baldwin,[1] it was stated that an act of Congress which prohibits the carrying of concealed weapons does not violate this amendment.

[1] 165 U. S. 275. 282 [1897]

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QUARTERING SOLDIERS

AMENDMENT 3

Amdt. 3. Quartering of soldiers in houses.

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

In General.

"This amendment seems to have been thought necessary. It does not appear to have been the subject of judicial exposition; and it is so thoroughly in accord with all our ideas, that further comment is unnecessary."—Miller, The Constitution (1893), page 646.

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AMENDMENT 4

SEARCHES AND SEIZURES

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AMENDMENT 4.—SEARCHES AND SEIZURES

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AMENDMENT 4

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.

Amdt. 4. Security from unreasonable searches and seizures.

Scope and Purpose of Amendment.

The security afforded by this amendment against unreasonable search and seizure applies solely to governmental action;[1] it is not invaded by the unlawful acts of individuals in which the Government has no part.[2] The amendment should be liberally construed to preserve the citizens' right to immunity from unreasonable search.[3]

[1] Smith *v.* Maryland, 18 How. 71, 76 [1855].

[2] Burdeau *v.* McDowell, 256 U. S. 465 [1921]; Adams *v.* New York, 192 U. S. 585, 598 [1904].

[3] Gouled *v.* United States, 255 U. S., 298, 304 [1921]; Grau *v.* United States, 287 U. S. 124 [1932].

This clause was not intended to interfere with the power of courts to compel, through a subpoena *duces tecum*, the production, upon a trial in court, of documentary evidence; and an officer or agent of a corporation may be required, under such process, to produce the books and papers of the corporation.[1] It has no reference to civil proceedings for the recovery of debts of which a search warrant is not made part. So held, that a distress warrant issued by the solicitor of the treasury under an act of Congress is not forbidden, though issued without support of an oath or affirmation.[2] But the amendment is applicable to search warrants issued under any statute, including revenue and tariff statutes.[3]

[1] Hale *v.* Henkel, 201 U. S. 43 [1906]; American Lithograph Co. *v.* Werckmeister, 221 U. S. 603 [1911]; American Tobacco Co. *v.* Werckmeister, 207 U. S. 284 [1907]; Boyd *v.* United States, 116 U. S. 616 [1886]. *Cf.* Potter *v.* Beal, 49 Fed. 793 [1892]; Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541 [1908]; Ex parte Fuller, 262 U. S. 91 [1923]; Essgee Co. *v.* United States, 262 U. S. 151 [1923]; Dier *v.* Banton, 262 U. S. 147 [1923].

[2] Den ex dem. Murray *v.* Hoboken Land & Improv. Co., 18 How. 272, 274 [1856].

[3] Nathanson *v.* United States, 290 U. S. 41 [1933].

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Amdt. 4.—Security from Unreasonable Searches and Seizures

It was said in Gouled *v.* United States,[1] that search warrants may not be used as a means of gaining access to a man's house or office and papers, solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.

[1] 225 U. S. 298 [1921].

The protection of the amendment reaches all alike, whether accused of crime or not, and including those suspected or known to be offenders,[1] and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.[2]

[1] Go-Bart Importing Co. *v.* United States, 282 U. S. 344 [1931].
[2] Weeks *v.* United States, 232 U. S. 383, 392 [1914].

The amendment does not mean that the lands or premises of a person shall not be searched; these are not included in the term "house." There is nowhere any provision against an officer searching one's land or premises without a warrant.[1]

[1] United States *v.* McBride, 261 U. S. 614 [1923]. *See also*, Hester *v.* United States, 265 U. S. 57 [1924].

Regulations of the Post Office Department as to inspection of mail matter must be in subordination to the principle of this amendment.[1]

[1] Ex parte Jackson, 96 U. S. 727, 733 [1878].

What Constitutes a Search.

An order not calling for the production, or demanding an inspection, of books or documents, but calling for a copy or a summary, is not a search or seizure within the meaning of this clause.[1]

[1] Isbrandtsen-Moller Co. *v.* United States, 300 U. S. 139, 145 [1937]

It was held in United States ex rel. Bilokumsky *v.* Tod, 263 U. S 149, 155 [1923], that mere interrogation under oath by a Government official of one lawfully in confinement is not a search or seizure.

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Amdt. 4.—Security from Unreasonable Searches and Seizures

What Constitutes an Unreasonable Search.

The amendment denounces only such searches or seizures as are unreasonable, and it is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted and in a manner which will conserve public interests as well as the interests and rights of individual citizens.[1] The question whether a seizure or a search is unreasonable in the language of the Constitution is a judicial and not a legislative question; but in determining whether a seizure is or is not unreasonable all of the circumstances under which it is made must be looked to.[2] A search prosecuted in violation of the Constitution is not made lawful by what it brings to light.[3]

[1] Carroll *v.* United States, 267 U. S. 132 [1925].
[2] Mason *v.* Rollins, 2 Biss (U. S.) 99 [1869]; Gouled *v.* United States, 255 U. S. 298 [1921].
[3] Byars *v.* United States, 273 U. S. 28, 29 [1927].

In Wilson *v.* United States,[1] involving an officer of a corporation who was compelled to produce books and papers of the corporation whose guilt of an offense was under investigation, it was held that there is no unreasonable search and seizure when a writ, suitably specific and properly limited in its scope, calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced.

[1] 221 U. S. 361 [1911]. *See also* Wheeler *v.* United States, 226 U. S. 478 [1913]; Grant *v.* United States, 227 U. S. 74 [1913].

A party is not subjected to an unreasonable search by reason of being required, in an investigation conducted by the Senate, to appear as a witness and answer the question whether the firm of which the witness was a member had bought or sold certain stocks for or in the interest of any United States Senator.[1]

[1] In re Chapman, 166 U. S. 661, 669 [1897].

Compelling interstate corporations to produce contracts with coal companies, to be used as evidence before the Interstate Commerce Commission, which would tend to show a discrimination against coal companies not having such contracts and paying the full rate, does not constitute a violation of the right to be secure against unreasonable searches and seizures.[1]

[1] Interstate Commerce Commission *v.* Baird, 194 U. S. 25, 44 [1904].

The provision of the Tariff Act of August 5, 1909 (36 Stat. 11), known as the corporation tax law, requiring certain returns to be filed by corporations in the office of the Commissioner of Internal Revenue, did not offend against this amendment.[1]

[1] Flint *v.* Stone Tracy Co., 220 U. S. 107 [1911].

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Amdt. 4.—Security from Unreasonable Searches and Seizures

In Boyd *v.* United States [1] it was held that a compulsory production of private papers to be used in evidence against the owner is an unreasonable search and seizure within this amendment, and that an act of Congress which required a party to produce his private books and papers, and if he refused to do so upon demand, permitted the Government to assume as true its allegations as to the contents of said books and papers, was unconstitutional.

[1] 116 U. S. 616 [1886].

The refusal of an application to return private papers, books, and other property, seized by the marshal upon the arrest of a person without a warrant or without a search warrant, and their use in evidence on the trial, is a denial of rights secured by this amendment.[1]

[1] Weeks *v.* United States, 232 U. S. 383 [1914].

Use of Evidence Obtained by Search.

It is an established principle that, except where there has been no opportunity to present the matter in advance of trial, the courts when engaged in trying a criminal case will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property which are material and properly offered in evidence, because the courts will not in trying a criminal case permit a collateral issue to be raised as to the source of competent evidence. Thus, where evidence as to a search and seizure, including liquor actually seized, was admitted in evidence without objection to the search and seizure, subsequent objection was held too late.[1]

[1] Segurola *v.* United States, 275 U. S. 106, 111 [1927], citing Adams *v.* New York, 192 U. S. 585 [1904]; Weeks *v.* United States, 232 U. S. 383, 395 [1914]; Marron *v.* United States, 275 U. S. 192 [1927].

The rule, as noted, is not applicable when it becomes apparent during the trial that there has been an unconstitutional seizure of property of the accused; and in such case the court should exclude the property and any testimony relating thereto, given by the government agents who made the unlawful seizure, on motion of the accused, made after both property and testimony have been introduced in evidence against him.[1]

[1] Amos *v.* United States, 255 U. S. 313 [1921]; Agnello *v.* United States, 269 U. S. 20, 34 [1925].

The Court said in Gouled *v.* United States,[1] that it has never been required that a criminal prosecution should be pending against a person in order to justify search for and seizure of his property under a proper warrant, if a case of crime having been committed and of probable cause is made out sufficient to satisfy the law and the officer having authority to issue it; and that it saw no reason why property seized

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Amdt. 4.—Security from Unreasonable Searches and Seizures

under a valid search warrant, when thus lawfully obtained by the Government, may not be used in the prosecution of a suspected person for a crime other than that which may have been described in the affidavit as having been committed by him. The question assumes that the property seized was obtained on a search warrant sufficient in form to satisfy the law, and if the papers to which the question refers had been of a character to be obtained, lawfully, it would have been competent to use them to prove any crime against the accused as to which they constituted relevant evidence.

[1] 255 U. S. 298, 311 [1921].

The use in evidence in a criminal case of letters voluntarily written by the accused after the crime, while he was in prison, and which without threat or coercion, under the practice and discipline of the institution, came into possession of the prison officials, does not infringe the constitutional safeguard.[1]

[1] Stroud *v.* United States, 251 U. S. 15, 21 [1919].

The United States may retain for use as evidence in the criminal prosecution of their owner incriminating documents which were turned over to it by private individuals who procured them without the participation or knowledge of any Government official, through a wrongful search of the owner's private desk and papers in an office.[1] But where an arrest and search was made by a State officer without a warrant and without probable cause for an offense punishable by the Federal Government only, it was held that the admission in evidence of the material seized violated this amendment;[2] and it has also been held that evidences of crime discovered by a Federal officer in making a search without a lawful warrant may not be used against the victim of the unlawful search where a timely challenge has been interposed.[3]

[1] Burdeau *v.* McDowell, 256 U. S. 465 [1921].
[2] Gambino et al. *v.* United States, 275 U. S. 310 [1927].
[3] Byars *v.* United States, 273 U. S. 28 [1927]. *See also*, Silverthorne Lumber Co. *v.* United States, 251 U. S. 385 [1920].

The principle of liberal construction applied to this amendment to effect its purpose in the interest of liberty, will not justify enlarging it beyond the possible practical meaning of "persons, houses, papers, and effects", or so applying "searches and seizures" as to forbid hearing or sight. The policy of protecting the secrecy of telephone messages by making them, when intercepted, inadmissible as evidence in Federal criminal trials, may be adopted by Congress through legislation;[1] but it is not for the courts to adopt it by attributing an enlarged and unusual meaning to this amendment. It was therefore held in Olmstead *v.* United States,[2] in the absence of Federal legislation, that evidence concerning a conspiracy, obtained by Government officers by secretly tapping the lines of a telephone company connected with the chief office and some of the residences of the conspirators, was admissible

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Amdt. 4.—Security from Unreasonable Searches and Seizures

at the trial as not violative of the Fourth Amendment. In Nardone *v.* United States, the Supreme Court held that section 605 of the Communication Act of 1934 (48 Stat. 1064, 1103) supplied such legislation, construing the prohibition against any "person" divulging the contents of an intercepted communication as applicable to law enforcement officers. Accordingly, it was held that evidence obtained by wire-tapping was inadmissible in a Federal Court.[3]

[1] Nardone *v.* United States, 302 U. S. 379 [1937].
[2] 277 U. S. 438 [1928].
[3] 302 U. S. 379 [1937].

Samples of illicit goods constituting part of a quantity seized by Federal officers under a valid search warrant may consistently with the Fourth Amendment be used as evidence against the occupant of the premises, in a prosecution, even though when the seizure was made the officers unlawfully destroyed the remainder of the goods, and even assuming that, by so doing, they became civilly liable as trespassers *ab initio*.[1]

[1] McGuire *v.* United States, 273 U. S. 95 [1927].

Warrants.

FORMALITIES IN CONNECTION WITH ISSUE.

A warrant of commitment by justices of the peace must state a good cause certain, and be supported by oath.[1]

[1] Ex parte Burford, 3 Cr. 448 [1806].

A notary public is not authorized to administer oaths in Federal criminal proceedings; and an arrest under a warrant based on affidavits verified before a notary violates the Fourth Amendment. But it does not follow that the information itself is void—that may be issued upon the official oath of the district attorney—and objection to the arrest in such case should be by motion to quash the warrant, not the information. Such a motion to quash is too late if the defendant is in court and the affidavits have already been properly amended.[1]

[1] Albrecht *v.* United States, 273 U. S. 1 [1927].

It was said in the case of McGrain *v.* Daugherty,[1] that a warrant of the Senate for attachment of a person who ignored a subpoena from a Senate committee, is supported by oath within the requirement of this amendment when based upon the committee's report of the facts of the contumacy, made on the committee's own knowledge and having the sanction of the oath of office of its members.

[1] 273 U. S. 135 [1927].

A search warrant issued upon an information stating only that affiant "has good reason to believe and does believe the defendant has

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Amdt. 4.—Security from Unreasonable Searches and Seizures

in his possession" intoxicating liquors and instruments and materials used in the manufacture of such liquors, "clearly is bad if tested by the Fourth Amendment * * *."[1]

[1] Byars v. United States, 273 U. S. 28, 29 [1927].

WHAT PROPERTY MAY BE SEIZED UNDER A WARRANT.

The requirement of the Fourth Amendment that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant. Thus, a search warrant describing intoxicating liquors and articles for their manufacture does not authorize the seizure of a ledger and bills of account found in a search of the premises specified in the warrant;[1] nor of strip stamps of the kind used upon whiskey bottled in bond.[2]

[1] Marron v. United States, 275 U. S. 192 [1927].
[2] Byars v. United States, 273 U. S. 28, 32 [1927].

Private papers of no pecuniary value, in which the sole interest of the Federal Government is their value as evidence against the owner in a contemplated criminal prosecution, may not, consistently with the constitutional guaranty against unreasonable searches and seizures, be taken from the owner's house or office under a search warrant.[1]

[1] Gouled v. United States, 255 U. S. 298 [1921].

NECESSITY FOR WARRANT.

A person's home and place of business are not to be invaded forcibly and searched by the curious and suspicious, or even by a disinterested officer of the law, unless he is armed with a search warrant.[1] And belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. Such searches are held unlawful notwithstanding facts unquestionably showing probable cause;[2] and a Government "fishing expedition" into the papers of a private corporation on the possibility that they may disclose evidence of crime is so contrary to first principles of justice, if not defiant of this amendment, that an intention to grant the power to a subordinate agency will not be attributed to Congress unless expressed in most explicit language.[3] But an officer can make a search, without a warrant, when the facts are such as to warrant a man of prudence and caution in believing that an offense was committed.[4]

[1] United States v. Veeder, 246 U. S. 675 [1918].
[2] Agnello v. United States, 269 U. S. 20 [1925].
[3] Federal Trade Commission v. American Tobacco Co., 264 U. S. 298 [1924]; United States v. Lefkowitz, 285 U. S. 452 [1932].
[4] Steele v. United States, No. 1, 267 U. S. 505 [1925]; Dumbra v. United States, 268 U. S. 435 [1925].

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Amdt. 4.—Security from Unreasonable Searches and Seizures

Searches and seizures without a warrant may be made as incidental to a lawful arrest. Thus, it has been held no violation of constitutional rights to seize a letter found on the arrested person;[1] or account books found in his control and used in carrying on the criminal enterprise on account of which the arrest was made.[2]

[1] Welsh *v.* United States, 267 Fed. 819 [1920], certiorari denied, 254 U. S. 637 [1921].
[2] Marron *v.* United States, 275 U. S. 192 [1927].

Where officers had visible evidence of commission of a crime, i. e., the transporting, etc., of smoking opium, it was held sufficient to justify an arrest and search without a warrant;[1] but the search, without a warrant, of the home of one arrested several blocks away is not incidental to the arrest and is unlawful.[2]

[1] Yip Wah *v.* United States, 8 F. (2d) 478 [1925], certiorari denied, 270 U. S. 645 [1926].
[2] Agnello *v.* United States, 269 U. S. 20 [1925].

Relation Between the Fourth and Fifth Amendment.

The Fourth and Fifth Amendments throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself", which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.[1]

[1] Boyd *v.* United States, 116 U. S. 616, 633 [1886].

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AMENDMENT 5

RIGHTS OF PERSONS

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AMENDMENT 5

Amdt. 5. Indictment, self-incrimination, double jeopardy, due process, etc.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life- liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Prosecution Upon Indictment.

IN GENERAL.

This amendment is a limitation upon the Federal Government and has no reference to State action.[1] The purpose of the amendment was to limit the powers of the legislature as well as the prosecuting officers of the United States, and no declaration of Congress that a crime is infamous is needed to secure or competent to defeat the constitutional safeguard.[2]

[1] Barron use of Tiernan *v.* Baltimore, 7 Pet. 243 [1833]. *See also* Hallinger *v.* Davis, 146 U. S. 314, 319 [1892]; Jack *v.* Kansas, 199 U. S. 372 [1905].

[2] Ex parte Wilson, 114 U. S. 417, 426 [1885].

Aliens cannot be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.[1]

[1] Wong Wing *v.* United States, 163 U. S. 228, 238 [1896]. *See also* Li Sing *v.* United States, 180 U. S. 486, 495 [1901].

The acts of a Territorial legislature are not laws of the United States within the meaning of United States Revised Statutes, section 753, and this amendment does not take up unto itself the local law as to how the grand jury should be made up and raise it to a constitutional requirement.[1] Neither does it apply to the local legislation of the Cherokee Nation, so as to require all prosecutions for offenses

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committed against the laws of that nation to be initiated by a grand jury organized in accordance with the provisions of that amendment.[2]

[1] Re Moran, 203 U. S. 96 [1906].
[2] Talton *v.* Mayes, 163 U. S. 376, 382 [1896]. *See also* Lone Wolf *v.* Hitchcock, 187 U. S. 553, 563 [1903].

The provision in the resolution annexing the Hawaiian Islands, that the municipal legislation not "contrary to the Constitution of the United States" should remain in force, was not intended to abolish at once the criminal procedure theretofore in force upon the islands and to substitute immediately and without new legislation the common-law proceedings by grand and petit jury; and there may be a conviction for manslaughter on an indictment not found by a grand jury.[1]

[1] Hawaii *v.* Mankichi, 190 U. S. 197, 211 [1903].

WHAT CONSTITUTES AN INFAMOUS CRIME.

In determining whether a crime is infamous, the question is whether it is one for which the statute authorizes the court to award an infamous punishment; and not whether the punishment ultimately awarded is an infamous one. Thus, a crime which is punishable by imprisonment in the State prison or penitentiary is an infamous crime, whether the accused is or is not sentenced or put to hard labor.[1]

[1] Re Claasen, 140 U. S. 200, 205 [1891]. *See also* Ex parte Bain, 121 U. S. 1, 13 [1887].

The act of 1892 (27 Stat. 25), providing for the trial by United States Commissioners of Chinese aliens found to be unlawfully within the United States and authorizing imprisonment at hard labor for 1 year (as well as deportation) if so found was held to impose an infamous punishment, and therefore to be in violation of this provision, since no indictment was had.[1] An offense the punishment for which is fine or imprisonment at hard labor in the workhouse of the District of Columbia is an infamous crime. It is the character of the punishment, not the place of imprisonment, that is determinative.[2]

[1] Wong Wing *v.* United States, 163 U. S. 228, 238 [1896].
[2] United States *v.* Moreland, 258 U. S. 433 [1922].

Prosecution for violation of section 137 of the Federal Criminal Code (making it a crime punishable by a fine of not more than $1,000 or imprisonment for not more than 6 months to attempt to influence a juror) may be instituted by information. The crime denounced is a misdemeanor not involving infamous punishment, notwithstanding the proviso added to section 335 of the Code which describes as "petty offenses" which may be prosecuted upon information or complaint, all offenses the penalty for which does not confine in a common jail, without hard labor for a period of 6 months, or a fine of not more than $500, or both.[1]

[1] Duke *v.* United States, 301 U. S. 492 [1937].

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Amdt. 5.—Rights of Persons—Indictment

Counterfeiting,[1] fraudulent altering of poll books,[2] fraudulent voting,[3] embezzlement by a national-bank president[4] are further examples of crimes declared by the courts to be infamous.

[1] Ex parte Wilson, 114 U. S. 417 [1885].
[2] Mackin *v.* United States, 117 U. S. 348, 354 [1886].
[3] Parkinson *v.* United States, 121 U. S. 281 [1887].
[4] United States *v.* DeWalt, 128 U. S. 393 [1888].

Changes in public opinion from one age to another may affect the question as to what punishments shall be considered as infamous.[1]

[1] Mackin *v.* United States, 117 U. S. 348, 351 [1886].

INDICTMENT.

On a petition for removal of an accused from one district to another, under section 1014, Revised Statutes, an indictment in the district to which removal is sought is at least *prima facie* evidence of probable cause. "The Constitution does not require two such inquiries and adjudications. The Government, having once satisfied the provision for an inquiry and obtained an adjudication by the proper tribunal of the existence of probable cause, ought to be able without further litigation concerning that fact to bring the party charged into court for trial."[1] But the judge of the district in which the accused is arrested must act judicially and not merely ministerially, and, before issuing a warrant of removal, must look into the indictment to ascertain whether an offense against the United States is charged, find whether there was probable cause, and determine whether the court to which the accused is sought to be removed has jurisdiction of the same.[2]

[1] Beavers *v.* Henkel, 194 U. S. 73, 84 [1904].
[2] Tinsley *v.* Treat, 205 U. S. 20 [1907].

A person can only be tried upon the indictment as found by the grand jury, and especially upon its language found in the charging part of the instrument. A change in the indictment deprives the court of the power of proceeding to try the accused.[1]

[1] Ex parte Bain, 121 U. S. 1, 12 [1887].

This amendment does not require an indictment to be presented by the grand jury in a body.[1]

[1] Breese *v.* United States, 226 U. S. 1 [1912].

COURT MARTIAL.

The Fifth Amendment expressly excepts "cases arising in the land and naval forces", and leaves such cases to be exercised to the fullest extent[1] subject to the rules for the government and regulation of those forces which, by article I, section 8, Congress is empowered to make.[2]

[1] Runkle *v.* United States, 19 Ct. Cl. 396 [1884]. *See also* Ex parte Reed, 100 U. S. 21 [1879].
[2] Kurtz *v.* Moffitt, 115 U. S. 487, 500 [1885].

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Amdt. 5.—Rights of Persons—Double Jeopardy

The words "when in actual service in time of war or public danger" apply to the militia only. All persons in the military or naval service of the United States are subject to the military law; the members of the Regular Army and Navy at all times; the militia so long as they are in such service.[1]

[1] Johnson *v.* Sayre, 158 U. S. 109, 114 [1895].

Double Jeopardy.

IN GENERAL.

This clause also is a limitation upon the powers of the Federal Government, and is not a limitation on the States.[1] It was not intended to do away with the rule that a judgment of acquittal on the ground of the bar of the statute of limitations is a protection against a second trial.[2]

[1] Brantley *v.* Georgia, 217 U. S. 284 [1910].
[2] United States *v.* Oppenheimer, 242 U. S. 85 [1916].

WHAT CONSTITUTES JEOPARDY.

What constitutes "jeopardy" is to be determined by the usage of the word and the custom of the common law at the time the Constitution was adopted. By the common law not only was a second punishment for the same offence prohibited, but a second trial forbidden whether or not the accused had suffered punishment, or had been acquitted or convicted.[1] The rule as now stated is that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him—certainly so when acquitted.[2] But in Palko *v.* Connecticut, Justice Cardozo by way of dicta pointed out that Kepner *v.* United States had been decided by "a closely divided court", that there was much to be said "in favor of a different ruling", and that right-minded men "could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case." [3]

[1] Ex parte Lange, 18 Wall. 163 [1874], holding that where a law authorized fine or imprisonment, and a court through inadvertence imposed both punishments, it could not, after the fine had been paid, during the same term of court change its judgment by sentencing the defendant to imprisonment.
[2] Kepner *v.* United States, 195 U. S. 100 [1904].
[3] 302 U. S. 319 [1937].

The phrase "life and limb" as here used would, if strictly construed, confine the cases wherein the plea of jeopardy could be raised to a very narrow compass; but the courts have construed it liberally, and have held it to embrace all cases wherein a second prosecution is attempted for the same offense, whether felony or misdemeanor.[1] A plea of former acquittal must be upon a prosecution for the same

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identical offense.[2] The test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of the one transaction does not make a single offense where two are defined by the statutes.[3] Where a person is convicted of a crime which includes several incidents, a second trial for one of those incidents is putting him twice in jeopardy.[4]

[1] Ex parte Lange, 18 Wall. 163 [1874].

[2] Burton v. United States, 202 U. S. 344 [1906]; United States v. Randenbush, 8 Pet. 288, 289 [1834].

[3] Morgan v. Devine, 237 U. S. 632 [1915]. *See also* Carter ex rel. Carter v. McClaughry, 183 U. S. 365 [1902]; Albrecht v. United States, 273 U. S. 1 [1927].

[4] Ex parte Nielsen, 131 U. S. 176, 188 [1899].

A former conviction must be pleaded in order to bar prosecution.[1]

[1] United States v. Wilson, 7 Pet. 150, 159 [1833].

A general verdict of acquittal upon an issue of not guilty to an indictment which was not objected to, before verdict, as being insufficient is a bar to a second indictment for the same offense. The prohibition of the amendment is against being twice put in jeopardy, and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.[1]

[1] United States v. Ball, 163 U. S. 662, 669 [1896], holding that while a judgment cannot be lawfully entered on a Sunday, where the case was submitted to the jury on Saturday the mere receipt of verdict and discharge of the jury on Sunday was a ministerial act; the verdict was final and could not be reviewed without violating this clause of the Constitution.

The following circumstances have been held not to amount to a putting in jeopardy within the meaning of this amendment:

(1) Preliminary examination of one arrested on suspicion of crime, and his discharge by the examining magistrate.[1]

(2) The finding of an indictment followed by arraignment, pleading thereto, repeated continuances, and eventual dismissal at the instance of the prosecuting officer on the ground that there was not sufficient evidence to hold the accused.[2]

(3) Ignoring of an indictment by one grand jury, and finding by a subsequent grand jury for the same offense.[3]

(4) Dismissal of jury, while plea of not guilty was pending, demurrer had been overruled, and both sides were ready to proceed to trial—in order that defendant might be arraigned anew.[4]

(5) Discharge of jury from giving any verdict, when in opinion of court there is manifest necessity therefor, and order of new trial by another jury.[5]

(6) Discharge of jury by the court, without consent of defendant, where the ends of justice would otherwise be defeated;[6] or where a juror is so biased as to be unfit to sit on the case;[7] or where the jury

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cannot agree;[8] or where one of the jurors is disqualified by reason of having served on the grand jury which returned the indictment.[9]

[1] Collins *v.* Loisel, 262 U. S. 426 [1923]. *See also* Kepner *v.* United States, 195 U. S. 100, 130 [1904].
[2] Bassing *v.* Cady, 208 U. S. 386 [1908].
[3] United States *v.* Martin, 50 Fed. 918 [1892].
[4] Lovato *v.* New Mexico, 242 U. S. 199 [1916].
[5] Thompson *v.* United States, 155 U. S. 271, 274 [1894].
[6] United States *v.* Perez, 9 Wheat. 579 [1824].
[7] Simmons *v.* United States, 142 U. S. 148, [1891].
[8] Dreyer *v.* Illinois, 187 U. S. 71 [1902]. *See also* Keerl *v.* Montana, 213 U. S. 135 [1909]; Robertson *v.* Baldwin, 165 U. S. 275, 281 [1897]; Logan *v.* United States, 144 U. S. 263, 297 [1892].
[9] Thompson *v.* United States, 155 U. S. 271 [1894].

For cases under the Philippine Bill of Rights—

See Trono *v.* United States, 199 U. S. 521 [1905]; Grafton *v.* United States, 206 U. S. 333 [1907]; Flemister *v.* United States, 207 U. S. 372 [1907]; Gavieres *v.* United States, 220 U. S. 338 [1911]; Diaz *v.* United States, 223 U. S. 442 [1912]; Stroud *v.* United States, 251 U. S. 15 [1919].

PROCEEDINGS IN COURTS OF DIFFERENT JURISDICTIONS, ETC.

When the same act is an offense against both the State and Federal Governments, its prosecution and punishment by the latter after prosecution and punishment by the former, is not double jeopardy, within the Fifth Amendment.[1] Thus, an acquittal in a State court of a charge of murder cannot be pleaded in bar of an indictment in a Federal court on the same facts charging the defendant, being a white man, with the killing of an Indian.[2]

[1] United States *v.* Lanza, 260 U. S. 377 [1922]. *See also* Fox *v.* Ohio, 5 How. 410, 434 [1847]; Moore *v.* Illinois, 14 How. 13, 20 [1853]; Ponzi *v.* Fessenden, 258 U. S. 254 [1922]; Hebert *v.* Louisiana, 272 U. S. 312 [1926].
[2] United States *v.* Barnhart, 22 Fed. 285, 290 [1884].

The power to punish for contempt remains in each House of Congress, and it cannot be held that a statute is invalid because it provides that contumacy in a witness called to testify in a matter properly under consideration by either House, and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States.[1]

[1] Re Chapman, 166 U. S. 661, 672 [1897].

Robbery on the seas is considered as an offense within the criminal jurisdiction of all nations. It is against all and punished by all; and there can be no doubt that the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the courts of any other civilized States.[1]

[1] United States *v.* Furlong, 5 Wheat. 184, 197 [1820].

Where an issue as to the existence of a fact or act has been tried in a criminal proceeding against a defendant, instituted by the United

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Amdt. 5.—Rights of Persons—Self-incrimination

States, and a judgment of acquittal rendered in his favor, that judgment is conclusive in a subsequent proceeding *in rem* by the United States involving the same subject matter.[1]

[1] Coffey *v.* United States, 116 U. S. 436, 443 [1886].

A civil action to recover taxes which in fact are penalties, is punitive in character and barred by a prior conviction of the defendant for a criminal offense involving the same transaction.[1] However, a forfeiture proceeding for defrauding the Government of tax on alcohol diverted to beverage purposes is a proceeding *in rem* and not punishment for a criminal offense. It follows that conviction of conspiracy to violate the statute imposing a tax on distilled spirits diverted to beverage purposes does not bar a forfeiture proceeding.[2]

[1] United States *v.* La Franca, 282 U. S. 568 [1931].
[2] Waterloo Distilling Co. *v.* United States, 282 U. S. 577 [1931].

Self-incrimination.

IN GENERAL.

This provision must be given a broad construction in favor of the right which it was intended to secure, the object being to insure a witness, in any investigation in Federal proceedings, against being compelled to give testimony which might tend to incriminate him. "It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself." [1]

[1] Counselman *v.* Hitchcock, 142 U. S. 547, 562 [1892], holding that a witness before a grand jury, investigating violations of the Interstate Commerce Act by other persons, was entitled under this amendment to refuse to answer questions, if the answers might lead to the discovery of evidence against him; and that R. S. 860, was not adequate protection under this constitutional guaranty which affords a witness absolute immunity against future prosecution for the offense to which the particular question related. However, subsequently such absolute protection was granted by the act of 1893 (27 Stat. 443) to any person testifying in pro- this act in Brown *v.* Walker, 161 U. S. 591, 595 [1896] said: "If * * * his testimony operate as a complete pardon for the offense to which it relates * * * a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause." *See also* Lees *v.* United States, 150 U. S. 476, 480 [1893]; Boyd *v.* United States, 116 U. S. 616 [1886]; Interstate Commerce Commission *v.* Baird, 194 U. S. 25, 45 [1904]; United States *v.* Lefkowitz, 285 U. S. 452 [1932]; Glickstein *v.* United States, 222 U. S. 139 [1911]; Mulloney *v.* United States, 79 F. (2d) 566 [1935], certiorari denied, 296 U. S. 658 [1935]; Bowles *v.* United States, 73 F. (2d) 772 [1934] certiorari denied, 294 U. S. 710 [1935].

A bankrupt is not deprived of his constitutional right not to testify against himself by an order requiring him to surrender his books to the duly authorized receiver, as the right does not allow one to appropriate property that may tell one's story.[1] A bankrupt may not object to the use of his books and papers as incriminating evidence

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against him while they are in the custody of the bankruptcy court;[2] nor may he condition their delivery by requiring a guaranty that they will not be used as incriminating evidence.[3] The filing of schedules by a bankrupt does not waive his right to refuse to answer questions pertaining to them when to do so may incriminate him.[4] A disclosure by a bankrupt not amounting to an actual admission of guilt or incriminating facts, does not deprive him of the privilege of stopping short in his testimony whenever it may fairly tend to incriminate him.[5] The rule against self-incrimination applies in civil proceedings and may be invoked by a bankrupt (in the absence of any statute affording him complete immunity) when being examined concerning his estate under section 21a of the Bankruptcy Act because when appearing under this section he comes like any other person, merely to testify and is entitled to the same immunity.[6]

[1] Re Harris, 221 U. S. 274, 279 [1911].
[2] Dier *v.* Banton, 262 U. S. 147 [1923].
[3] Re Fuller, 262 U. S. 91 [1923].
[4] Arndstein *v.* McCarthy, 254 U. S. 71 [1920].
[5] McCarthy *v.* Arndstein, 262 U. S. 355 [1923].
[6] McCarthy *v.* Arndstein, 266 U. S. 34 [1924].

The principle established is that full and complete immunity against prosecution by the Government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination.[1]

[1] United States *v.* Murdock, 284 U. S. 141, 149 [1931], citing Jack *v.* Kansas, 199 U. S. 372, 381 [1905], and holding that a refusal to answer in a Federal investigation could not be justified by claiming that disclosures might lead to State prosecution. *See also* Ballman *v.* Fagin, 200 U. S. 186 [1906].

The protection of this provision extends to aliens.[1]

[1] United States *v.* Wong Quong Wong, 94 Fed. 832 [1899]. *See also* United States ex rel. Rennie *v.* Brooks, 284 Fed. 908 [1922].

This clause does not impair the obligation of a witness to testify if a prosecution against him be barred by the lapse of time, a pardon, or by the statutory enactment.[1]

[1] Robertson *v.* Baldwin, 165 U. S. 275, 281 [1897].

ANY CRIMINAL CASE.

This term is broader than the expression "criminal prosecution" in the Sixth Amendment.[1] It includes proceedings for forfeiture under the customs laws, which though in form civil, are in nature criminal.[2]

[1] Counselman *v.* Hitchcock, 142 U. S. 547, 563 [1892].
[2] Boyd *v.* United States, 116 U. S. 616 [1886].

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Amdt. 5.—Rights of Persons—Self-incrimination

NATURE OF THE PRIVILEGE.

The right of a person to refuse to incriminate himself is purely a personal privilege of the witness.[1] It does not permit him to plead the fact that some third person might be incriminated by his testimony,[2] even though he were the agent of such person, and an officer or agent of a corporation cannot refuse to testify because his testimony may incriminate the corporation.[3] An officer of a corporation who actually holds custody and control of books and papers of the corporation, which he is required by a subpoena *duces tecum* to produce, is not entitled to the same protection against exposing the contents thereof which would tend to incriminate him as if the books and papers were absolutely his own.[4]

[1] In re Knickerbocker Steamboat Co., 136 Fed. 956 [1905], holding that it cannot be invoked by counsel.

[2] Mason *v.* United States, 244 U. S. 362 [1917], holding that a witness before a grand jury investigating a gambling charge against others cannot justify a refusal to answer whether a game of cards was going on, since merely sitting at table where cards are played is not criminal under Comp. Laws, Alaska, sec. 2032.

[3] Hale *v.* Henkel, 201 U. S. 43 [1906]. *See also* McAllister *v.* Henkel, 201 U. S. 90 [1906]; Baltimore & O. R. Co. *v.* Interstate Commerce Commission, 221 U. S. 612 [1911]; American Lith. Co. *v.* Werckmeister, 221 U. S. 603 [1911]; American Tobacco Co. *v.* Werckmeister, 207 U. S. 284 [1907].

[4] Wilson *v.* United States, 221 U. S. 361 [1911]. *See also* Dreier *v.* United States, 221 U. S. 394 [1911]; Grant *v.* United States, 227 U. S. 74 [1913]; Heike *v.* United States, 227 U. S. 131 [1913]; Essgee Co. *v.* United States, 262 U. S. 151 [1923].

The prohibition of this clause is against the use of physical or moral compulsion to extort communications from a witness, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof.[1] The amendment protects every person against incrimination by use of evidence obtained through search and seizure made in violation of his rights under the Fourth Amendment.[2] But the use of evidence obtained by tapping telephone wires was held not to involve self-incrimination.[3] A statute requiring the production of books and papers, and providing that on failure to produce them the allegations intended to be proved thereby shall be taken as confessed, is a violation of the amendment.[4]

[1] Holt *v.* United States, 218 U. S. 245 [1910].

[2] Agnello *v.* United States, 269 U. S. 20, 34 [1925]. *See also* Marron *v.* United States, 275 U. S. 192, 194 [1927]; Gouled *v.* United States, 255 U. S. 298 [1921] (*cf.* Schenck *v.* United States, 249 U. S. 47 [1919]); United States *v.* Lefkowitz, 285 U. S. 452 [1932].

[3] Olmstead *v.* United States, 277 U. S. 438 [1928].

[4] Boyd *v.* United States, 116 U. S. 616 [1886]. *See also* Brown *v.* United States, 276 U. S. 134 [1928]; Mulloney *v.* United States, 79 F. (2d) 566 [1935], certiorari denied, 296 U. S. 658 [1935].

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Amdt. 5.—Rights of Persons—Due Process

In a case where the constitutional immunity against self-incrimination applies, it may be assumed that such guaranty would be violated as well by inferences drawn from silence with respect to incriminating matters as by testimony which the witness is compelled to give.[1]

[1] United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U. S. 103 [1927].

The privilege secured by this clause being personal, may be waived; [1] but if a witness does waive his privilege, he must make full disclosure,[2] and may be cross-examined concerning his statement.[3]

[1] In re Tracy & Co., 177 Fed. 532 [1910].

[2] Brown v. Walker, 161 U. S. 591, 597 [1896]; Sawyer v. United States, 202 U. S. 150, 165 [1906].

[3] Powers v. United States, 223 U. S. 303 [1912]. *See also* Reagan v United States, 157 U. S. 301 [1895]; Burrell v. Montana, 194 U. S. 572 [1904].

A person to whom a Presidential pardon is tendered may refuse it and continue to refuse to testify on the ground that his testimony may have an incriminating effect.[1]

[1] Burdick v. United States, 236 U. S. 79 [1915].

Due Process of Law.*

IN GENERAL.

Prohibition Against United States.

This article is a restraint on the legislative as well as on the executive and judicial powers of the Government and cannot be so construed as to leave Congress free to make any process "due process of law." [1]

[1] Den ex dem. Murray v. Hoboken Land and Improvement Co., 18 How. 272, 277 [1856].

The general scope of the prohibitions of the Fifth Amendment as against the Federal Government is frequently measured by the settled scope of the Fourteenth Amendment as against the States. The Court has proceeded on the assumption "that the legal import of the phrase 'due process of law' is the same in both amendments." [1] "If any different meaning of the same words as they are used in the Fourteenth Amendment [and in the Fifth Amendment] can be conceived, none has as yet appeared in a judicial decision." [2] "The restraint imposed upon legislation by the due process clauses of the two amendments is the same." [3]

[1] French v. Barber Asphalt Paving Co., 181 U. S. 324, 329 [1901].

[2] Twining v. New Jersey, 211 U. S. 78, 101 [1908]. Earlier cases had intimated that there might be a difference: Wight v. Davidson, 181 U. S. 371, 384 [1901].

[3] Heiner v. Donnan, 285 U. S. 312, 326 [1932].

* For due process of law under the 14th Amendment, see p. 770.

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Thus, in Farrington *v.* Tokushige,[1] a statute of Hawaii restricting private schools was judged by the standards set up in Meyer *v.* Nebraska,[2] Bartels *v.* Iowa,[3] and Pierce *v.* Society of Sisters.[4] "Those fundamental rights of the individual which the cited cases declared were protected by the Fourteenth Amendment from infringement by the States, are guaranteed by the Fifth Amendment against action by the Territorial legislature or officers." In Ellis *v.* United States,[5] upholding the Hours of Labor Act for employees in public works, the Court said: "We see no reason to deny to the United States the power thus established for the States in Atkin *v.* Kansas, 191 U. S. 207 * * *. The arguments naturally urged against such a statute apply equally for the most part to the two jurisdictions." And in Bromley *v.* McCaughn,[6] upholding a graduated gift tax of the United States, the Court stated clearly: "Graduated taxes on inheritances or successions, with provisions for exemptions, have so often been upheld as not violating either the due process or the equal protection clauses of the Fourteenth Amendment, Stebbins *v.* Riley, 268 U. S. 137, as to leave little ground for supposing that taxation by Congress embracing these features, and otherwise valid, could be deemed a denial of the due process clause of the Fifth."

[1] 273 U. S. 248, 299 [1927].
[2] 262 U. S. 390 [1923].
[3] 262 U. S. 404 [1923].
[4] 268 U. S. 510 [1925].
[5] 206 U. S. 246, 255 [1907].
[6] 280 U. S. 124, 138 [1929].

Statutes enacted by Congress not under its municipal power to punish crimes against the United States but in exercise of the war power of the Government "are not affected by the restrictions imposed by the Fifth and Sixth Amendments." [1] So, in United States *v.* Chemical Foundation,[2] it was said: "There is no constitutional prohibition against confiscation of enemy property." And it is not debatable that Congress may authorize seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision is made for return in case of mistake.[3] But the fact that the Trading With the Enemy Acts as a whole suggested that confiscation was not intended, still left Congress with full freedom to dispose of property seized as it deemed expedient; and an appropriation of proceeds to payment of expenses of seizure was upheld [4] as was also a resolution postponing return to nonenemy owners of seized property, under section 11 of the Settlement of War Claims Act (45 Stat. 254).[5]

[1] Page (Miller) *v.* United States, 11 Wall. 268, 304 [1871], upholding the Confiscation Acts of 1861 (12 Stat. 319) and 1862 (12 Stat. 589).
[2] 272 U. S. 1, 11 [1926].
[3] Stoehr *v.* Wallace, 255 U. S. 239, 245 [1921], upholding the Trading With the Enemy Acts.
[4] Woodson *v.* Deutsche Vormals, 292 U. S. 449, [1934].
[5] Cummings *v.* Deutsche Bank, 300 U. S. 115 [1937].

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But the mere existence of a state of war does not suspend or change the operation of the guaranties and limitations of the Fifth and Sixth Amendments upon the power of Congress with respect to rights conferred on citizens by the Constitution (such as the right to be informed of the nature and cause of an accusation against him).[1]

[1] United States *v.* Cohen Grocery Co., 255 U. S. 81, 88 [1921].

In Hamilton *v.* Kentucky Distilleries & W. Co.,[1] it was stated that the Fifth Amendment imposed "no greater limitations upon the national power than does the Fourteenth Amendment upon State power"—and held, that the War-Time Prohibition Act (40 Stat. 1045) was within the war power, and valid, since it allowed a considerable period within which to dispose of liquor on hand. In Ruppert *v.* Caffey,[2] the Court was considering the Volstead Act (41 Stat. 305), where the prohibition became effective immediately, and stated: "we cannot say the action of Congress was unreasonable or arbitrary."

[1] 251 U. S. 146 [1919].

[2] 251 U. S. 264, 302 [1920], followed in Everard's Breweries *v.* Day, 265 U. S. 545 [1924], which upheld the Supplemental Prohibition Act penalizing prescription of beer for medicinal purposes. *See also* Clark Distilling Co. *v.* Western Md. Ry. Co., 242 U. S. 311, 332 [1917].

Whatever may be the restraints against discriminatory legislation imposed by this clause on the power of Congress, they do not extend to the length of denying Congress the right to impose greater punishment for an offense involving the rights and property of the United States than for a like offense involving the rights or property of a private person.[1]

[1] Hill *v.* United States ex rel. Weiner, 300 U. S. 105, 109 [1937].

The amendment, although not specifically argued, is presumably the ground for such decisions as Reichart *v.* Felps,[1] and Jones *v.* Meehan.[2] In the Reichart case, the question largely discussed was the validity of a title acquired under Virginia, and confirmed by the governor of the northwest territory, under act of Congress. Once that validity was established, "Congress had no power to organize a board of revision to nullify titles confirmed many years before by the authorized agents of the Government." In Jones *v.* Meehan,[2] the Court first decided that title to the land in question was vested by treaty, directly, and devolved upon defendant's grantor; and then held, briefly, that "Congress had no constitutional power * * * to affect titles already granted by the treaty itself."

[1] 6 Wall. 160 [1868].

[2] 175 U. S. 1 [1899].

Applicability in Territory Acquired by the United States.

This amendment is effective within the Territories of the United States[1] and in the District of Columbia.[2] It was stated in Ras-

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mussen *v.* United States[2] that the decisions of the Court demonstrated "that where territory was a part of the United States the inhabitants thereof were entitled to the guarantees of the Fifth, Sixth, and Seventh Amendments, and that * * * acts of Congress purporting to extend the Constitution were considered as declaratory merely of a result which existed independently by the inherent operation of the Constitution." The Rassmussen case involved the applicability of the Sixth Amendment only.

[1] *Cf.* Lovato *v.* New Mexico, 242 U. S. 199, 201 [1916].
[2] Wight *v.* Davidson, 181 U. S. 371, 384 [1901].
[3] 197 U. S. 516, 526 [1905].

The act of 1902 (32 Stat. 691) for the government of the Philippines did not carry over the constitutional requirement of indictment by a grand jury, and in the absence of such requirement, it was held that due process in the Philippines did not require a jury trial in criminal cases.[1] But in several cases, the substance of the Fifth Amendment having been expressly extended to territory acquired, the question became, not the "self-operative application" of the Constitution, but the extent of the declared application. Thus in 1898 (30 Stat. 750), by resolution annexing Hawaii, Congress in terms saved "municipal legislation not contrary" to the Constitution of the United States, but it was held that in view of the long-established usage in the islands, Congress did not intend thereby instantly to abolish the practice of prosecution upon information—a procedure not involving fundamental rights, and conducive to the peace and good order of the community.[2] While the constitutional limitations of power are not controlling upon Congress when legislating, in virtue of the sovereignty of the United States, over territory not forming part of the United States because not incorporated therein,[3] when provisions of the Constitution are carried over to acquired territory, they are to be given the same construction there as in the United States.[4] The question of applying American constitutional limitations to a Philippine or Puerto Rican statute, dealing with the rights of persons living under the government, established by the United States is not a local one.[5]

[1] Dowdell *v.* United States, 221 U. S. 325 [1911].
[2] Hawaii *v.* Mankichi, 190 U. S. 197 [1903].
[3] Public Utility Commrs. *v.* Ynchausti and Co., 251 U. S. 401, 406 [1920], citing Downes *v.* Bidwell, 182 U. S. 244 [1901]; Hawaii *v* Mankichi, 190 U. S. 197 [1903]; Dorr *v.* United States, 195 U. S. 138 [1904]; Dowdell *v.* United States, 221 U. S. 325 [1911]; Ocampo *v.* United States, 234 U. S. 91 [1914].
[4] Kepner *v.* United States, 195 U. S. 100 [1904].
[5] Yu Cong Eng *v.* Trinidad, 271 U. S. 500 [1926].

Persons to Whom Protection Extends.

All persons within the territory of the United States are entitled to the protection guaranteed by this amendment; "even aliens shall

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not * * * be deprived of life, liberty, or property without due process of law." [1]

[1] Wong Wing *v.* United States, 163 U. S. 228, 238 [1896], arguing by analogy from the 14th Amendment, as construed in Yick Wo. *v.* Hopkins, 118 U. S. 356, 369 [1886]. The case held that when an act (27 Stat. 25) authorized imposing a year's imprisonment at hard labor upon Chinese found unlawfully within the United States, preliminary to deportation, it was going beyond a mere matter of exclusion or deportation, and imposing an infamous punishment, which must conform to the requirements of the 5th and 6th Amendments. In United States ex rel. Turner *v.* Williams, 194 U. S. 279, 292 [1904], answering an argument under the 1st Amendment, the Court used this language: "As under [the Constitution] the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise." *See also* Ong Chang Wing *v.* United States, 218 U. S. 272, 280 [1910].

The protection extends to a State, and prohibits a subsequent executive withdrawal of land vested in the State by a lieu selection under act of Congress.[1]

[1] Wyoming *v.* United States, 255 U. S. 489 [1921].

It applies to corporations as well as to natural persons.[1] But the contention that a corporation cannot be punished for a crime on the ground that to do so would deprive the stockholders of property without due process, is without merit.[2]

[1] Union P. R. Co. *v.* United States (Sinking Fund Cases), 99 U. S. 700, 719 [1879].
[2] New York Central and Hudson River R. R. Co. *v.* United States, 212 U. S. 481, 492 [1909].

DEPRIVATION OF LIFE, LIBERTY, AND PROPERTY.

Liberty of Person.

The provisions of the Bituminous Coal Conservation Act of 1935 (49 Stat. 991), which authorized a specified majority of producers and miners to fix maximum hours, and minimum wages within the several districts, compulsory upon the minority by virtue of the tax rebate [13½ percent of the 15 percent tax on coal at the mine] to members of the coal code, and denial of Government purchases, was held to be an unconstitutional interference with personal liberty and private property.[1]

[1] Carter *v.* Carter Coal Co., 298 U. S. 238, 311 [1936].

It was assumed in United States *v.* Ju Toy,[1] that the Fifth Amendment applies to the case of a person seeking admission to

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the United States, and that to deny entrance to a citizen is to deprive him of liberty.

[1] 198 U. S. 253, 263 [1905].

A Philippine statute which, as construed, absolutely prohibited all Chinese merchants from keeping any accounts in Chinese, was unconstitutional, as depriving the Chinese "of their liberty and property without due process of law", and denying them "the equal protection of the laws." [1]

[1] Yu Cong Eng *v.* Trinidad, 271 U. S. 500, 528 [1926].

Enforcement of an Hawaiian act was enjoined which prohibited maintenance of foreign-language schools except upon written permit and payment of a fee based upon attendance, and which further empowered the Department of Public Instruction to regulate all courses, student qualifications, text books, etc. The scope of protection "to fundamental rights of private school owners, parents, and children against invasion by the United States" is the same as is afforded by the Fourteenth Amendment against State action.[1]

[1] Farrington *v.* Tokushige, 273 U. S. 284 [1927].

Liberty of Contract.

Generally speaking, the right to enter into and carry out contracts in respect of one's property and private affairs is protected by the due process clause of the Fifth and Fourteenth Amendments.[1]

[1] Highland *v.* Russell Car & Snow Plow Co., 279 U. S. 253, 261 [1929], citing, as to the 5th Amendment, Adair *v.* United States, 208 U. S. 161, 174 [1908] and Adkins *v.* Children's Hospital, 261 U. S. 525, 546 [1923], In the Adair Case, sec. 10 of the act of June 1, 1898, prohibiting any interstate carrier from threatening any employee with loss of employment because of membership in a labor organization, was held invalid as an invasion of the personal liberty, as well as of the right of property guaranteed by the amendment—an attempt to compel employers against their will, to retain persons in their service.

The Adkins case held unconstitutional the Minimum Wage Law for the District of Columbia, which authorized a board to fix minimum wages for women and minor employees in the District. The exercise of legislative authority to abridge the freedom of contract, it was said, "can be justified only by the existence of exceptional circumstances"—which a majority of the Court thought did not exist in the instant case. They pointed out that the act applied to all occupations and attempted to fix wages on the basis not of work performed but of cost of living; that the standard so prescribed was too vague for practical application, and that there was no such connection between wages and morality as to justify a broad attempt to adjust the latter with reference to the former (the act provided that wages should be such as to "protect the morals" of the women employees).

The Adkins case was expressly overruled in West Coast Hotel Co. *v.* Parrish, 300 U. S. 379 [1937], a case coming up under the 14th Amendment. The Court stressed the unsoundness of the distinction taken

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in the Adkins case between a regulation of wages and a regulation of hours of labor such as had been upheld in Muller *v.* Oregon, 208 U. S. 412 [1908].

"It is also well-established by the decisions of this court that such liberty is not absolute or universal and that Congress may regulate the making and performance of such contracts whenever reasonably necessary to effect any of the great purposes for which the National Government was created." [1]

[1] Highland *v.* Russell Car & Snow Plow Co., *supra*, citing Frisbie *v.* United States, 157 U. S. 160, 165 [1895]; Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 228 [1899]; Ellis *v.* United States, 206 U. S. 246 [1907]; Atlantic Coast Line *v.* Riverside Mills, 219 U. S. 186, 202 [1911]; Louisville & Nashville R. R. *v.* Mottley, 219 U. S. 467, 482 [1911]; Baltimore & Ohio *v.* Interstate Commerce Commission, 221 U. S. 612, 618 [1911]; Mondou *v.* New York, N. H. & H. R. Co. (Second Employers' Liability Cases), 223 U. S. 1, 52 [1912]; Great Northern Ry. *v.* Sutherland 273 U. S. 182, 193 [1927]. The Highland case upheld the Lever Act and executive orders thereunder, fixing maximum prices for coal, where plaintiff's case was merely that the order prevented him from selling coal at prices in excess of the just compensation he would have been entitled to had his coal been taken under eminent domain (which could lawfully have been done).

Acts of Congress restricting in some degree this liberty of contract have been upheld as follows:

(1) The antitrust act (26 Stat. 209) was sustained as applied to prevent contracts in restraint of trade in the sale of pipes, the Court saying "the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States."[1]

(2) Act of 1898 (30 Stat. 763) prohibiting advance of wages to seamen (by making the vessels liable for full payment of wages when earned), was sustained both under the commerce power and because of the special character of seamen's contracts.[2]

(3) Act of 1892 (27 Stat. 340) limiting hours of labor of mechanics and laborers on public works, employed by the United States or by public contractors.[3]

(4) The Hepburn Act of 1906 (34 Stat. 584) prohibiting issue of free passes, was not unconstitutional even as applied to abolish rights under a prior agreement, by which a carrier agreed to issue such passes annually for life in settlement of a claim for personal injuries.[4]

(5) Railway Hours of Labor Act of 1907 (34 Stat. 145) which limited hours of empolyees in general engaged in or connected with the movement of interstate trains to 16 hours, and of train despatchers, etc., to 9 hours, was upheld as within the power of Congress under its commerce power to provide for the safety of employees and travelers.[5]

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"In imposing restrictions having reasonable relations to this end there is no interference with liberty of contract as guaranteed by the Constitution."

(6) Employers' Liability Act of 1908 (35 Stat. 65) which made carriers liable for damages suffered by their employees by reason of negligence of the carrier or fellow workers, or defect in equipment, etc., was sustained in Mondou *v.* New York, N. H. & H. R. Co. (Second Employers Liability Cases).[6] The section which declared void any contract regulation or device the intent of which was to enable a carrier to exempt itself from the liability created by the act was separately considered and upheld in Philadelphia, B. & W. R. Co. *v.* Schubert.[7]

(7) The Adamson Act of 1916 (39 Stat. 721) which (1) established an 8-hour day for employees of interstate railroads; and (2) prohibited wage reductions pending the 6–9 months' observation period,[8] was upheld as to hours on the basis of Baltimore & O. R. Co. *v.* Interstate Commerce Commission, *supra*; and on the point of fixing of wages was sustained as a temporary exercise of power to insure continuous operation of interstate carriers and prevent imminent injury to the public interest. To this extent the private right to fix by agreement a standard of wages was subject to the legislative authority to regulate commerce.[9]

(8) An order of the Interstate Commerce Commission under section 15 of the Interstate Commerce Act establishing through routes and joint rates, is not a deprivation of liberty of contract, by compelling the formation of a partnership relation.[10]

(9) Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424) which classified disabilities (as well as beneficiaries) and the amount of compensation payable in the several cases, was not unreasonable, and therefore no violation of the amendment.[11]

(10) The Railway Labor Act of 1926 (44 Stat. 577 as amended by 48 Stat. 1188) provides that in all disputes as to who shall represent labor, the Mediation Board, upon request of either party, may investigate and certify the representatives of labor. The act requires the carriers to negotiate with the representatives so certified; it does not require them to hire or to discharge any employees or to enter into any contract. In answer to the objection that the act was a denial of due process the Court said "it seems plain that the command of the statute to negotiate for the settlement of labor disputes, given in the appropriate exercise of the commerce power, cannot be said to be so arbitrary or unreasonable as to infringe due process."[12]

(11) The National Labor Relations Act of 1935 (49 Stat. 449) providing that representatives designated by a majority of employees in any bargaining unit shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining, and empowering the Board to restrain interference by employers with the

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selection of representatives by employees, was held not to be an arbitrary or capricious restraint upon the conduct of a business.[13]

[1] Addyston Pipe and Steel Co. *v.* United States, 175 U. S. 211, 229 [1899].
[2] Patterson *v.* The "Eudora", 190 U. S. 169 [1903].
[3] Ellis *v.* United States, 206 U. S. 246 [1907]. *See also* United States *v.* Garbish, 222 U. S. 257 [1911].
[4] Louisville & N. R. Co. *v.* Mottley, 219 U. S. 467 [1911].
[5] Baltimore & O. R. Co. *v.* Interstate Commerce Commission, 221 U. S. 612 [1911]. *See also* Wilson *v.* New, 243 U. S. 332, 346 [1917].
[6] 223 U. S. 1 [1912].
[7] 224 U. S. 603 [1912].
[8] 221 U. S. 612 [1911].
[9] Wilson *v.* New, 243 U. S. 332 [1917].
[10] St. Louis S. W. Ry. Co. *v.* United States, 245 U. S. 136, 142 [1917].
[11] Crowell *v.* Benson, 285 U. S. 22 [1932].
[12] Virginia R. Co. *v.* System Federation, 300 U. S. 515, 559 [1937]. *See also* Texas & N. O. R. R. Co. *v.* Brotherhood of Railway & S. S. Clerks, 281 U. S. 548 [1930], sustaining the original act.
[13] National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U. S. 1 [1937].

Deprivation of Property.

In General.—The provision of the Fifth Amendment against depriving of property without due process of law "referred only to a direct appropriation. A new tariff, an embargo, or a war, might bring upon individuals great losses; might, indeed, render valuable property almost valueless,—might destroy the worth of contracts." The harshness of such legislation, or the hardship it may cause, affords no reason for considering it to be unconstitutional.[1]

[1] Norman *v.* Baltimore and O. R. Co., 294 U. S. 240 [1935], holding valid the repeal of the "gold clause" (48 Stat. 113) as applied to a private contract.

Rights created by statute are subject to qualification by Congress without violation of due process. Thus, a statute authorizing use or sale of patented articles by one who purchased from the inventor, without further liability therefor, was upheld.[1] Where Congress in granting lands to a railroad, qualified the grant by a condition in favor of settlers, so that the substantial right granted the railroad was to a payment of $2.50 an acre on disposal of lands, it could constitutionally, for breach of performance, resume title to the lands, if assuring the railroad the equivalent of its interest above noted.[2] A revocation by his successor in office, of the approval by the Secretary of the Interior of plats and papers showing that a railroad company is entitled to land under a grant, is an attempt to deprive the company of its property without due process of law, and is void.[3] Section 206 (f) of the Transportation Act of 1920 (41 Stat. 456, 589), which excepted the period of Federal control from the time limit

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set by the act upon claims against carriers for damages caused by misrouting of goods, was read as prospective only. The limitation thus imposed was an integral part of the liability created by the act, and not merely a matter of the remedy; and to make it retroactive would violate the amendment.[4]

[1] Dable Grain Shovel Co. *v.* Flint, 137 U. S. 41 [1890].

[2] Oregon & C. R. Co. *v.* United States, 243 U. S. 549 [1917]. Followed by Santa Fe P. R. Co. *v.* Lane, 244 U. S. 492 [1917], upholding an act which subsequent to grant required the railroad to pay the cost of survey.

[3] Noble *v.* Union River Logging R. Co., 147 U. S. 165 [1893].

[4] Danzer Co. *v.* Gulf & S. I. R. Co., 268 U. S. 633 [1925].

Benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress;[1] and appropriations may be conditioned to restrict payments therefrom. Thus, an act appropriating for a private claim and restricting attorneys' fees payable therefrom to 20 percent, was valid although inconsistent with a prior contract with the claimant allowing a fee of 50 percent of amount recovered.[2] An omnibus act of 1915 (38 Stat. 962, sec. 4) which restricted fees to 20 percent of claim from any source whatever was likewise upheld.[3]

[1] United States ex rel. Burnett *v.* Teller, 107 U. S. 64, 68 [1883]; Frisbie *v.* United States, 157 U. S. 160, 166 [1895]; United States *v.* Cook, 257 U. S. 523, 527 [1922].

[2] Capital Trust Co. *v.* Calhoun, 250 U. S. 208 [1919], citing Frisbie *v.* United States, 157 U. S. 160 [1895]; Ball *v.* Halshell, 161 U. S. 72 [1896].

[3] Calhoun *v.* Massie, 253 U. S. 170 [1920], followed in Newman *v.* Moyers, 253 U. S. 182 [1920], and in Margolin *v.* United States, 269 U. S. 93 [1925], where the act fixed a fee of $3 for services in connection with veterans' insurance.

Valid contracts are property, whether the obligor be a private individual, a municipality, a State, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment; and the provision of the Economy Act of March 20, 1933 (48 Stat. 8), repealing laws relating to veterans insurance, was unconstitutional as applied to outstanding policies.[1]

[1] Lynch *v.* United States, 292 U. S. 571, 579 [1934].

But a right to sue the Government on a contract is a privilege granted, not a property right protected by the Fifth Amendment.[1] Where the right to sue for recovery of taxes paid was conditioned upon an appeal to the Commissioner and his refusal to refund, there was no violation of due process.[2] Nor was there any violation of the amendment when Congress took away the right to sue for recovery of taxes, where the claim for recovery was without substantial equity, and arose merely from mistake of administrative officials in allowing the statute of limitations to run before distraining;[3] or when sections 901–917 of the Revenue Act of 1936 (49 Stat. 1747) denied taxpayers

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the right to sue for refund of processing and floor taxes collected under the Agricultural Adjustment Act of 1933 prior to its invalidation in United States *v.* Butler (297 U. S. 1), and substituting in lieu thereof a new administrative procedure for the recovery of such sums.[4] So, where an act (34 Stat. 636) ratifying the imposition and collection of duties by United States authorities in the Philippine Islands was attacked upon the ground that it deprived those who had paid the duties of the right to recover them, the Court said: "the argument disregards the fact that when the duties were illegally exacted in the name of the United States Congress possessed the power to have authorized their imposition in the mode in which they were enforced, and hence from the very moment of collection a right in Congress to ratify the transaction, if it saw fit to do so, was engendered. In other words, as a necessary result of the power to ratify, it followed that the right to recover the duties in question was subject to the exercise by Congress of its undoubted power to ratify." [5]

[1] Lynch *v.* United States, 292 U. S. 571, 579 [1934].
[2] Dodge *v.* Osborn, 240 U. S. 118 [1916].
[3] Graham *v.* Goodcell, 282 U. S. 409 [1931].
[4] Anniston Mfg. Co. *v.* Davis, 301 U. S. 337 [1937].
[5] United States *v.* Heinszen & Co., 206 U. S. 370, 386 [1907].

An attorney's calling or profession was conceded to be "his property, within the true sense and meaning of the Constitution."[1] A railroad's right-of-way has the substantiality of the fee and is private property.[2]

[1] Ex parte Wall, 107 U. S. 265, 289 [1883].
[2] Western U. Teleg. Co. *v.* Pennsylvania R. Co., 195 U. S. 540 [1904].

But there is no vested right, which will be protected under the Fifth Amendment, in the following circumstances:

(1) To trade with foreign countries (upholding the Tea Inspection Act of 1897 (29 Stat. 604), which provided for fixing of standards, and prohibited importation of tea not conforming thereto.[1])

(2) In the continuing operation of a treaty.[2]

(3) To require a competing carrier to impose penalty charges—right of a carrier under the Interstate Commerce Act is limited to protection against unjust discrimination.[3]

(4) To build up the business of a trunk line carrier by paying bonuses or rebates (acts which have been prohibited by Congress), and such action may be enjoined by the Interstate Commerce Commission.[4]

(5) A judgment creditor levying an attachment on personal property in the Indian Territory was not deprived of any right under this amendment by operation of act of 1897, which (as construed) in terms validated mortgages of personal property theretofore executed by

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nonresidents of the territory, which had been recorded in the district where the property was situated.[5]

[1] Buttfield *v.* Stranahan, 192 U. S. 470 [1904].
[2] Rainey *v.* United States, 232 U. S. 310 [1914]. *See also* Alvarez y Sanchez *v.* United States 216 U. S. 167 [1910].
[3] Hines *v.* United States, 263 U. S. 143 [1923].
[4] O'Keefe *v.* United States, 240 U. S. 294 [1916].
[5] McFaddin *v.* Evans-Snider-Buel Co., 185 U. S. 505 [1902].

BANKRUPTCY.—The bankruptcy power of Congress is subject to the Fifth Amendment.[1]

[1] Louisville Joint Stock Lank Bank *v.* Radford, 295 U. S. 555 [1935].

Section 77 (railroad reorganization) of the Bankruptcy Act (47 Stat. 1467), construed as authorizing injunction against sale of collateral under terms of contract, if interfering with a proposed reorganization, does not violate the Fifth Amendment. While Congress cannot under the due process clause by direct legislation impair the obligation of contracts, it "undeniably has authority to pass legislation pertinent to any of the powers conferred by the Constitution, however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts." [1]

[1] Continental Ill. Nat. Bank & Trust Co. *v.* Chicago, R. I. & P. R. Co., 294 U. S. 648, 680 [1935], citing Legal Tender Cases, 12 Wall. 457 [1871]; Louisville & N. R. Co. *v.* Mottley, 219 U. S. 467, 480–482, 484 [1911]; Highland *v.* Russell Car and Snow Plow Co., 279 U. S. 253, 261 [1929].

The Frazier-Lemke Act of 1934 (48 Stat. 1289) provided that in case of farmers unable to effect composition of mortgage indebtedness under the act of 1933, they might purchase the property at then appraised value, with no down payment and the price spread over 6 years at 1 percent interest. If creditor objected to such sale, the Court might stay proceedings for 5 years, the debtor to remain in possession of all or part, at reasonable rental (to be distributable among secured and unsecured creditors) and with the option of purchasing at the expiration of the 5 years at the same appraised valuation. This act was held unconstitutional, the effect as a whole being to deprive the creditor of property rights acquired prior to the act, viz: The rights, recognized by the law of Kentucky, to retain his lien until indebtedness paid, to have a judicial sale and to determine when such sale should be had, to bid at the sale, to control the property during the default and to have the rents used in satisfaction of his debt.[1] The second Frazier-Lemke Act, of 1935 (49 Stat. 942) was held constitutional in Wright *v.* Vinton Branch of Mountain Trust Bank of Roanoke.[2] The new act adequately protected the rights impaired by the first act, by making the stay of foreclosure subject to termination by the court, giving the court supervision at all times of property retained by the debtor.

[1] Louisville Joint Stock Land Bank *v.* Radford, 295 U. S. 555 [1935].
[2] 300 U. S. 440 [1937].

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Section 77B (corporate reorganization) of the Bankruptcy Act (48 Stat. 911) provided in subdivision (10) (b) that claims of landlords for injury resulting from rejection of an unexpired lease, or for damages or indemnity under a covenant of the lease, should be treated as on a parity with provable debts, but limited to an amount equal to 3 years' rent (48 Stat. 915). Construed as limiting the landlord's claim to an amount not exceeding 3 years' rent for all purposes, the act was held not a taking of property without due process—since it gave him a new and more certain remedy for a limited amount, in lieu of an old remedy inefficient and uncertain in result; nor is it arbitrary merely because it may not in all cases have the same relation to the actual loss of landlords.[1]

[1] Kuehner *v.* Irving Trust Co., 299 U. S. 445 [1937].

CARRIERS.—The act of 1878 (20 Stat. 56) requiring establishment of a sinking fund in the Federal Treasury by the Union Pacific Railroad (a Government-chartered corporation) to assure the payment of debts owing in part to the United States, was held within the power of the United States as sovereign, and not a taking of property of current stockholders since it took from them nothing that actually and equitably belonged to them.[1]

[1] Union P. R. Co. *v.* United States (Sinking Fund Cases), 99 U. S. 700 [1879].

The commerce power of Congress "must be exercised in subjection to the guarantees of due process of law found in the Fifth Amendment" (Railroad Retirement Bd. *v.* Alton R. Co., 295 U. S. 330 [1935]). In this case it was held that the Railroad Retirement Act (48 Stat. 1283) was unconstitutional under the due process clause in the following particulars:

(1) Because it made eligible for pensions all persons who had been in the service of any railroad within a period of 1 year prior to enactment; also, former employees subsequently reemployed.

(2) Because it counted past unconnected service of an employee toward the requirement for pension without requiring any contribution therefor.

(3) Because of the disparity in rate of contributions toward the Retirement Fund required of different carriers while the drafts on the fund were at a fixed rate.

(4) Because of the pooling principle adopted, under which the act treated all carriers as a single employer and pooled their assets regardless of their individual obligations and the varying conditions of their respective enterprises.

On the other hand, acts of Congress, relating to carriers or administrative action taken thereunder, have been sustained against the argument of deprivation of property, as follows:

(1) An act prohibiting the bringing to this country of aliens afflicted with loathsome or dangerous diseases (Immigration Act of

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1903, 32 Stat. 1213) was held "obviously" within the power of Congress; and a further provision empowering the Secretary of Commerce and Labor to impose a "fine" on the steamship company bringing any alien so afflicted, when, in the opinion of the medical examining officer, the disease could have been detected at date of sailing, said fine to be enforced by making payment a prerequisite to grant of clearance to the vessel—was sustained in view of the plenary power of Congress over the admission of aliens, and over the administrative matter of issuance of clearances. The question was reserved, however, as to whether a delegation to the Secretary would have been valid which involved the exercise of purely judicial authority.[1]

(2) The Hepburn Act (34 Stat. 584) subjecting interstate oil pipe lines to regulation by the Interstate Commerce Commission as common carriers was upheld, when, as applied in the particular case, it required the pipe line (the Standard Oil and its subordinates) to cease its practice of requiring that all oil offered for transmission should be sold to it as a condition of carriage. The Standard Oil being under the circumstances a common carrier in all but name, Congress had power to require it to become so in form; and as a regulation of carriers, the act simply required that if they carried, they must do it in a way they did not like—not a taking of property.[2]

(3) An order of the Commission, under section 418, making division of joint rates between groups of carriers, and giving a weaker group a greater share of such rates, was upheld as within the power of the Commission to maintain the group in effective operation as part of an adequate transportation system—the share allotted to the stronger group being adequate to avoid a confiscatory result.[3]

(4) The "Recapture Clause" (41 Stat. 489–491) limited railroads to a fair net operating income upon the aggregate of property held for use in transportation, and provided for recapture of one-half of excess earnings to be available as a revolving fund, for loans by the Interstate Commerce Commission to weaker roads, etc. The section was held valid; a railroad "however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled as of constitutional right to more than a fair net operating income upon the value of its properties which are being devoted to transportation." And any carrier earning an excess, held it as trustee, and did not acquire such title as to make the recapture a taking without due process.[4]

(5) An argument that act of December 26, 1920 (41 Stat. 1082) [requiring detention of "alien seamen" found to be afflicted with enumerated diseases, viz, diseases which under sec. 35 of the Immigration Act are ground for exclusion, and payment of expenses by the vessel bringing them to United States] was void under the Fifth Amendment as imposing liability without causal connection, was held without merit.[5]

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(6) An order of the Interstate Commerce Commission ordered certain steam railroads to cease from discrimination against an electric road (also engaged in general freight business), effected by denying to it reciprocal switching services which by arrangement they performed for each other, although the electric road in fact had physical connection with only one of the steam roads. *Held*, that while the practical effect of the order is to admit the electric road to a part of the business now being adequately handled by the steam roads, it did not constitute a violation of the Fifth Amendment. "Substantially the same objection was made and overruled in Penn. Co. *v.* United States, 236 U. S. 351 [1915], and Louisville & N. R. Co. *v.* United States, 238 U. S. 1, 20 [1915]." [6]

(7) A demurrage tariff filed under the Interstate Commerce Act and imposing a "penalty" of $10 a day for detention of loaded cars, for reconsignment, longer than a specified time, was held not to impose a penalty without notice. It was strictly a tariff provision; and the filing was notice, in any event.[7]

(8) A rule of the Interstate Commerce Commission requiring carriers, in determining how many coal cars are available for distribution, to count cars owned by shippers, and prohibiting them from placing at any one mine more than a ratable share of the total count, but not diverting the surplus of privately owned cars to the use of another, was held not to involve a taking of private property. Congress could under its commerce power exclude private cars from interstate railroads; and it may prescribe conditions to their use as well as to the use of carrier-owned cars.[8] Where a rule fixed the number of cars distributable to coal mines in proportion to the daily production capacity of each, an argument that it was arbitrary in violation of the amendment was held "without merit." [9]

(9) An order of the Interstate Commerce Commission relieving short-line roads from daily accounting to car owners as to cars on their lines (in effect authorizing report to the intermediate connecting carriers, and requiring additional reports by such trunk lines) was held not to amount to confiscation of property of the trunk lines, in view of the negligible amount of car equipment owned by the short lines, the greater facilities of the trunk lines to perform the accounting, etc. But a further provision of the order (made in face of a finding by the Commission that all railroads were entitled to a fixed sum per day rental for cars used on foreign roads) relieving the short lines from such payment for a space of 2 days, was arbitrary and invalid. "Confiscation may result from a taking of the use of property without compensation as well as from the taking of the title." [10]

(10) An order of the Federal Communications Commission prescribing a uniform system of accounts for telephone companies based upon a so-called "uniform cost" rule, is not arbitrary and therefore void.[11]

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(11) An order of the Secretary of Commerce under the Shipping Act of 1916 (39 Stat. 728) requiring a common carrier by water to file with him a copy or summary of its books and records is not, although directed to a single carrier, unreasonable and arbitrary in violation of the Fifth Amendment.[12]

[1] Oceanic Steam Nav. Co. *v.* Stranahan, 214 U. S. 320, 340 [1909].

[2] United States *v.* Ohio Oil Co. (The Pipe Line Cases), 234 U. S. 548 [1914].

[3] Akron C. & Y. R. Co. *v.* United States (New England Divisions Case), 261 U. S. 184 [1923].

[4] Dayton-Goose Creek R. Co. *v.* United States, 263 U. S. 456, 481, 484 [1924].

[5] United States *v.* New York & C. Mail S. S. Co., 269 U. S. 304 [1925].

[6] Chicago, I. & L. R. Co. *v.* United States, 270 U. S. 287 [1926]. *Cf.* Seaboard Air Line R. Co. *v.* United States, 254 U. S. 57 [1920]; United States *v.* Illinois C. R. Co., 263 U. S. 515, 523 [1924]; United States *v.* American R. Exp. Co., 265 U. S. 425, 437–438 [1924].

[7] Turner, D. & L. Lumber Co. *v.* Chicago, M. & St. P. R. Co., 271 U. S. 259 [1926].

[8] United States *v.* Berwind-White Coal Mine Co. (Assigned Car Cases), 274 U. S. 564, 575 [1927]. *Cf.* United States ex rel. Attorney General *v.* Delaware & Hudson Co., 213 U. S. 366, 405–406, 411, 415 [1909]; Procter & Gamble Co. *v.* United States, 225 U. S. 282 [1912]; Swift & Co. *v.* Hocking Valley R. Co., 243 U. S. 281 [1917].

[9] United States *v.* New River Co., 265 U. S. 533 [1924].

[10] Chicago, R. I. & P. R. Co. *v.* United States, 284 U. S. 80 [1931]. *See also* Chicago, M. & St. P. R. Co. *v.* Minnesota ex rel. Railroad & W. Commission, 134 U. S. 418, 458 [1890]; Chicago, M. & St. P. R. Co. *v.* Wisconsin, 238 U. S. 491, 498 [1915]; Reagan *v.* Farmers' Loan & T. Co., 154 U. S. 362, 410, 412 [1894].

[11] American Teleph. & Teleg. Co. *v.* United States, 299 U. S. 232 [1936].

[12] Isbrandsten-Moller Co. *v.* United States, 300 U. S. 139, 145 [1937]. *See also* Swayne & Hoyt Ltd. *v.* United States, 300 U. S. 297 [1937].

INDIANS.—Rights of tax-exemption accruing to Indian allotments under an act of Congress, and which have become vested, are protected by this amendment against repeal.[1] So, one who was duly approved and enrolled as a member of the Chickasaw Nation, under act of July 1, 1902 (32 Stat. 177, 641), acquired valuable rights [viz, participation in distribution of tribal lands and funds] which the Secretary of Interior could not, under the Fifth Amendment, strike down without notice and hearing.[2]

[1] Choate *v.* Trapp, 224 U. S. 665 [1912]. *See also* English *v.* Richardson 224 U. S. 680 [1912]; Sizemore *v.* Brady, 235 U. S. 441 [1914].

[2] Garfield *v.* United States, 211 U. S. 249 [1908]. *See also* United States ex rel. Turner *v.* Fisher, 222 U. S. 204 [1911].

But the power of Congress in virtue of its wardship over the Indians has been held to extend to a restriction on alienation of Indian lands, even after the particular Indian had been granted citizenship.[1] The guardianship arises from the condition of dependency; and it rests with Congress to determine when the relationship shall cease; the mere grant of citizenship not being sufficient to term-

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inate it.[2] The fact of guardianship does not make the United States a necessary party to a proceeding involving Indian property; and where an act authorizing suit against allottees as a class, for the value of services rendered in securing the allotments, provided for notice upon the governor of the tribe, and designated the Attorney General to defend the suit, there was no substantial basis for an argument under the due process clause.[3]

[1] Tiger *v.* Western Investment Co., 221 U. S. 286 [1911]. *See also* Brader *v.* James, 246 U. S. 88 [1918]; Williams *v.* Johnson, 239 U. S. 414 [1915].

[2] Lone Wolf *v.* Hitchcock, 187 U. S. 553 [1903].

[3] Winton *v.* Amos, 255 U. S. 373 [1921].

Where an act of Congress created a tribal council for the Osage Indians, to be elected by the tribe, but at the same time vested the Secretary of the Interior with power in his discretion to remove a member without the necessity of notice or hearing, it was held not to deny due process of law, since the right involved was indissolubly united in its creation with the Secretary's right of removal.[1]

[1] United States ex rel. Brown *v.* Lane, 232 U. S. 598 [1914].

USE OF POSTAL SERVICE.—In its complete control over the postal service [1] Congress may annex such conditions as it chooses. Its exclusion of poisons, explosives, and matter objectionable on grounds of public policy, has never been supposed to deny to the owners any constitutional rights. And when an act (26 Stat. 465) authorized the Postmaster General "upon evidence satisfactory to himself" that any person was engaged in a lottery or scheme for obtaining money through the mails by fraudulent pretenses, to mark "fraudulent" and return all registered letters directed to such person, the constitutionality of the act was assumed in the first case thereunder,[2] with the reservation that "the person injured may apply to the courts for redress in case the Postmaster General has exceeded his authority or his action is palpably wrong." But his action will not be reviewed in doubtful cases.[3]

[1] Ex parte Jackson, 96 U. S. 727 [1878].

[2] American School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94 [1902], where a fraud order was temporarily enjoined which had been issued under a "mistake of law," in that the evidence on which the Postmaster General acted "in any view of the facts failed to show a violation of any Federal law." The admitted facts were that defendant's business was based on the practical proposition that the mind is a perceptible factor in the curing of human ills; and the Court held that the effectiveness of any particular method of treatment of disease is "a fruitful source of difference of opinion" and "certainly not a matter for the decision of the Postmaster General within the statutes relative to fraud." *See also* Bates and G. Co. *v.* Payne, 194 U. S. 106 [1904].

[3] Public Clearing House *v.* Coyne, 194 U. S. 497 [1904]. The Court here upheld an order which required return of all letters addressed to the concern involved or its officers as such, holding that to limit such order to matter obviously connected with the enterprise would be a practical annullment of the law.

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A hearing upon revocation of second-class mailing privilege by an Assistant Postmaster General upon notice, at which relator was heard and evidence received, was due process. That such a hearing "on precisely such a question as is here involved, when fairly conducted, satisfies all the requirements of due process of law has been repeatedly decided. Smith *v.* Hitchcock, 226 U. S. 53, 60 [1912]; Bates and G. Co. *v.* Payne, 194 U. S. 106 [1904]; Publ. Clearing House *v.* Coyne, 194 U. S. 497 [1904]; Lewis Pub. Co. *v.* Morgan, 229 U. S. 288 [1933]." [1]

[1] United States ex rel. Milwaukee Social Democratic Pub. Co. *v.* Burleson, 255 U. S. 407 [1921].

TAXATION.—This clause is not a limitation upon the taxing power conferred on Congress by the Constitution. In other words, "the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same away on the other by the limitations of the due process clause." [1]

[1] Brushaber *v.* Union P. R., 240 U. S. 1, 24 [1916], upholding the income tax of 1916 against the argument of want of due process on grounds of the progressive rates, the exemptions, and discriminations between classes of corporations and individuals. All the objections were comprehensively held to be based upon the "mistaken theory that although there be differences between the subjects taxed, to differently tax them transcends the limit of taxation and amounts to a want of due process" and that want of due process arises from the mere fact that one who opposes a tax believes it unjust and unwise.

Support for the proposition laid down in the Brushaber case, above, was drawn from Treat *v.* White, 181 U. S. 264 [1901]; Patton *v.* Brady, 184 U. S. 608 [1902]; McCray *v.* United States, 195 U. S. 27, 61 [1904]; Flint *v.* Stone Tracy Co., 220 U. S. 107 [1911]; Billings *v.* United States, 232 U. S. 261, 282 [1914]. In succession these cases had held—

(1) Treat *v.* White—That failure of the War Revenue Act of 1898 (30 Stat. 448) to tax "puts" furnished no ground for denying the validity of the tax on "calls."

(2) Patton *v.* Brady—That the power to lay an "excise tax" is not exhausted by a single exercise, but that an excise may be increased by Congress, at least while the property is still held for sale. An "excise" as such is not an arbitrary power, but limited by the rule of geographical uniformity.[1]

(3) McCray *v.* United States—That although, in determining whether a particular act is within a granted power, such as the taxing power, its scope and effect are to be considered, once it be found within that power, it may not be judicially restrained because of the results to arise from its exercise. Accordingly, a tax of 10 cents a pound on colored oleomargarine was upheld, although amounting to a destruction of the business, and although discriminating between colored and uncolored oleomargarine by taxing the latter at only ¼ cent a pound.[2]

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(4) Flint *v.* Stone Tracy Co.—That the Corporation Tax Act of 1909 (36 Stat. 11) was not invalid because taxing businesses carried on by corporations and exempting the same businesses carried on by individuals, nor because measuring the tax by income from all sources. No standard "can be chosen which will operate with absolute justice and equality upon all corporations."

(5) Billings *v.* United States—That the tax on foreign-built yachts imposed by section 37 of the Tariff Act of 1909 (36 Stat. 11) was not invalid because domestic-built yachts were exempted, nor because retroactive.

[1] *See also* Knowlton *v.* Moore, 178 U. S. 41, 106 [1900].

[2] *See also* Alaska Fish Salting & By-products Co. *v.* Smith, 255 U. S. 44 [1921]; Sonzinsky *v.* United States, 300 U. S. 506, 513 [1937].

The classification of the Social Security Act, imposing a tax on employers of eight persons or more, and exempting agricultural labor and domestic service, was upheld.[1]

[1] Steward Machine Co. *v.* Davis, 301 U. S. 548, [1937]; Helvering *v.* Davis, 301 U. S. 619, [1937].

But while in Patton *v.* Brady, *supra*, the Court stated briefly (p. 623) that "it is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed", it was conceded in McCray *v.* United States (p. 64) that if a case was presented where the abuse of the taxing power was so extreme that it was "plain to the judicial mind that the power had been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred." In the Brushaber case the Court held that the doctrine that the taxing power was not limited by the due process clause "would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation [1] but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

[1] *Cf.* the Child Labor Tax Case, 259 U. S. 20 [1922], where the act was held not a tax but a regulation of child labor, and as such an infringement of rights reserved by the 10th Amendment. In Hill *v.* Wallace, 259 U. S. 44 [1922], the tax on grain futures under the Future Trading Act of 1921 was held to be a penalty to enforce compliance with detailed regulations of grain exchanges, and further, not sustainable under the commerce power. So, in Carter *v.* Carter Coal Co., 298 U. S. 238 [1936], the 15 percent tax on

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coal, with a refund of 13½ percent to members of the coal code set up by the Coal Conservation Act, was held a penalty rather than a tax, and the real question was as to the validity of the act under the commerce power. On the other hand, where a license tax of $200 on dealers in firearms was supplemented only by provisions for registration, it was held that it was a true tax and the registration supportable as in aid thereof (Sonzinsky *v.* United States, 300 U. S. 506 [1937]).

By 1932, the Court considered it settled "that a Federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process clause of the Fifth Amendment." [1]

[1] Heiner *v.* Donnan, 285 U. S. 312, 326 [1932].

Under the principle thus adverted to, taxes have been held unconstitutional because arbitrary and unreasonable, as follows:

(1) Nichols *v.* Coolidge, 274 U. S. 531 [1927], held invalid section 402 (c) of the Revenue Act of 1919 (40 Stat. 1057), so far as it required inclusion in gross estate, for estate tax purposes, of the value of property transferred prior to passage of the act, merely because the conveyance was to take effect in possession or enjoyment at or after death of transferor (i. e., by raising a presumption that "unless shown to the contrary" any transfer within 2 years of death, without consideration, should be deemed made in contemplation of death).[1]

(2) Untermeyer *v.* Anderson, 276 U. S. 440 [1928], held unconstitutional the gift tax provisions of the Revenue Act of 1924 (43 Stat. 253) (which were construed as being applicable to gifts made at any time during the calendar year of enactment), as applied to a transfer by gift consummated before passage, but while the bill was in the last stages of progress through Congress.[2]

(3) Heiner *v.* Donnan, 285 U. S. 312 [1932], held unconstitutional the provision of section 302 (c) of the Revenue Act of 1926 (44 Stat. 9) which established a conclusive presumption, for purposes of the death transfer tax, that any transfer within 2 years of death, without consideration, was made in contemplation of death, and imposed a tax on the decedent's estate including the value of such gifts. Such tax was held "more arbitrary and less defensible against attack than one imposing arbitrarily retroactive taxes, which this court has decided to be in clear violation of the Fifth Amendment." It was arbitrary when considered as a death tax, and would be equally invalid as a gift tax, which it is construed not to be.[3]

[1] Followed in Handy *v.* Delaware Trust Co., 285 U. S. 352 [1932].
[2] *See also* Blodgett *v.* Holden, 275 U. S. 142 [1927].
[3] *See also* Barclay & Co. *v.* Edwards, 267 U. S. 442, 450 [1925].

But the argument of unreasonableness has failed, and legislation been sustained, in numerous instances (in addition to Brushaber *v.* Union P. R., and cases cited):

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(1) Alaska Fish Salting & By-Products Co. *v.* Smith, 255 U. S. 44 [1921], held valid an Alaska license statute, which taxed the manufacture of oil and fertilizer from fish at a higher rate when herring were so used than when other fish or fish offal were used.

(2) La Belle Iron Works *v.* United States, 256 U. S. 377 [1921], sustained the Excess Profits Tax of 1917 (40 Stat. 300), where the tax on excess profits was based on "invested capital", and invested capital was defined as the original cost of the property—thus preventing any write-up of assets.

(3) National Paper & Type Co. *v.* Bowers, 266 U. S. 373 [1924], sustained an income tax on foreign corporations based on their income from sources within the United States only, while domestic corporations were taxed on income from all sources.

(4) Haavik *v.* Alaska Packers' Association, 263 U. S. 510 [1924], sustained an Alaska statute imposing license taxes on nonresident fishermen only.

(5) Bromley *v.* McCaughn, 280 U. S. 124 [1929], upheld the gift tax provisions of the act of 1924, amended in 1926, under which the scheme of graduations and exemptions was such that the tax on donors of the same total amount might be different.

(6) Cooper *v.* United States, 280 U. S. 409 [1930], where the Revenue Act of November 23, 1921 (42 Stat. 227), construed as retroactive for the calendar year, was upheld as applied to tax a donee upon the increase in value of property received by gift prior to passage of the act and later sold.

(7) Tyler *v.* United States, 281 U. S. 497 [1930], sustained transfer taxes under Revenue Acts of 1916 (39 Stat. 756, 777–778) and 1921 (42 Stat. 227), measured in part by the value of property held jointly by a husband and wife, but which had come to the joint tenancy as a pure gift from the decedent spouse.

(8) Reinecke *v.* Smith, 289 U. S. 172 [1933], upheld section 219 (g) of the Revenue Act of 1924 (43 Stat. 253), taxing the settlor of a trust on income of the trust accruing during any period in which he had power to revoke or modify the trust, as applied to such income accruing after the effective date of the act.

(9) United States *v.* Hudson, 299 U. S. 498 [1937], sustained section 8 of the Silver Purchase Act of 1934 (48 Stat. 1178) construed as laying a special income tax on profits arising from sale of silver, and retroactive for 35 days. In this instance, agitation on the subject matter of the act had been strong for several months, and the 35-day period was practically the period during which the bill was before Congress. Speaking of the practice of making taxes retroactive for short periods so as to include profits made while the tax was in process of enactment, the Court said (p. 500): "Repeated decisions of this Court have recognized this practice and sustained it as consistent with the due process of law clause of the Constitution. Stockdale *v.* Atlantic Ins. Co., 20 Wall. 323, 331, 332, 341 [1874]; Brushaber *v.*

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Union P. R., 240 U. S. 1, 20 [1916]; Lynch *v.* Hornby, 247 U. S. 339, 343 [1918]; Cooper *v.* United States, 280 U. S. 409, 411 [1930]."

(10) Cincinnati Soap Co. *v.* United States, 301 U. S. 308 [1937], upheld section 602½ of the Revenue Act of 1934 (48 Stat. 680, 763) taxing the first domestic processing of coconut oil of Philippine production, proceeds therefrom to be paid to the Treasurer of the Philippine Islands for benefit of Philippine producers.

MISCELLANEOUS.—A statute of the Choctaw Nation providing for the forfeiture and sale of buildings erected on their lands, even though valid, may not be enforced without giving the builder an opportunity to be heard, as to do so would be to deprive him of his property without due process of law.[1]

[1] Walker *v.* McLoud, 204 U. S. 302, 309 [1907].

Congress in its exercise of the police power within the District of Columbia required improved property in the District to be connected with the city sewage system, with penalties varying according to whether the owner was a resident or nonresident (29 Stat. 125). The act was sustained against the arguments that there was no showing of necessity, and that the classification was arbitrary.[1]

[1] District of Columbia *v.* Brooke, 214 U. S. 138 [1909].

A statute of New Mexico Territory, under which disseisin of real property was authorized after 10 years to ripen into title, was held not to take property without due process.[1]

[1] Montoya *v.* Gonzales, 232 U. S. 375 [1914].

Section 3450 of the Revised Statutes, which declared that every conveyance whatsoever used in the removal, concealment, etc., of goods with intent to defraud the United States of any tax thereon, shall be forfeited, was so construed as to deprive a conditional vendee who had no notice of the illegal use to which an automobile was being put of his interest therein. Such construction was held not to be violative of the Fifth Amendment as a deprivation of property without due process.[1]

[1] Goldsmith-Grant Co. *v.* United States, 254 U. S. 505 [1921].

The District of Columbia Rents Act of 1919 (41 Stat. 298, title II) which was declared to be necessary because of emergencies growing out of the War, created a rent commission with power after hearing to fix rents; and permitted tenants to remain after expiration of leases, so long as they continued to perform conditions fixed by lease or by the commission. It was upheld, against the argument that it deprived owners of free use of their property, on the ground that the public interest required temporarily some degree of public control, and the Court did not feel itself warranted in saying that the control actually exercised went so far as to violate the Amendment.[1] When,

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however, Congress undertook in May 1922 to extend the act, again on the declared ground of emergency, for a further period of 2 years, the Court held that it was open to the courts to inquire whether the exigency still existed upon which the continued operation of the law depended.[2]

[1] Block *v.* Hirsh, 256 U. S. 135 [1921].
[2] Chastleton Corp. *v.* Sinclair, 264 U. S. 543 [1924].

Where a lease of Government boats by the Chief of Engineers, acting for the United States, stipulated for termination of lease and retaking of property if in his judgment lessee was not complying with terms of lease, action on such stipulation is not a taking of property unless there is "an absence of good faith in the exercise of the judgment." [1]

[1] Goltra *v.* Weeks, 271 U. S. 536 [1926].

The Ashurst-Sumners Act (49 Stat. 494) is not arbitrary or capricious, and violative of the due process clause because making it unlawful knowingly to transport convict-made goods into any State where their receipt, possession, or sale are violative of its laws.[1]

[1] Kentucky Whip & Collar Co. *v.* Illinois C. R. Co., 299 U. S. 334 [1937].

PROCEDURAL DUE PROCESS.

In General.

The words "due process of law" were undoubtedly intended to convey the same meaning as the words "by the law of the land" in Magna Charta.[1] The principle has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term, all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure and without notice or an opportunity for a hearing.[2]

[1] Den ex dem. Murray *v.* Hoboken Land & Improv. Co., 18 How. 276 [1856]. Speaking of similar language in the constitution of Maryland, the Court said in Bank of Columbia *v.* Okely, 4 Wheat. 235 [1819]: "The good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."
[2] Ochoa *v.* Hernandez y Morales, 230 U. S. 139 [1913].

Due process of law signifies a right to be heard in one's defense, and a decree *pro confesso* entered against a defendant after striking his answer from the files for contempt of court is void.[1] But an order of a court, like a statute, is not unconstitutional because it endows an official act or finding with a presumption of regularity or

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of verity.[2] Error committed by a trial judge in admitting a former judgment in evidence and in rendering judgment on such evidence against one who objected, but who was fully heard, did not constitute denial of due process.[3] And a suggestion that due process forbade a hearing upon a transcript of evidence formerly heard in court was answered by its very statement.[4] A statute authorizing judgment against the sureties of an appeal bond, as well as against the appellants, in case of affirmance, is not unconstitutional;[5] a man may contract to be bound by a judgment in which he has no right to be heard.[6]

[1] Hovey *v.* Elliott, 167 U. S. 407, 417 [1897].
[2] Ex parte Peterson, 253 U. S. 300, 301 [1920].
[3] Jones *v.* Buffalo Creek Coal & Coke Co., 245 U. S. 328 [1917].
[4] De la Rama *v.* De la Rama, 241 U. S. 154, 158 [1916].
[5] Beall *v.* New Mexico ex rel. Griffin, 16 Wall. 535 [1873].
[6] United Surety Co. *v.* American Fruit Product Co., 238 U. S. 140 [1915], where it was held immaterial whether the amount of the judgment (the appraised value of the property attached) was to be fixed by appraisal or by the court.

The words "due process of law" do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts.[1] They do not require a plenary suit and a trial by jury in all cases where property or personal rights are involved.[2] The important right of personal liberty is generally determined by a single judge on a writ of habeas corpus, using affidavits or depositions for proofs where facts are to be established. The courts of chancery, bankruptcy, probate, and admiralty administer immense fields of jurisdiction without trial by jury. In all cases that kind of procedure is due process of law which is suitable and proper to the nature of the case and sanctioned by the established customs and usages of the courts.[3]

[1] Davidson *v.* New Orleans, 96 U. S. 97, 102 [1878]; Public Clearing House *v.* Coyne, 194 U. S. 497, 508 [1904].
[2] Thus, the District of Columbia Rents Act having been sustained in its delegation of power to a commission to regulate the relation of landlord and tenant, it was held "of little moment" that it made no provision for jury trial of the right to possession (Block *v.* Hirsh, 256 U. S. 135 [1921]). In matters of contempt a jury is not required by "due process." This is manifest from the very nature of the institution of courts (Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 489 [1894]), where there was the further circumstance that the issue involved was purely a question of law.
[3] Ex parte Wall, 107 U. S. 265, 289 [1883], sustaining a summary proceeding to disbar an attorney of which due notice was given and the attorney accorded a hearing, although the charge was of an offense triable under State law, and not made on affidavit. Disbarment proceedings are not criminal, Lovato *v.* New Mexico, 242 U. S. 199 [1916].

Thus, to foreigners seeking admission to this country, the decision of an administrative officer acting in pursuance of law is due process.[1]

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To those in the military or naval service of the United States, the military law is due process, and the decision of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts.[2] This principle extends to persons who commit offenses while undergoing punishment inflicted by court martial—even conceding that they have ceased to be soldiers, they are still, as military prisoners, subject to military law.[3]

[1] Nishimura Ekiu *v.* United States, 142 U. S. 651, 659, 660 [1892].

[2] Reaves *v.* Ainsworth, 219 U. S. 296, 304 [1911]. *See also* Ex parte Reed, 100 U. S. 13 [1879]; Johnson *v.* Sayre, 158 U. S. 109 [1895]; Mullan *v.* United States, 212 U. S. 516 [1909]; United States ex rel. Creary *v.* Weeks, 259 U. S. 336 [1922], in which case sec. 24b of the Army Reorganization Act was upheld, which denied a second hearing to officers, classified as not to be retained, on the question whether the classification was due to misconduct, etc. (which if answered in the affirmative meant discharge from the Army).

[3] Kahn *v.* Anderson, 255 U. S. 1 [1921].

An argument of deprivation of property is unavailing where, under conclusive findings of fact, petitioners' claims as a junior lienor were of no value.[1]

[1] In re 620 Church St. Corp., 299 U. S. 24 [1936].

A person who, while en route to answer an indictment in Federal court of another district, is arrested by Federal authorities for another offense cannot argue a violation of due process. Such arrest constitutes at most a breach of the rule of comity.[1] So, the constitutional question, if without real foundation, cannot be put forward as a mere pretext to open other questions which otherwise could not come before the court;[2] or in disregard of principles settled by decisions of the court.[3]

[1] Morse *v.* United States, 267 U. S. 80 [1925].

[2] United Surety Co. *v.* American Fruit Product Co., 238 U. S. 140 [1915]. *See also* Bianchi *v.* Morales, 262 U. S. 170 [1923].

[3] Billings *v.* United States, 232 U. S. 261 [1914]; United States *v.* Bennett, 232 U. S. 299 [1914]; Rainey *v.* United States 232 U. S. 310 [1914].

The fact that a statute allowed an injured seaman a choice between varying measures of redress and differing forms of action without any corresponding right in their employers, was held no violation of due process; "in the nature of things the right to choose cannot be accorded to both parties."[1]

[1] Panama R. Co. *v.* Johnson, 264 U. S. 375, 392 [1924].

A judgment obtained in garnishment proceedings under a statute of Hawaii, under which leaving a copy of the summons at the "last and usual place of abode" was sufficient notice to defendant, was affirmed on the ground that the existence of such a statute was

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notice to any owner of claims to be ready to be represented in case of attachment.[1]

[1] Herbert v. Bicknell, 233 U. S. 70 [1914].

When a State court, in proceedings designed, *inter alia*, to invalidate certain releases signed by the widow and heirs of a testator, rendered judgment without special finding on the exact point, the United States Circuit Court in subsequent proceedings giving effect to such judgment as though conclusive on the validity of the releases did not deny due process.[1]

[1] Fayerweather v. Ritch, 195 U. S. 276 [1904].

Use of a party wall (in the District of Columbia) without questioning the building regulations governing the subject, waived any right of the lot owner to object, when called upon to pay for such use, that the regulations deprived him of property without due process.[1] But where a man's wife, under implied coercion, permitted Government agents to search his house without a warrant, no waiver was intended, or effected, of his rights under the Fourth and Fifth Amendments.[2]

[1] Walker v. Gish, 260 U. S. 447 [1923].
[2] Amos v. United States, 255 U. S. 313 [1921].

Administrative Proceedings.

ALIENS.

ADMISSION AND EXCLUSION.—Assuming that the Fifth Amendment applies to one seeking admission to the United States, and that to deny entrance is a deprivation of liberty, due process does not necessarily require judicial trial.[1] Exclusion of aliens, or admission upon terms prescribed, is within the power of every sovereign nation* and while an alien prevented from landing in the United States, is entitled to a writ of *habeas corpus* to ascertain whether his restraint is lawful,[2] if Congress entrusts the final determination of facts upon which the right to enter depends to an executive officer, no other tribunal, unless expressly authorized by law, is at liberty to reexamine the sufficiency of the evidence on which he acted.[3] As to foreigners who have never been naturalized nor acquired any domicile or residence within the United States nor even been admitted to the country pursuant to law the decision [whether they shall be permitted to enter] of an executive or administrative officer, acting within powers expressly conferred by Congress is due process of law.[4] But when there was omitted from the record of a case the evidence as to mutual recognition between a Chinese claiming right to enter as an American citizen and three intelligent white witnesses (upon the strength of whose testimony his status of citizenship had previously been certified and

* *See also* pp. 164, 283, 645, 957 for other cases involving aliens.

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he had been on a visit to China) it was held "not a fair report, and a hearing based upon it was not a fair hearing within the definition of the cases cited." [5]

[1] United States *v.* Ju Toy, 198 U. S. 253, 263 [1905]. *See also* Yamataya *v.* Fisher, 189 U. S. 86, 100 [1903].

[2] Chew Heong *v.* United States, 112 U. S. 536 [1884]; United States *v.* Jung Ah Lung, 124 U. S. 621 [1888]; Ex parte Lau Ow Bew, 141 U. S. 583 [1891].

[3] Oteiza y Cortes *v.* Jacobus, 136 U. S. 330 [1890].

[4] Nishimura Ekiu *v.* United States, 142 U. S. 651, 659, 660 [1892], sustaining an adverse decision of an immigration inspector even though the record did not show that he took any testimony under oath. This finality of decision of administrative officers is not always conclusive; e. g., under the act of 1894, it was held to be conclusive only if adverse to the alien's right of entry; if favorable, the alien might still be challenged under an earlier act of 1884 (Li Sing *v.* United States, 180 U. S. 486, 490 [1901]).

[5] Kwock Jan Fat *v.* White, 253 U. S. 454, 457, 464 [1920]. "It is fully settled that the decision of the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were 'manifestly unfair', were 'such as to prevent a fair investigation', or show 'manifest abuse' of the discretion committed to the executive officers by the statute, Low Wah Suey *v.* Backus, 225 U. S. 460, 469, 472 [1912], or that 'their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law'. Tang Tun *v.* Edsell, 223 U. S. 673, 681, 682 [1912]. The decision must be after a hearing in good faith, however summary, Chin Yow *v.* United States, 208 U. S. 8, 12 [1908], and it must find adequate support in the evidence (Zakonaite *v.* Wolf, 226 U. S. 272, 274 [1912])."

Where an act of 1894 (28 Stat. 390) made the decision of an immigration inspector final unless appeal was taken to the Secretary of Treasury, a person who failed to take such appeal did not, by mere allegation of citizenship, acquire right to judicial hearing on *habeas corpus*. "A petition for *habeas corpus* ought not to be entertained unless the Court is satisfied that the petitioner can make out at least a *prima facie* case." [1] In this case the rules required the immigration officer to prevent communication with the aliens other than by officials under his control, to have them examined promptly, apart from the public, in the presence of Government officials and such witnesses as the examining officer shall designate. All these requirements were held "intended to give as fair a chance to prove the right to enter the country as the necessarily summary character of the proceedings will permit."

[1] United States *v.* Sing Tuck, 194 U. S. 161 [1904]. *See also* Quon Quon Poy *v.* Johnson, 273 U. S. 352, 358 [1927].

But where persons of Chinese blood were admitted by the immigration authorities and months afterward were arrested and held for deportation, by executive order, they were held entitled to a judicial hearing on the jurisdictional question of citizenship, upon which they

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had presented evidence both before the immigration officers and upon petition for *habeas corpus*.[1]

[1] Ng Fung Ho *v.* White, 259 U. S. 276, 281 [1922].

The complete authority of Congress in the matter of admission of aliens justifies delegation of power to executive officers to enforce the exclusion of aliens afflicted with contagious diseases by imposing upon the vessel bringing any such alien a money penalty, collectible before and as a condition of the grant of clearance.[1]

[1] Oceanic Steam Nav. Co. *v.* Stranahan, 214 U. S. 320 [1909], followed in International Mercantile Marine Co. *v.* Stranahan, 214 U. S. 344 [1909].

DEPORTATION.—Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful; and may do so by appropriate executive proceedings.[1]

[1] Ng Fung Ho *v.* White, 259 U. S. 276 [1922], upholding deportation on executive order (as authorized by Immigration Act of 1917) on ground of an offense committed prior to 1917, when by law deportation required judicial proceedings.

Deportation proceedings are not criminal prosecutions within the meaning of the Fifth and Sixth Amendments. The authority to deport is drawn from the authority of Congress to regulate the coming of aliens within the United States and to impose conditions upon the performance of which the continued liberty of the alien to reside within the country may be made to depend; and findings of fact reached by executive officials after a fair [1] though summary hearing may constitutionally be made conclusive.[2]

[1] Quon Quon Poy *v.* Johnson, 273 U. S. 352 [1927], holding that mere delay in commencing an investigation does not render the hearing unfair; nor does absence of a relative, when petitioner waived that right; nor introduction of evidence previously taken by an inspector, where not objected to at the time.

[2] Zakonaite *v.* Wolf, 226 U. S. 272 [1912]. *See also* Fong Yue Ting *v.* United States, 149 U. S. 698, 730 [1893]; Chae Chan Ping *v.* United States, 130 U. S. 581 [1889]; Lem Moon Sing *v.* United States, 158 U. S. 538 [1895]; United States *v.* Zucker, 161 U. S. 475 [1896]; Wong Wing *v.* United States, 163 U. S. 228, 237 [1896]; Fok Yung Ho *v.* United States, 185 U. S. 296 [1902]; Chin Bak Kan *v.* United States, 186 U. S. 193 [1902]; United States ex rel. Turner *v.* Williams, 194 U. S. 279 [1904].

"The very ground of the power in the necessities of public welfare shows that it may have to be exercised in a summary way through executive officers." [1]

[1] Chuoco Tiaco *v.* Forbes, 228 U. S. 549, 557 [1913], sustaining the power of the Philippine Legislature to direct deportation of aliens "as an incident of the self-determination, however limited, given to it by the United States" even to the extent of retroactively confirming a deportation effected by the Governor General.

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"Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*. * * * But a want of due process is not established by showing merely that the decision is erroneous * * * or that incompetent evidence was received and considered." [1]

[1] United States ex rel. Vajtauer *v.* Commissioner of Immigration, 273 U. S. 103, 106 [1927]. *See also* United States ex rel. Tisi *v.* Tod, 264 U. S. 131, 133 [1924], where a deportation order was upheld which found the fact of knowledge by the alien of the seditious character of printed matter distributed by him, from evidence which was legally, but not manifestly, inadequate. *See also* Mahler *v.* Eby, 264 U. S. 32, 41 [1924].

NATURALIZATION.—Section 15 of the Naturalization Law of 1906 (34 Stat. 596, 601), authorized cancellation of certificates for fraud and provided that the taking up a permanent residence abroad within 5 years after naturalization should be *prima facie* evidence of lack of intention to become a permanent resident of the United States when applying for citizenship. It was held that this rule of evidence was not so certainly unreasonable as to amount to lack of due process.[1]

[1] Luria *v.* United States, 231 U. S. 9 [1914].

DISTRICT OF COLUMBIA UTILITIES.

When the Public Utilities Commission of the District of Columbia in good faith failed to exercise jurisdiction over certain concerns on the ground they were so small as not to be within the meaning of the act (37 Stat. 938, 974) it was held that a concern which had been adjudged within the scope of the Commission's jurisdiction, had no just cause of complaint on that score.[1]

[1] Terminal Taxicab Co. *v.* Kutz, 241 U. S. 252 [1916].

An individual gas user in the District of Columbia may challenge the validity of an order of the Utilities Commission on constitutional grounds without first complaining before the Commission. But the argument that such a user is entitled to equality with the Government in the matter of rates established by a utility created by permission of Congress needs no answer.[1]

[1] Hollis *v.* Kutz, 255 U. S. 452 [1921].

INTERSTATE CARRIERS.

"It has been settled in cases arising under the Interstate Commerce Act that if an order rests upon an erroneous rule of law, Interstate Commerce Commission *v.* Diffenbaugh, 222 U. S. 42 [1911]; or is based upon a finding made without evidence, Chicago Junction Case, 264 U. S. 258, 263 [1924]; or upon evidence which clearly does not support it, Interstate Commerce Commission *v.* Union Pac. R. R. Co., 222 U. S. 541, 547 [1912];[1] New England Divisions Case, 261 U. S. 184, 203 [1923]; Colorado *v.* United States, 271 U. S. 153, 166 [1926], the order must be set aside." (Tagg Bros. and Moorhead *v.* United States, 280 U. S. 420, 442 [1930].) But the mere admission

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by the Interstate Commerce Commission of matter which would not be admissible under rules of evidence in judicial proceedings does not invalidate an order.[2]

[1] It was pointed out in this case that a reviewing court will not consider the expediency or wisdom of the order; it will confine itself to the ultimate question as to whether the commission acted within its power. *See also* Manufacturers' R. Co. *v.* United States, 246 U. S. 457, 489 [1918].

[2] Western Paper Makers Chemical Co. *v.* United States, 271 U. S. 268 [1926]. *See also* United States *v.* Abilene & S. R. Co., 265 U. S. 274, 288 [1924].

This judicial scrutiny to prevent transgression of the constitutional limits of power is not to be precluded, when Congress acts directly, by any declaration or legislative finding, nor by authorizing an agent to make findings that the agent has kept within those limits. Judicial power cannot be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. In such cases the complaining party carries the burden of establishing confiscation.[1]

[1] St. Joseph Stock Yards Co. *v.* United States, 298 U. S. 38, 51 [1936].

The mere fact that one was not a party to proceedings before the Interstate Commerce Commission does not bar him from contesting the Commission's order on the ground of being in excess of authority.[1] But in order to invoke protection of the amendment against enforcement of an order of the Commission, the facts relied upon to prevent enforcement "must be specifically alleged and from them it must clearly appear that the enforcement of the measure complained of will necessarily deny to the utility the just compensation safeguarded to it by the Constitution." [2]

[1] Interstate Commerce Commission *v.* Diffenbaugh, 222 U. S. 42, 49 [1911]; Skinner & E. Corp. *v.* United States, 249 U. S. 557 [1919].

[2] Beaumont, S. L. & W. R. Co. *v.* United States, 282 U. S. 74, 88 [1930].

Bankruptcy Proceedings.

The provisions of the Bankruptcy Act as to voluntary proceedings are not in violation of this amendment. Proceedings in bankruptcy are in the nature of proceedings *in rem* and if such notice to all who may be interested in opposing the discharge as the nature of the proceeding admits is provided to be given, that is sufficient.[1]

[1] Hanover Nat. Bank *v.* Moyses, 186 U. S. 181, 190 [1902].

Criminal Proceedings.

As applied to criminal procedure, "generally speaking, it may be said that if an accused has been heard in a court of competent jurisdiction, and proceeded against under the orderly processes of law, and

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only punished after inquiry and investigation, upon notice to him, with an opportunity to be heard, and a judgment awarded within the authority of a constitutional law, then he has had due process of law."[1]

[1] Ong Chang Wing v. United States, 218 U. S. 272, 279 [1910]. *See also* Rogers v. Peck, 199 U. S. 425, 435 [1905]; Twining v. New Jersey, 211 U. S. 78 [1908].

Due process requires that there shall be arraignment and plea on a charge of an infamous crime;[1] that the act creating the offense shall set up an ascertainable standard of guilt;[2] and that, after indictment found, nothing shall be done in the absence of the prisoner—and specifically that the trial of challenges of jurors by triers shall not take place apart from the court and in absence of defendant.[3] The practice in impaneling a jury, where there is no Federal statute, must not conflict with or abridge the right as it exists at common law—including the right of challenge. "While this rule has in the cases of misdemeanors been somewhat relaxed, yet in felonies it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial."[4] Where an act of Congress made public employees eligible for jury service in the District of Columbia, subject to challenge for bias, an argument that it was arbitrary in violation of the Fifth Amendment failed, and the act was upheld.[5]

[1] Crain v. United States, 162 U. S. 625 [1896].

[2] United States v. Cohen (L.) Grocery Co., 255 U. S. 81 [1921]; Weeds v. United States, 255 U. S. 109 [1921]. *See also* Re Gregory, 219 U. S. 210 [1911].

[3] Hopt v. Utah, 110 U. S. 574 [1884].

[4] Lewis v. United States, 146 U. S. 370, 377 [1892], holding that where at direction of court, prosecution and defendant made their challenges of jurors independently of each other and consequently three persons challenged by defendant were also challenged by the United States, it was substantial error. But *cf.* Diaz v. United States, 223 U. S. 442 [1912].

[5] United States v. Wood, 299 U. S. 123 [1936].

In matters of contempt, due process does not require a jury trial.[1] So, it was held that in criminal contempt, it was immaterial that proceedings were had in absence of defendant; criminal contempt is *sui generis* and not a criminal prosecution within common understanding.[2] The requirement of due process is satisfied by suitable notice and adequate opportunity to be heard.[3]

[1] Interstate Commerce Commission v. Brimson, 154 U. S. 447, 489 [1894].

[2] Blackmer v. United States, 284 U. S. 421 [1932].

[3] *Cf.* Cooke v. United States, 267 U. S. 517, 537 [1925].

As noted above, deportation proceedings are not criminal prosecutions.[1]

[1] Zakonaite v. Wolf, 226 U. S. 272 [1912].

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Special Assessments (District of Columbia).

Where an act of Congress (28 Stat. 275), providing for the laying of water mains in the District of Columbia, fixed an assessment of $1.25 per linear front foot against abutting property, it was held that the act was "conclusive alike of the question of the necessity of the work, and of the benefits as against abutting property." The Court pointed out the distinction between such a case and one where the legislature submits these questions for inquiry to a commission or other officers; in such case "the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing, or to notice or an opportunity to be heard."[1] This latter situation arose in Wight *v.* Davidson,[2] where the act (30 Stat. 1344) for the extension of a street in the District provided that the Commissioners should condemn the necessary land by proceedings in the District Supreme Court, and that a jury should fix the damages and benefits to adjacent land. Notice by publication having been given in such proceedings, it was held sufficient, as to all persons interested.

[1] Parsons *v.* District of Columbia, 170 U. S. 45 [1898].
[2] 181 U. S. 371 [1901].

Where Congress by a general prospective law (27 Stat. 255; 28 Stat. 501) authorized the Commissioners to condemn land for the opening of alleys, the damages to be assessed and apportioned by a jury upon all lots in the square affected, it was argued that the charges might exceed the benefits. But it was held that the act could be read as limiting the apportionment to the benefit in any case, and as so construed was valid.[1] In a later act (30 Stat. 834) for extension of an avenue, Congress provided for assessment of one-half the benefits against lands within a described area, and it was held that the question whether a specified assessment was so excessive as to amount to a taking without due process was a question of fact not going to the validity of the act.[2]

[1] Martin *v.* District of Columbia, 205 U. S. 135 [1907].
[2] Briscoe *v.* Rudolph, 221 U. S. 547 [1911].

An act of Congress (26 Stat. 492) authorizing establishment in the District of Columbia of a public park for the benefit of the people of the United States, and assessing one-half the cost against adjacent property specially benefited, was upheld against the argument that the purpose of the park is so general as not to warrant a special assessment; and that being dedicated to the whole people, its cost should be defrayed out of the general treasury.[1]

[1] Shoemaker *v.* United States, 147 U. S. 282 [1893]; Wilson *v.* Lambert, 168 U. S. 611 [1898].

Taxation.

"Before collection of taxes levied by statutes enacted in plain pursuance of the taxing power can be enforced, the taxpayer must be

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given fair opportunity for hearing—this is essential to due process of law (Central of Georgia R. Co. *v.* Wright, 207 U. S. 127, 136, 138, 142)." And *a fortiori* where the tax was substantially a penalty for crime, collection by distraint would be unconstitutional if no hearing was allowed.[1]

[1] Lipke *v.* Lederer, 259 U. S. 557, 562 [1922].

Section 280 (a) (1) of the Revenue Act of 1926 (44 Stat. 61) provided that corporation taxes theretofore recoverable from transferees of the corporation only by suit at law or in equity might be recovered by any proceedings normally invoked against delinquent taxpayers. It was held that the summary procedure thus authorized (there being two alternative methods of eventual judicial review) satisfied the requirements of due process. While immediate relief may be had by habeas corpus for the protection of life and liberty,[1] postponement of redress in case of property rights is valid.[2]

[1] Phillips *v.* Commissioner of Internal Revenue, 283 U. S. 589, citing United States *v.* Woo Jan, 245 U. S. 552 [1918], Ng Fung Ho *v.* White, 259 U. S. 276 [1922].

[2] Phillips *v.* Commissioner of Internal Revenue, 283 U. S. 589 [1931]. *Cf.* Springer *v.* United States, 102 U. S. 586, 593 [1881]; Scottish Union & Nat. Ins. Co. *v.* Bowland, 196 U. S. 611, 631 [1905].

Distraint of personal property for the payment of taxes "is almost as old as the common law"; it is only the "further legitimate exercise of the same power for the same purpose." [1]

[1] Springer *v.* United States, 102 U. S. 586, 593 [1881].

Eminent Domain.

IN GENERAL.

The right of eminent domain is an incident of sovereignty [1] and requires no constitutional recognition. This clause, providing for just compensation for property taken, is merely a limitation upon the use of the power.[2] However, it contains an implied recognition of the right of eminent domain beyond what may justly be implied from the express grants of power.[3]

[1] Searl *v.* School District No. 2, 133 U. S. 553, 562 [1890]

[2] United States *v.* Jones, 109 U. S. 518 [1883].

[3] Kohl *v.* United States, 91 U. S. 372 [1876].

The extent to which private property shall be taken for public use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made.[1]

[1] Shoemaker *v.* United States, 147 U. S. 298 [1893].

Whenever, in the execution of the powers granted to the United States by the Constitution, lands in any State are needed by the United States for a fort, magazine, dockyard, lighthouse, custom-

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house, courthouse, post office, or any other public purpose, and cannot be acquired by agreement with the owners, the Congress, exercising the right of eminent domain, and making just compensation to the owners, may authorize such lands to be taken, either by proceedings in the courts of the State with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the State, as Congress may direct or permit.[1]

[1] Chappell *v.* United States, 160 U. S. 499, 510 [1896], sustaining the act of 1888 (25 Stat. 357) authorizing the Secretary of the Treasury to institute proceedings for condemnation of land for lighthouses. *See also* Harris *v.* Elliott, 10 Pet. 25 [1836]; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641 [1890]; Monongahela Nav. Co. *v.* United States, 148 U. S. 312 [1893]; Luxton *v.* North River Bridge Co., 153 U. S. 525 [1894]; Manufacturers' Land & Improv. Co. *v.* United States Shipping Board Emergency Fleet Corporation, 264 U. S. 250 [1924]; James *v.* Dravo Contracting Co., 302 U. S. 134 [1937].

This provision was intended to be enforced by the judiciary, and the Federal courts may take jurisdiction of an action in ejectment by a citizen against officers of the Government, to recover property of which he has been deprived by force and which has been converted to the use of the Government without lawful authority, without due process of law, and without compensation.[1] If a statutory remedy for obtaining compensation is incomplete or imperfect, the owner is not thereby debarred from his common-law remedy, and may recover damages in an action of trespass or ejectment; but he has no right, especially after acquiescing in the appropriation of his land for a number of years, to take the law into his own hands and repossess himself of his own.[2]

[1] United States *v.* Lee, 106 U. S. 220 [1882].

[2] Kaukauna Water Power Co. *v.* Green Bay & M. Canal Co., 142 U. S 254 [1891].

PROPERTY SUBJECT TO CONDEMNATION.

"All private property is held subject to the necessities of Government. The right of eminent domain underlies all such rights of property. The Government may take personal or real property whenever its necessities or the exigencies of the occasion demand * * * but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation." [1]

[1] United States *v.* Lynah, 188 U. S. 449, 465 [1903].

The franchise of a private corporation is property which cannot be taken for public use without compensation.[1] Thus, when Congress, under its power to regulate commerce, condemns and appropriates a lock and dam belonging to a navigation company, its action does not destroy the State franchise, and just compensation requires

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payment for the franchise to take tolls as well as for the value of the tangible property.[2]

[1] Wilmington & W. R. Co. *v.* Reid, 13 Wall. 264 [1872].
[2] Monongahela Nav. Co. *v.* United States, 148 U. S. 312 [1893]. *See also* Louisville Bridge Co. *v.* United States, 242 U. S. 409 [1917].

Letters patent for a new invention or discovery in the arts confer upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the Government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser.[1] Prior to the act of 1910 authorizing suit in the Court of Claims the right of a patentee against the Government was based on an implied contract; by the act of 1910 (36 Stat. 851), a remedy was afforded in cases where such implication did not arise but the use of the patent rights was ratified and adopted by the Government.[2] It did not apply where the use was by a contractor without knowledge or consent.[3]

[1] James *v.* Campbell, 104 U. S. 358 [1882]. *See also* Hollister *v.* Benedict & B. Mfg. Co., 113 U. S. 67 [1885].
[2] Crozier *v.* Krupp Aktiengesellschaft, 224 U. S. 290 [1912].
[3] William Cramp & Sons Ship & E. Bldg. Co. *v.* International Curtis Marine Turbine Co., 246 U. S. 28 [1918].

Where Congress condemned certain lands for park purposes, setting off resulting benefits against the value of the property taken, and by a subsequent act directed the erection of a fire-station house therein, it was held that property was not thereby taken without just compensation. The mere presence of the park may have conferred a special benefit on neighboring owners and enhanced the value of their property, but the existence of value alone does not generate interests protected by the Constitution against diminution by the Government, however unreasonable its action may be.[1]

[1] Reichelderfer *v.* Quinn, 287 U. S. 315, 318 [1932].

Likewise, a valuable contract right is property within the meaning of this amendment, and when taken for public use must be paid for by the Government; but when it is lost or injured as a consequence of lawful governmental action not a taking, the law affords no remedy. Thus when the Government, for war purposes, requisitioned the entire production of a steel manufacturer, rendering impossible of performance an outstanding contract between the manufacturer and a customer, the customer's rights were not taken by the Government, but frustrated by its lawful action.[1]

[1] Omnia Commercial Co. *v.* United States, 261 U. S. 502 [1923]. *See also* Morrisdale Coal Co. *v.* United States, 55 Ct. Cl. 310 [1920].

Where the Government takes property of an alien friend by eminent domain it must pay the equivalent of full value thereof.

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The fact that property of our citizens may be confiscated in that alien's country does not subject the alien friend's property to confiscation here.[1]

[1] Russian Volunteer Fleet *v.* United States, 282 U. S. 481 [1931].

PUBLIC USE.

The courts have power to determine whether the use for which private property is authorized by the legislature to be taken is in fact a public use.[1]

[1] Shoemaker *v.* United States, 147 U. S. 298 [1893].

An act of Congress making an appropriation for continuing the work of surveying, locating, and preserving for memorial purposes the line of battle at Gettysburg, Pa., was valid.[1]

[1] United States *v.* Gettysburg Electric R. Co., 160 U. S. 668 [1896].

Manufacture of snowplows for railroads during the World War was a "public use", for which coal and other private property might have been taken under power of eminent domain.[1]

[1] Highland *v.* Russell Car & Snowplow Co., 279 U. S. 253 [1929].

Where establishment of a reservoir under the Reclamation Act involved flooding part of a town, the United States had constitutional authority to take by condemnation nearby property for a new townsite; and the fact that there might be some surplus lots to be sold did not deprive the transaction of its character as a taking for public use.[1]

[1] Brown *v.* United States, 263 U. S. 78 [1923].

WHAT CONSTITUTES A TAKING.

Taking property for public use occurs where land or other property of an individual is taken from him for the use of the Government or public, and where, if the property were not paid for, the burden would fall chiefly upon the persons whose property is taken and not upon the public generally; in such case payment must be made to prevent inequality.[1]

[1] Michigan Central R. Co. *v.* Slack, 17 Fed. Cas. No. 9527a [1876], affirmed, 100 U. S. 595 [1880]. *See also* United States *v.* Creek Nation, 295 U. S. 103 [1935]; United States *v.* North American Transp. & Trading Co., 253 U. S. 330 [1920]; Phelps *v.* United States, 274 U. S. 341 [1927].

There is a distinction between the taking of property for public uses and a consequential injury to such property by reason of some public work. In the one class the law implies a contract, a promise to pay for the property taken, which, if the taking was by the General Government, will uphold an action in the Court of Claims, while in the other class there is simply a tortious act doing injury, over which the Court of Claims has no jurisdiction.[1]

[1] United States *v.* Lynah, 188 U. S. 445, 472 [1903].

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The construction, by officers and agents of the Government under the authority of Congress, of dams, training walls, and other obstructions across a river, which results in an overflow of water which it is impossible to remove, rendering property unfit for the purpose of any agriculture and depriving it of all value, is a taking of property by the Government within the meaning of this provision, for the value of which the Government is under an implied contract to make just compensation, even though Congress did not specifically direct the taking of the particular property and no formal proceedings have been taken to condemn the land.[1]

[1] United States *v.* Lynah, 188 U. S. 445 [1903], citing Pumpelly *v.* Green Bay & M. Canal Co., 13 Wall. 181 [1872] (involving similar provision in constitution of Wisconsin). *See also* Jacobs *v.* United States, 290 U. S. 13 [1933].

However, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard. When damage results consequentially from the prosecution of an improvement of a navigable river, for the public good, it is not a taking of property, but is merely incidental to the exercise of a servitude to which it is always subject.[1] Such servitude is, however, a natural servitude, confined to such streams as in their natural condition are navigable in fact, and to the natural condition of the streams. Where the construction by the Government of locks and dams for "canalizing" a river creates a permanent liability to recurring overflows, impairing but not destroying the value of the land, it is a partial taking of property subject to the protection of the Fifth Amendment—the fee being permitted to remain in the owner, subject to an easement in the United States to overflow it as often as necessarily may result from the operation of the dock and dam for purposes of navigation.[2]

[1] Gibson *v.* United States, 166 U. S. 271 [1897]. *See also* Scranton *v.* Wheeler, 179 U. S. 153 [1900]; Bedford *v.* United States, 192 U. S. 223 [1904]; Jackson *v.* United States, 230 U. S. 1 [1913]; Hughes *v.* United States, 230 U. S. 24 [1913]; Greenleaf-Johnson Lumber Co. *v.* Garrison, 237 U. S. 251 [1915]; Sanguinetti *v.* United States, 264 U. S. 146 [1924]; Willink *v.* United States, 240 U. S. 572 [1916]; Cubbins *v.* Mississippi River Commission, 241 U. S. 351 [1916].

[2] United States *v.* Cress, 243 U. S. 316 [1917].

The destruction of the property of the owner of a lake through the raising of the lake level, consequent upon the carrying out of a Government irrigation project, cannot be said to be a taking, from which an agreement by the United States to make compensation will be implied where the result of the Government work to the lake owner's property could not have been foreseen or foretold.[1]

[1] Horstmann Co. *v.* United States, 257 U. S. 138 [1921].

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Where Congress, legislating for the District of Columbia, chartered a corporation to construct a tunnel under a part of the city and operate railway trains therein, the corporation was immune from abatement as a public nuisance, but liable for damages at suit of an individual whose property was so injured by reason of smoke and gas forced from the tunnel and arising from engines switching near the entrance, as to amount to a taking of private property.[1]

[1] Richards *v.* Washington Terminal Co., 233 U. S. 546 [1914].

Where a petition alleged that the United States, after having several times in the past discharged its battery over petitioner's land, reinstalled guns with the intention of so firing them and, without intention or ability to fire them otherwise, established a fire control and service upon that land, and again discharged all of the guns over and across it, and a taking by the United States was alleged as a conclusion of fact from these specific acts: *Held*, that the imposing of a servitude, and an implied contract to pay, might be inferred.[1]

[1] Portsmouth Harbor Land & Hotel Co. *v.* United States, 260 U. S. 327 [1922]. *Cf.* Portsmouth Harbor Land & Hotel Co. *v.* United States, 250 U. S. 1 [1919]; Peabody *v.* United States, 231 U. S. 530 [1914].

The determination of Congress that for the purpose of navigation of certain waters the whole flow of the stream should be devoted to that end does not take any private property rights of a water power company which is a riparian owner holding a revocable permit from the Secretary of War to erect dams and dykes for the purpose of controlling the current and using its power for commercial purposes, and which has been for some years engaged in using and selling water power.[1]

[1] United States *v.* Chandler-Dunbar Water Power Co., 229 U. S. 52 [1913].

It is competent for Congress to provide for the establishment of harbor lines notwithstanding they may be different from those previously established under State authority, and may constitutionally authorize the Secretary of War to fix the lines.[1]

[1] Philadelphia Co. *v.* Stimson, 223 U. S. 605 [1912]. *See also* Willink *v.* United States, 240 U. S. 572 [1916].

Such removals or alterations of bridges over the navigable waters of the United States as the Secretary of War may require to be made after notice and hearing to the parties interested, under authority of an act of Congress, to abate obstructions to navigation is not a taking of the property of the owners of such bridges within the meaning of the Constitution.[1] The mere failure to interfere and prevent the original construction of a bridge over an interstate waterway imposes no constitutional obligation upon the United

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States to make compensation for subsequent changes or alterations which the public good requires.[2]

[1] Hannibal Bridge Co. *v.* United States, 221 U. S. 194 [1911]. *See also* Union Bridge Co. *v.* United States, 204 U. S. 364 [1907]; Louisville Bridge Co. *v.* United States, 242 U. S. 409 [1917]; Newport & C. Bridge Co. *v.* United States, 105 U. S. 481 [1882].

[2] Monongahela Bridge Co. *v.* United States, 216 U. S. 177, 194 [1910].

Where the construction by the Government of locks and dams raises a creek to such an extent as to raise the water to about 1 foot below the crest of an upper milldam, which prevents the drop in the current which is necessary to run the mill, this is a taking of property for which compensation must be made. The right to have the water flow away from the milldam unobstructed, except as in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land.[1]

[1] United States *v.* Cress, 243 U. S. 316, 329 [1917].

Where submerged land under navigable waters of a bay is planted with oysters, the action of the Government in dredging a channel across the bay in such a way as to destroy the oysters and the oyster bed is not a "taking" of private property for which compensation can be required.[1]

[1] Lewis Blue Point Oyster Cultivation Co. *v.* Briggs, 229 U. S. 82 [1913].

Congress has power to enact that paper currency shall be equal in value to the representative of value determined by the coinage acts, and impress upon it qualities as currency for purchases and for payment of debts; and the impairment of private contracts resulting from such exercise is not a taking of private property for public use without compensation.[1]

[1] Norman *v.* Baltimore & O. R. Co., 294 U. S. 240, 302, 305 [1935]. *See also* Knox *v.* Lee (Legal Tender Cases), 12 Wall. 457, 551 [1871].

The first Frazier-Lemke amendment to the Bankruptcy Act (48 Stat. 344) requiring a 5-year stay of proceedings against a debtor, and permitting the debtor to retain possession of the property under the bankruptcy court's supervision if paying a reasonable rental, etc., *held*, inter alia, to take private property for a wholly public use without just compensation.[1]

[1] Louisville Joint Stock Land Bank *v.* Radford, 295 U. S. 555, 602 [1935]. The second Frazier-Lemke amendment, which modified the above provisions after this decision, was subsequently upheld. Wright *v.* Vinton Branch of Mt. T. Bank of Roanoke, 300 U. S. 440 [1937].

Where by reason of the construction of a tunnel to increase the water supply of the city of Washington a well on an adjoining tract of land was drained and destroyed, the owner was entitled to recover

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under the act of Congress authorizing the construction of the tunnel and providing for recovery under such conditions.[1]

[1] United States v. Alexander, 148 U. S. 186 [1893].

Property confiscated under an act of Congress as the property of a public enemy is not so taken as to give a right to recover its value under this clause.[1]

[1] United States v. Dunnington, 146 U. S. 344 [1892].

COMPENSATION.

By Whom Determined.

The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial.[1] The compensation to be paid may be ascertained by any appropriate tribunal capable of estimating the value of the property and whether the tribunal shall be created directly by an act of Congress, or one already established by the State shall be adopted for the occasion, is a mere matter of legislative discretion.[2] By the Constitution the estimate of just compensation for property taken is not required to be made by a jury, but may be intrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury.[3]

[1] Monongahela Nav. Co. v. United States, 148 U. S. 327 [1893].
[2] United States v. Jones, 109 U. S. 518 [1883].
[3] Bauman v. Ross, 167 U. S. 548 [1897].

The Measure of Compensation.

The just compensation required by the Constitution to be made to the owner is to be measured by the loss occasioned to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more.[1] "The value of property may be greater or less than its cost; and this is true of contract rights and other intangibles as well as of physical things."[2]

[1] Bauman v. Ross, 167 U. S. 548, 574 [1897].
[2] Brooks-Scanlon Corp. v. United States, 265 U. S. 106, 123 [1924].

The market price of the property is just compensation.[1] The market value is the sum which probably would be arrived at as a result of fair negotiations by an owner willing to sell and a purchaser willing to buy, after due consideration of all elements reasonably affecting value.[2] The value of the property to the Government for its particular use is not a criterion.[3]

[1] United States v. New River Collieries Co., 262 U. S. 341 [1923]. *See also* L. Vogelstein & Co. v. United States, 262 U. S. 337 [1923]; McCandless v. United States, 298 U. S. 342 [1936].
[2] Olson v. United States, 292 U. S. 246 [1934].
[3] United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53 [1913].

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The concept of just compensation is comprehensive and includes all elements. The owner is not limited to the value of the property at the time of the taking; "he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking",[1] which is customarily 6 percent.[2]

[1] Jacobs *v.* United States, 290 U. S. 13, 17 [1933], citing Seaboard Air Line R. Co. *v.* United States, 261 U. S. 299, 306 [1923]; United States *v.* Rogers, 255 U. S. 163 [1921]; Phelps *v.* United States, 274 U. S. 341 [1927]. The "interest" thus allowed as a measure of the added value comprising part of just compensation is not "interest" in the sense of the Judicial Code (sec. 177) precluding payment on claims against the United States.

This case (which was brought in District Court under the Tucker Act) distinguishes United States *v.* North American Transp. & Trading Co., 253 U. S. 330 [1920], on the ground that there the original taking was tortious and created no liability on the part of the Government—and subsequent action creating a liability was rested upon implied contract, bringing the case within the jurisdiction of the Court of Claims. The court there stated that the case was not founded upon the 5th Amendment, citing United States *v.* Great Falls Mfg. Co., 112 U. S. 645 [1884]; United States *v.* Lynah, 188 U. S. 445, 470 [1903]; Langford *v.* United States, 101 U. S. 341 [1880]; Bigby *v.* United States, 188 U. S. 400 [1903]; Tempel *v.* United States, 248 U. S. 121, 129 [1918].

These cases would seem to be questioned in the Jacobs case, the Court stating briefly: Suits brought to enforce the constitutional right to just compensation are governed by the later decisions which are directly in point (i. e., the cases of Seaboard Air Line, etc., above cited).

[2] Atlantic Refining Co. *v.* United States, 59 Ct. Cl. 108 [1924].

Where property of a citizen has been mistakenly seized by the Government, converted into money, and invested, the person so deprived of his property is entitled, in recovering compensation, to an allowance for the use of his property notwithstanding the rule that the Government is not liable for interest except with its consent.[1]

[1] Henkels *v.* Sutherland, 271 U. S. 298 [1926]. *See also* Phelps *v.* United States, 274 U. S. 341 [1927].

While this clause excludes the taking into account, as an element in the compensation, of any supposed benefit that the owner may receive in common with all from the public uses to which the private property is appropriated,[1] where only a part of a parcel of land is appropriated it is proper to consider any special and direct benefits or injuries, capable of present estimate and reasonable computation, which may result to the remainder of the tract.[2]

[1] Monongahela Nav. Co. *v.* United States, 148 U. S. 326 [1893].

[2] Bauman *v.* Ross, 167 U. S. 584 [1897]. *See also* McCoy *v.* Union Elev. R. Co., 247 U. S. 354 [1918].

Where the Government appropriates a portion of an entire tract of private land for public purposes, it is also liable, in ascertaining the just compensation, for the damage to the remainder resulting from such taking, embracing injury due to the use to which the part appro-

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priated is to be devoted.[1] So where on the taking of a strip of land across a farm, a private right-of-way, which was the only practical outlet from the farm to the county road, was closed and the value of the farm thereby lessened, the owner was entitled to compensation not only for the strip of land but also for the decreased value of the farm consequent on the closing of his private right-of-way.[2]

[1] Archer v. United States, 53 Ct. Cl. 405 [1918], affirmed 251 U. S. 548 [1920].
[2] United States v. Welch, 217 U. S. 333 [1910].

It is a settled rule that damages resulting from a loss or destruction of business incident to a taking of land are not recoverable as a part of the compensation for the land taken.[1]

[1] Mitchell v. United States, 267 U. S. 341 [1925].

While it was held unconstitutional for Congress to exclude the value of the franchise of a company to take tolls, from consideration in determining amount of compensation for navigation improvements taken by the United States,[1] a statute excluding, from the amount to be paid to the owners of condemned property, the value of improvements made by the Government before acquisition is not unconstitutional, where such improvements were in fact the property of the Government at the time.[2] An act of Congress providing for the condemnation of land for a public purpose is not invalid upon the ground that the aggregate amount to be expended for the land is limited to a sum appropriated by the act. Such limitation did not affect the right of the property holders in case condemnation was resorted to.[3]

[1] Monongahela Nav. Co. v. United States, 148 U. S. 327 [1893].
[2] Old Dominion Land Co. v. United States, 269 U. S. 55 [1925].
[3] Shoemaker v. United States, 147 U. S. 282 [1893].

This clause does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken,[1] but the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed.[2] Proceeding in the Court of Claims under statute prescribing a particular mode for ascertaining compensation to which entitled, is a waiver of any right to compensation in advance of the taking.[3]

[1] Hurley v. Kincaid, 285 U. S. 95 [1932].
[2] Cherokee Nation v. Southern Kansas R. Co., 135 U. S. 659 [1890].
[3] Great Falls Mfg. Co. v. Garland, 124 U. S. 599 [1888].

A taking of private property by the Government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger is impending; and it is equally clear that the taking of such property under such circumstances creates an obligation on the part

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of the Government to reimburse the owner to the full value of the service.[1]

[1] United States *v.* Russell, 13 Wall. 629 [1871]. *See also* Mitchell *v.* Harmony, 13 How. 134 [1852].

The obligation of the United States to pay just compensation for private property taken by eminent domain rests upon the Fifth Amendment, independent of statute or express promise. A promise is implied because the duty is imposed by the amendment.[1] Such a promise is implied where the property of a nonenemy alien has been mistakenly seized under the Trading with the Enemy Act.[2]

[1] Jacobs *v.* United States, 290 U. S. 13 [1933].

[2] Becker Steel Co. of America *v.* Cummings, 296 U. S. 74 [1935]. *See also* Cummings *v.* Deutsche Bank Und Discontogesellschaft, 300 U. S. 115 [1937].

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AMENDMENT 6

RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

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AMENDMENT 6

Amdt. 6. Right to trial by jury and to confront witnesses and secure testimony.

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.

Applicability of Amendment.*

The Sixth Amendment was designed to prevent interference with the rights of States and their citizens; it is restrictive of the powers exercised by the Federal Government alone, whether by Congress or by the judiciary, and is not a limitation upon the powers of the States.[1]

[1] Barron use of Tiernan *v.* Baltimore, 7 Pet. 243 [1833]; Fox *v.* Ohio, 5 How. 410 [1847]; Davis *v.* Texas, 139 U. S. 653 [1891]; Eilenbecker *v.* District Court, 134 U. S. 35 [1890]. *See also* Livingston *v.* Moore, 7 Pet. 551 [1833]; United States *v.* Dawson, 15 How. 487 [1854]; Twitchell *v.* Pennsylvania, 7 Wall. 324 [1869]; Spies *v.* Illinois, 123 U. S. 131 [1887]; Ex parte Sawyer, 124 U. S. 219 [1888]; Brooks *v.* Missouri, 124 U. S. 397 [1888]; McElvaine *v.* Brush, 142 U. S. 158 [1891]; Monongahela Nav. Co. *v.* United States, 148 U. S. 324 [1893]; Brown *v.* Walker, 161 U. S. 606 [1896]; Brown *v.* New Jersey, 175 U. S. 174 [1899]; Bolln *v.* Nebraska, 176 U. S. 87 [1900]; West *v.* Louisiana, 194 U. S. 264 [1904]; Ohio ex rel. Lloyd *v.* Dollison, 194 U. S. 447 [1904]; Howard *v.* Kentucky, 200 U. S. 164 [1906]; Ughbanks *v.* Armstrong, 208 U. S. 481 [1908].

The amendment is applicable to trials in the courts of the District of Columbia [1] and the Territories,[2] and was held to apply in Alaska even before its organization as a Territory.[3] On the other hand, it

* *See also* pp. 283, 501, 661, 693, 960, 1002 in the matter of trial by jury.

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is held not applicable in Puerto Rico [4] or the Virgin Islands,[5] those islands not having been incorporated into the Union.

[1] Callan *v.* Wilson, 127 U. S. 549 [1888], holding unconstitutional a statute providing for trial of misdemeanors on information by the court alone, and even though it allowed a jury on appeal. *See also* Capital Traction Co. *v.* Hof, 174 U. S. 5 [1899].

[2] Reynolds *v.* United States, 98 U. S. 145 [1879]. *See also* Lovato *v.* New Mexico, 242 U. S. 199 [1916].

[3] Rassmussen *v.* United States, 197 U. S. 516 [1905].

[4] Balzac *v.* Porto Rico, 258 U. S. 298 [1922].

[5] Francis *v.* Virgin Islands, 11 F. (2d) 860 [1926], certiorari denied, 273 U. S. 693 [1926].

The right to jury trial protected by this amendment is doubtless limited to those persons who were subject to indictment or presentment in the Fifth Amendment.[1] Thus, a person who violates an injunction is not entitled under the Constitution to a trial by jury, as contempt proceedings are not in execution of the criminal laws, but only securing to suitors the rights to which they have been adjudged entitled.[2]

[1] Ex parte Milligan, 4 Wall. 2 [1866].

[2] In re Debs, 158 U. S. 594 [1895]; Gompers *v.* United States, 233 U. S. 604 [1914]; Myers *v.* United States, 264 U. S. 95 [1924].

The guarantees afforded by the Constitution for an impartial trial by a jury, in case of accusation of crime, "apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad." The laws passed by Congress to carry into effect the various treaties granting extraterritorial rights are not unconstitutional in that they do not secure to an accused a trial by jury.[1]

[1] Ross *v.* McIntyre, 140 U. S. 453, 464 [1891], citing Cook *v.* United States, 138 U. S. 157, 181 [1891].

Scope of Criminal Prosecution.

This provision of the Constitution relates to a prosecution which is technically criminal in its nature.[1] It "distinctly means a criminal prosecution against a person who is accused and who is to be tried by a petit jury." Criminal prosecution is much narrower than "criminal case" under the Fifth Amendment.[2] The question of a conflict between this amendment and article III, section 2 (providing that the trial of "crimes" committed in a State shall be had within the State where committed) was raised in Callan *v.* Wilson,[3] and the Court held there was no necessary conflict between the two. A later

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case,[4] however, intimated that if there were any conflict, the amendment would control.

[1] United States *v.* Zucker, 161 U. S. 481 [1896].
[2] Counselman *v.* Hitchcock, 142 U. S. 563 [1892].
[3] Callan *v.* Wilson, 127 U. S. 549 [1888]. *See also* Patton *v.* United States, 281 U. S. 276, 298 [1930].
[4] Schick *v.* United States, 195 U. S. 68 [1904].

An action to recover a penalty under an act of Congress is not a criminal prosecution;[1] and it is of no moment that the statute denominates the offense a misdemeanor, as that merely declares the Government's alternative right to prosecute as for a crime.[2] The deportation of an alien who is found to be in the United States in violation of law is not a criminal proceeding;[3] but a law providing punishment (by imprisonment at hard labor) in addition to final deportation, was held unconstitutional in that it did not secure to the alien a judicial trial.[4]

[1] Oceanic Steam Nav. Co. *v.* Stranahan, 214 U. S. 320 [1909]; Hepner *v.* United States, 213 U. S. 103 [1909].
[2] United States *v.* Regan, 232 U. S. 37 [1914]; United States *v.* Stevenson, 215 U. S. 199 [1909].
[3] United States ex rel. Turner *v.* Williams, 194 U. S. 289 [1904]; Zakonaite *v.* Wolf, 226 U. S. 272 [1912].
[4] Wong Wing *v.* United States, 163 U. S. 228, 238 [1896].

Trial by Jury.

The phrase "trial by jury", as used in the Federal Constitution, means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted; viz, that the jury should consist of 12 men, neither more nor less; that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts, and that the verdict should be unanimous. But where, after commencement of a trial upon an indictment charging a crime the punishment for which may involve a penitentiary sentence, one juror becomes incapacitated and unable to proceed with his work as a juror, the defendant and the Government, through its attorney in charge of the prosecution, may consent to the trial's proceeding to a finality with 11 jurors, and defendant may thus waive the right to a trial and verdict by a constitutional jury of 12 men.[1]

[1] Patton *v.* United States, 281 U. S. 276 [1930], citing Thompson *v.* Utah, 170 U. S. 343, 350 [1898], as to number of jurors; Capital Traction Co. *v.* Hof, 174 U. S. 1, 13 [1899], as to superintending power of judge; and American Publ. Co. *v.* Fisher, 166 U. S. 464, 468 [1897], Springville *v.* Thomas, 166 U. S. 707 [1897], and Maxwell *v.* Dow, 176 U. S. 581, 586 [1900], as to unanimous verdict. *See also* Rassmussen *v.* United States, 197 U. S. 518 [1905], holding a 6-person jury unconstitutional in Alaska, this amendment being applicable.

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Amdt. 6.—Criminal Trials

As to "speedy trial", the court said in Beavers *v.* Haubert:[1] "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. It cannot be claimed for one offense and prevent arrest for other offenses; and removal proceedings are but process for arrest—means of bringing a defendant to a trial."

[1] 198 U. S. 77, 87 [1905].

As to "public trial", it was held in Davis *v.* United States,[1] that exclusion from the court room at one session of a criminal trial of all persons except two relatives of the accused, a few newspaper men and about 10 members of the bar, was in violation of the Sixth Amendment.

[1] 247 Fed. 394 [1917]. *See also* Gaines *v.* Washington, 277 U. S. 81, 85 [1928], discussing the conflict of decisions under corresponding provisions of State constitutions.

The constitutional right of a jury trial is not infringed because, after demurrer to indictment had been overruled, the jury was dismissed and accused required to plead, and thereafter the same jury was sworn and trial proceeded;[1] nor were Socialists denied any constitutional or statutory rights because the trial jury was composed exclusively of members of other parties and of property owners.[2]

[1] Lovato *v.* New Mexico, 242 U. S. 199 [1916].
[2] Ruthenberg *v.* United States, 245 U. S. 480 [1918].

Right to an Impartial Jury.

Where a person called as a juror testified that he believed he had formed an opinion but had not expressed it, that the opinion was based upon evidence not produced in court, and would not influence his verdict, it was held not erroneous for trial court to overrule a challenge and permit such person to be sworn. "It is clear, therefore, that upon the trial of the issue of fact raised by [such] a challenge * * * the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality." [1]

[1] Reynolds *v.* United States, 98 U. S. 145, 156 [1879]; Spies *v.* Illinois, 123 U. S. 131 [1887]; Queenan *v.* Oklahoma, 190 U. S. 548 [1903].

A contention that because each of several defendants, being tried together on a charge of conspiracy, was not allowed the full statutory number of peremptory challenges, they were therefore denied a trial by an impartial jury, was dismissed on the ground that "there is nothing in the Constitution which requires the Congress to grant peremptory challenges to defendants in criminal cases." [1]

[1] Stilson *v.* United States, 250 U. S. 583, 586 [1919].

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Amdt. 6.—Criminal Trials

The right to an impartial jury does not require the absolute disqualification of Government employees on the ground of an implied bias; the act of August 22, 1935, qualifying such employees for jury service in the District of Columbia, subject to challenge for actual bias is valid.[1]

[1] United States v. Wood, 299 U. S. 123 [1936].

Right as to Place of Trial.

Under this amendment an accused cannot be tried in one district under an indictment showing that the offense was committed in another district;[1] the locality in which an offense is charged to have been committed determines the place and court of trial.[2] A person charged with crime in a district other than that of his residence cannot insist upon a right to be tried in the district of his residence; he has neither the legal nor constitutional right to object to removal to the district where the trial is to be held.[3]

[1] Salinger v. Loisel, 265 U. S. 224 [1924].
[2] Beavers v. Henkel, 194 U. S. 83 [1904].
[3] Haas v. Henkel, 216 U. S. 462 [1910].

In a prosecution for conspiracy, the place of trial can be any State and district where an overt act was performed.[1] Where a United States Senator was indicted for receiving or agreeing to receive compensation for services to be rendered in a proceeding before a department, and it appeared that a tentative arrangement for such services was made in Illinois subject to confirmation at St. Louis, which confirmation was subsequently given, it was held that defendant was properly tried at St. Louis.[2]

[1] Brown v. Elliott, 225 U. S. 392 [1912]; Hyde v. United States, 225 U. S. 347 [1912].
[2] Burton v. United States, 202 U. S. 344 [1906].

The Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the court having jurisdiction of the charge. Then he may deny his guilt, and the Constitution is satisfied by his right to contest it there. With immaterial exceptions anyone in the United States is subject to the jurisdiction of the United States and may be required to stand trial wherever he is alleged to have committed the crime.[1] The power of Congress to order the surrender of accused persons from other States is a necessary complement of the duty of trying an offense in the jurisdiction where the crime was committed.[2]

[1] Hughes v. Gault, 271 U. S. 149 [1926].
[2] Hyde v. Shine, 199 U. S. 78 [1905].

The assignment of a district judge from one district to another, conformably to statute, to sit on a prosecution does not create a new judicial district whose boundaries are undefined nor subject the ac-

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cused to trial in a district not established when the offense with which he is charged was committed and thus violate the rights secured under this amendment.[1]

[1] Lamar v. United States, 241 U. S. 103 [1916].

Right To Be Informed of the Nature and Cause of the Accusation.

This is a reaffirmation of the essential principles of the common law, and puts it beyond the power of either Congress or the courts to abrogate them. It follows, as a matter of course, that the effect of this provision commences with the statutes fixing or declaring offenses, and, as to them, insures the general rule of the common law that they are not to be construed to embrace offenses which are not within their intention and terms. This does not mean that all the elements of a crime must be set out in the statute on which the prosecutor relies, nor that the statute may not create an offense by the use of inapt or imperfect phraseology, but they must be in some way declared by the legislative power, and cannot be constructed by the courts from any supposed intention of the legislature which the statute fails to state.[1]

[1] United States v. Potter, 56 Fed. 83 [1892]; Paraiso v. United States, 207 U. S. 368 [1907].

"Offences created by statute, as well as offences at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statutes defining the offence, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offence is composed."[1]

[1] United States v. Cook, 17 Wall. 168, 174 [1872].

The doctrine to be deduced from the American cases is that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defence and protect himself after judgment against another prosecution for the same offence;[1] that this right is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him; and that, in such case, the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied

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on by the prosecu ıscivious, which
motion will be gr he exercise of a
sound legal discre ds of justice.[2]

[1] United S ; United States v.
Simmons, 96 U 7 U. S. 427 [1913];
Burton v. Unit
[2] Rosen v.

There is no general obligation on the part of the Government to furnish copies of indictments to defendants. "The object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to them; but it was not contemplated that this should be done at the expense of the Government. We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished upon the request of the defendant, and at the expense of the Government; and, when such order is made, the clerk is entitled to his fee for the copy."[1]

[1] United States v. Van Duzee, 140 U. S. 169, 173 [1891].

The Food and Drugs Act amendment of August 23, 1912 (37 Stat. 416), which declares that "If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein which is false and fraudulent," is sufficiently certain as to permit of the laying of a definite charge as required by this amendment.[1]

[1] Seven Cases v. United States, 239 U. S. 510 [1916].

The Food Control Act of August 10, 1917 (40 Stat. 276), as amended October 22, 1919 (41 Stat. 297), penalizing the making of sales of necessaries at unreasonable prices, sets up no ascertainable standard of guilt and is invalid.[1]

[1] United States v. Cohen (L.) Grocery Co., 255 U. S. 81 [1921]; Weeds v. United States, 255 U. S. 109 [1921].

A recital in the record that "thereupon the defendant being arraigned upon the indictment pleads thereto not guilty and for trial puts himself upon the country, and the attorney of the United States doth the like," is sufficient to show that the defendant was informed of the accusation against him by the reading of the indictment.[1]

[1] Johnson v. United States, 225 U. S. 405 [1912].

Right To Be Confronted With the Witnesses Against Him.

"The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions."[1] Thus it has been held that testimony may

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be received in evidence without the witness actually appearing when it involves the admission of a dying declaration;[2] and that when the testimony of a witness sworn upon a former trial and since deceased is necessary in the present case, such testimony is admissible against the accused when a copy of the stenographic report of the former testimony is supported by an oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness.[3] But so much of the act of Congress of March 1, 1875 (18 Stat. 479), as declared that the judgment of conviction against the principal felons should be conclusive evidence, in the prosecution against the receiver, that the property of the United States alleged to have been embezzled, stolen, or purloined had been embezzled, etc., was held to be in violation of this clause.[4]

[1] Salinger v. United States, 272 U. S. 542, 548 [1926].

[2] Kirby v. United States, 174 U. S. 61 [1899]; Robertson v. Baldwin, 165 U. S. 282 [1897].

[3] Mattox v. United States, 156 U. S. 240 [1895]. *See also* Motes v. United States, 178 U. S. 471 [1900], as to absence of witness due to negligence of the Government; Reynolds v. United States, 98 U. S. 160 [1879], as to absence of witness by procurement of defendant; Dowdell v. United States, 221 U. S. 325 [1911], as to supplying parts of record on appeal.

[4] Kirby v. United States, 174 U. S. 47 [1899].

The amendment does not accord the right to be apprised of the names of the witnesses who appeared before the grand jury.[1]

[1] Wilson v. United States, 221 U. S. 361 [1911].

Referring to the act of Congress embodying the so-called Philippine Bill of Rights, the court said: "This provision of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination".[1]

[1] Dowdell v. United States, 221 U. S. 325 [1911]. *See also* Dias v. United States, 223 U. S. 442 [1912].

Assistance of Counsel for Defense.

Where the rules of the Secretary of Labor concerning deportation cases did not require that a person under investigation prior to application for a warrant of arrest should be advised of his right to have counsel and to decline to answer questions before being interrogated as to his alienage, it was held that admission of such examination did not render the hearing unfair.[1]

[1] United States ex rel. Bilokumsky v. Tod, 263 U. S. 149 [1923].

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Amdt. 6.—Criminal Trials

While pointing out that the right to counsel as secured by the Sixth Amendment relates only to criminal prosecutions, it was stated in Ex parte Chin Loy You,[1] "* * * but it is equally true that the provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner."

[1] 223 Fed. 833, [1915] cited with approval in Powell v. Alabama, 287 U. S. 45, 70 [1932].

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AMENDMENT 7

CIVIL TRIALS

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AMENDMENT 7

Amdt. 7. Jury trials in suits at common law.

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.

To What Courts Applicable.

This amendment applies only to courts sitting under the authority of the United States,[1] including courts in the Territories [2] and the District of Columbia.[3] It does not apply to a State court even where it is enforcing a right created by Federal statute; the court in such case still derives its authority as a court from the State.[4] Where a State workmen's compensation act abolished *in futuro* all rights of recovery in ordinary cases between employer and employee, it was held that since there were no private rights left to be tried by jury, it was not material, in a suit in a State court under the act, that Federal courts in proceedings within the provisions of the act would follow State procedure and try the case without a jury.[5]

[1] Pearson *v.* Yewdall, 95 U. S. 294, 296 [1877]. *See also* Edwards *v.* Elliott, 21 Wall. 532, 557 [1874]; Justices of Supreme Court *v.* United States ex rel. Murray, 9 Wall. 274, 277 [1870]; Walker *v.* Sauvinet, 92 U. S. 90 [1876]; St. Louis & K. C. Land Co. *v.* Kansas City, 241 U. S. 419 [1916].

[2] Webster *v.* Reid, 11 How. 437, 460 [1851]; Kennon *v.* Gilmer, 131 U. S. 22, 28 [1889].

[3] Capital Traction Co. *v.* Hof, 174 U. S. 1, 5 [1899].

[4] Minneapolis & St. L. R. Co. *v.* Bombolis, 241 U. S. 211 [1916], involving the Federal Employers Liability Act; Chesapeake & O. R. Co. *v.* Carnahan, 241 U. S. 241 [1916]; Louisville & N. R. Co. *v.* Stewart, 241 U. S. 261 [1916]; Chesapeake & O. R. Co. *v.* Kelly, 241 U. S. 485 [1916]; Chesapeake & O. R. Co. *v.* Gainey, 241 U. S. 494 [1916].

[5] Mountain Timber Co. *v.* Washington, 243 U. S. 219 [1917].

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Amdt. 7.—Civil Trials

To What Cases Applicable.

IN GENERAL.

This provision is "limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law and by the appropriate modes and proceedings of courts of law."[1] An order of a Federal district court transferring a count in an action at law for damages, to the equity docket upon the ground that under the law of the State it could not be entertained at law, is a deprivation of the right of trial by jury.[2] By common law, the framers meant "what the Constitution denominated in the third article 'law'; not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit."[3] Suits at common law are recognized in the Constitution as a distinct class, and the Seventh Amendment did not operate to exclude from admiralty (without a jury) cases of recognized admiralty jurisdiction as to which the court had concurrent jurisdiction at common law.[4] "In cases of admiralty and maritime jurisdiction, it has been settled * * * that the trial is to be by the court."[5]

[1] Shields *v.* Thomas, 18 How. 253, 262 [1856].

[2] Re Simons, 247 U. S. 231 [1918].

[3] Parsons *v.* Bedford, 3 Pet. 433, 447 [1830]; Root *v.* Lake Shore & M. S. R. Co., 105 U. S. 189, 206 [1882]. *See also* National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U. S. 1 [1937].

[4] Waring *v.* Clarke, 5 How. 441, 460 [1847].

[5] The "Sarah", 8 Wheat. 390, 391 [1823]; citing United States *v.* "La Vengeance", 3 Dall. 297 [1796]; The "Sally", 2 Cr. 406 [1805]; United States *v.* The "Betsy and Charlotte", 4 Cr. 443 [1808]. *See also* Whelan Alaska Treadwell Gold Min. Co. *v.* United States, 7 Cr. 112 [1812]; The "Margaret", 9 Wheat. 421 [1824].

Omission of a jury has been upheld in the following instances on the ground the suit in question was not a suit at common law within the meaning of the Seventh Amendment:

(1) Suit against United States in the Court of Claims.[1]

(2) Suit authorized by Territorial law against a municipality, based upon a moral obligation only.[2]

(3) Suit to cancel a naturalization certificate for fraud.[3]

(4) Order of deportation of an alien.[4]

(5) Assessment of damages in patent infringement suit.[5]

(6) Longshoremen's and Harbor Workers Compensation Act.[6]

(7) Jurisdiction of bankruptcy court to examine into reasonableness of fees paid by person for legal services in contemplation of bankruptcy.[7]

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(8) Final decision of customs appraisers in regard to value of imports.[8]

[1] McElrath v. United States, 102 U. S. 426, 440 [1880]. *Cf.* Ex parte Skinner & E. Corp., 265 U. S. 86, 96 [1924].

[2] Guthrie Nat. Bank v. Guthrie, 173 U. S. 528, 534 [1899]. *See also* United States v. Realty Co., 163 U. S. 427, 439 [1896]; Jefferson City Gaslight Co. (New Orleans) v. Clark, 95 U. S. 644, 653 [1877].

[3] Luria v. United States, 231 U. S. 9, 27 [1914].

[4] Gee Wah Lee v. United States, 25 F. (2d) 107 [1928], certiorari denied 277 U. S. 608 [1928].

[5] Filer & S. Co. v. Diamond Iron Works, 270 Fed. 489 [1921], certiorari denied 256 U. S. 691 [1921].

[6] Crowell v. Benson, 285 U. S. 22, 45 [1932].

[7] In re Wood and Henderson, 210 U. S. 246 [1908].

[8] Auffmordt v. Hedden, 137 U. S. 310, 329 [1890].

It has further been held that there was no infringement of the constitutional right to a trial by jury in the following circumstances:

(1) Territorial statute requiring specific answers to special interrogatories, in addition to general verdict.[1]

(2) Rule of District of Columbia court authorizing judgment by default in an action *ex contractu*, on failure to show, by affidavit, a good defense.[2]

(3) State statute making certified copy of coroner's certificate *prima facie* evidence of facts stated.[3]

(4) Federal statute (24 Stat. 379) giving *prima facie* effect to findings of the Interstate Commerce Commission.[4]

(5) Summary judgment against sureties on an appeal bond upon affirmance of decree appealed from, in accordance with statutory practice in State courts.[5]

[1] Walker v. New Mexico & S. P. R. Co., 165 U. S. 593, 598 [1897].

[2] Fidelity & D. Co. v. United States use of Smoot, 187 U. S. 315, 320 [1902].

[3] Jensen v. Continental Life Ins. Co., 28 F. (2d) 545 [1928], certiorari denied 279 U. S. 842 [1929].

[4] Meeker v. Lehigh Valley R. Co., 236 U. S. 434, 439 [1915].

[5] Pease v. Rathbun-Jones Engineering Co., 243 U. S. 273 [1917].

SUITS IN EQUITY.

The absolute right to a trial of the facts by a jury does not extend to cases of equity jurisdiction, no matter what may be their importance or complexity,[1] but it may not be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the Federal courts must be sought in separate proceedings.[2] Federal statutes from Revised Statutes (sec. 723) through to the Judicial Code (sec. 267), prohibiting courts of the United States from sustain-

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ing suits in equity where the remedy is complete at law, serve to guard the right of trial by jury, and should be liberally construed.[3] So also should Equity Rule 30, requiring the answer to a bill in equity to state any counterclaim arising out of the same transaction; such rule was not intended to change the line between law and equity, and must be construed as referring to equitable counterclaims only.[4]

[1] Barton *v.* Barbour, 104 U. S. 126, 133 [1881]. *See also* Bien *v.* Robinson, 208 U. S. 423 [1908].

[2] Scott *v.* Neely, 140 U. S. 106, 109 [1891]. *See also* Bennett *v.* Butterworth, 11 How. 669 [1850]; Hipp *v.* Babin, 19 How. 271, 278 [1857]; Lewis *v.* Cocks, 23 Wall. 466, 470 [1874]; Killian *v.* Ebbinghaus, 110 U. S. 568, 573 [1884]; Buzard *v.* Houston, 119 U. S. 347, 351 [1886].

[3] Schoenthal *v.* Irving Trust Co., 287 U. S. 92, 94 [1932].

[4] American Mills Co. *v.* American Surety Co., 260 U. S. 360, 364 [1922]. *See also* Stamey *v.* United States, 37 F. (2d) 188 [1929].

The distinction between law and equity, so far as Federal courts are concerned, cannot be obliterated by State legislation.[1] So, where State law, in advance of judgment, treated the whole proceeding upon a simple contract, including determination of validity and of amount due, as an equitable proceeding, it did bring the case within the Federal equity jurisdiction on removal. Ascertainment of plaintiff's demand being properly by action at law, the fact that the equity court has power to summon a jury on occasion cannot be regarded as an equivalent of the right of trial by jury secured by the Seventh Amendment.[2] But where State law gives an equitable remedy, such as to quiet title to land, the Federal courts will enforce it if it does not violate the rights of the parties as to trial by jury.[3]

[1] Thompson *v.* Central Ohio R. Co., 6 Wall. 134 [1868].

[2] Cates *v.* Allen, 149 U. S. 451 [1893]. *See also* Whitehead *v.* Shattuck, 138 U. S. 146 [1891]; Buzard *v.* Houston, 119 U. S. 347 [1886].

[3] Greeley *v.* Lowe, 155 U. S. 58, 75 [1894]. *See also* Clark *v.* Smith, 13 Pet. 195 [1839]; Holland *v.* Challen, 110 U. S. 15 [1884]; Reynolds *v.* Crawfordsville First Nat. Bank, 112 U. S. 405 [1884]; Chapman *v.* Brewer, 114 U. S. 158 [1885]; Cummings *v.* Merchants Nat. Bank, 101 U. S. 153, 157 [1880]; United States *v.* Landram, 118 U. S. 81 [1886]; More *v.* Steinbach, 127 U. S. 70 [1888]. *Cf.* Re Simons, 247 U. S. 231 [1918].

PROCEEDINGS IN BANKRUPTCY.

When a creditor files a claim in bankruptcy, with respect to which an issue of fraud is raised, he has voluntarily sought a forum where the procedure of equity obtains and has waived a trial by jury.[1] But the right to a jury trial on written application under section 19 of the Bankruptcy Act (U. S. C. 11: 42) is absolute and cannot be withheld at the discretion of the court. "The proceedings in administration of the estate are equitable in their nature, but the bankruptcy courts act under specific statutory authority, and when on an issue of fact as to the existence of ground for adjudication a jury trial is demanded, it is

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demanded as of right, and the trial is a trial according to the course of the common law." [2]

[1] In re Standard Telephone & Electric Co., 157 Fed. 106 [1907], affirmed in Knapp *v.* Milwaukee Trust Co., 162 Fed. 675 [1908] and 216 U. S. 545 [1910]. *See also* Re Wood & Henderson, 210 U. S. 246 [1908].

[2] Elliott *v.* Toeppner, 187 U. S. 327, 331 [1903]. *See also* Knickerbocker Insurance Co. *v.* Comstock, 16 Wall. 258, 268–269 [1873]; Parsons *v.* Bedford, 3 Pet. 433, 448 [1830]. *Cf.* Continental Ill. Nat. Bk. & T. Co. *v.* Chicago, R. I. & P. R. Co., 294 U. S. 648, 669 [1935].

Trial by Jury.

MEANING OF THE TERM.

The Seventh Amendment is to be construed in the light of the practice of the courts of law and chancery in England when our Constitution and the amendment were adopted.[1] "'Trial by jury' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and empanelled * * * but it is a trial by a jury of 12 men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or evidence."[2] It is absolutely inconsistent with the wager of law; that practice "if it ever had a legal existence in the United States, is now completely abolished."[3] This clause does not mean that old forms of practice and procedure must be retained, neither does it prohibit the introduction of new methods for determining what facts are actually in issue nor prohibit the introduction of new rules of evidence.[4]

[1] Liberty Oil Co. *v.* Condon Nat. Bank, 260 U. S. 235, 243 [1923].

[2] Capital Traction Co. *v.* Hof, 174 U. S. 1, 13 [1899], holding that the trial by a jury of 12 before a justice of the peace in the District of Columbia, under an act of 1823 was not a jury trial within the meaning of the 7th Amendment.

[3] Childress *v.* Emory, 8 Wheat. 642, 675 [1823].

[4] Ex parte Peterson, 253 U. S. 300, 309 [1920]. *See also* Walker *v.* New Mexico & S. P. R. Co., 165 U. S. 593, 596 [1897]; Baltimore & Carolina Line, Inc. *v.* Redman, 295 U. S. 654, 657 [1935].

Within the meaning of jury trial under the Seventh Amendment, it has been held constitutional for a Federal judge in the course of trial, to express his opinion upon the facts, provided all questions of fact are ultimately submitted to the jury; [1] call the jury's attention to parts of the evidence thought to be important,[2] being careful to distinguish between matters of law and matters of opinion in regard thereto;[3] direct the verdict where the evidence is so meagre as not in law to justify a verdict; [4] or condition his refusal of defendant's motion for a new trial upon plaintiff's remitting the amount of his

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verdict deemed excessive, but the court is without power to condition such a refusal upon consent to an increase in the amount of damages found.[5]

[1] United States v. Philadelphia & R. R. Co., 123 U. S. 113, 114, [1887]. *See also* Rucher v. Wheeler, 127 U. S. 85, 93 [1888]; Lovejoy v. United States, 128 U. S. 171, 173 [1888]; California Ins. Co. v. Union Compress Co., 133 U. S. 387, 417 [1890]; St. Louis, I. M. & S. R. Co. v. Vickers, 122 U. S. 360 [1887].

[2] Vicksburg, M. R. Co. v. Putnam, 118 U. S. 545, 553 [1886], citing Carver v. Jackson ex dem. Astor, 4 Pet. 1, 80 [1830]; Magniac v. Thompson, 7 Pet. 348, 390 [1833]; Mitchell v. Harmony, 13 How. 115, 131 [1852]; Eastern Transportation Line v. Hope, 95 U. S. 297, 302 [1877].

[3] Games v. Stiles ex dem. Dunn, 14 Pet. 322, 327 [1840].

[4] Sparf v. United States, 156 U. S. 51, 99 [1895]. *See also* Pleasants v. Fant, 22 Wall. 116, 121 [1875]; Montclair v. Dana, 107 U. S. 162 [1883]; Randall v. Baltimore & O. R. Co., 109 U. S. 478, 482 [1883]; Schofield v. Chicago, M. & St. P. R. Co., 114 U. S. 615, 619 [1885]; Marshall v. Hubbard, 117 U. S. 415, 419 [1886]; Meehan v. Valentine, 145 U. S. 611, 625 [1892]; Treat Mfg. Co. v. Standard Steel & I. Co., 157 U. S. 674 [1895]; Grand Chute v. Winegar, 15 Wall. 355 [1873]; Marion County v. Clark, 94 U. S. 278 [1877]; Herbert v. Butler, 97 U. S. 319 [1878]; Coughran v. Bigelow, 164 U. S. 301 [1896].

[5] Dimick v. Schiedt, 293 U. S. 474, 476–478 [1935]; Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 72 [1889].

UNANIMITY IN FINDING A VERDICT.

"The right of trial by jury in certain suits at common law is preserved by the Seventh Amendment; such a trial implies that there shall be an unanimous verdict of 12 jurors in all Federal courts where a jury trial is held." [1] It is not now open in the slightest to question that if the requirements of the Seventh Amendment applied to trials in State courts, a statute authorizing a verdict by a five-sixths majority, after 12 hours deliberation without reaching a unanimous verdict, would be void because of repugnancy to the Constitution;[2] but a State court may, under the Federal Employers Liability Act, give effect to a local practice permitting a less than unanimous verdict.[3] However a Territorial statute providing that "in all cases a verdict may, be rendered on the concurrence therein of nine or more members of the jury" is invalid; unanimity was one of the peculiar and essential features of trial by jury at the common law.[4]

[1] Maxwell v. Dow, 176 U. S. 581, 586 [1900].

[2] Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 216, 217 [1916].

[3] Chicago, R. I. & P. R. Co. v. Ward, 252 U. S. 18 [1920], following St. Louis, & S. F. R. Co. v. Brown, 241 U. S. 223 [1916].

[4] American Pub. Co. v. Fisher, 166 U. S. 464, 467 [1897], citing Webster v. Reid, 11 How. 437, 460 [1851]; Reynolds v. United States, 98 U. S. 145, 154 [1879]; Callan v. Wilson, 127 U. S. 540 [1888]; Walker v. New Mexico & S. P. R. Co., 165 U. S. 593 [1897]. *See also* Springville v. Thomas, 166 U. S. 707 [1897].

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Amdt. 7.—Civil Trials

WAIVER OF RIGHT OF TRIAL BY JURY.

Parties have a right to enter into a stipulation waiving a jury and submitting the case to the court upon an agreed statement of facts, even without any legislative provision for waiver.[1] "Congress has by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing. Revised Statutes sections 648, 649." [2] This statutory provision for a written stipulation, however, does not preclude other kinds of waivers.[3] But every reasonable presumption should be indulged against a waiver.[4] No waiver is to be implied from a request for a directed verdict.[5]

[1] Henderson's Distilled Spirits, 14 Wall. 44, 53 [1872]. *See also* Rogers *v.* United States, 141 U. S. 548, 554 [1891]; Parsons *v.* Armor, 3 Pet. 425 [1830]; Campbell *v.* Boyreau, 21 How. 223 [1859].

[2] Baylis *v.* Travelers Ins. Co., 113 U. S. 316, 320, 321 [1885], holding it error for a judge, in absence of any waiver, to find the facts and render judgment thereon.

[3] Dulgnan *v.* United States, 274 U. S. 195, 198 [1927], holding jury trial waived by an appearance and participation in the trial without demanding a jury.

[4] Hodges *v.* Easton, 106 U. S. 408, 412 [1883].

[5] Aetna Insurance Co. *v.* Kennedy, 301 U. S. 389 [1937].

Facts To Be Reexamined Only According to the Rules of the Common Law.*

IN GENERAL.

This is a prohibition to the courts of the United States to reexamine in any other manner facts tried by a jury. The only modes known to the common law to reexamine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court for some error of law which intervened in the proceedings.[1]

[1] Parsons *v.* Bedford, 3 Pet. 433, 447 [1830]. *See also* Justices of the Supreme Court *v.* United States ex rel. Murray, 9 Wall. 274, 277 [1870]; Metropolitan R. Co. *v.* Moore, 121 U. S. 558 [1887]; Wilson *v.* Everett, 139 U. S. 616 [1891]; Capital Traction Co. *v.* Hof, 174 U. S. 7 [1899] (Rules of Common Law); Slocum *v.* New York L. Ins. Co., 228 U. S. 364 [1913], holding that a circuit court had no authority after verdict to determine the facts and enter judgment non obstante verdicto; Pedersen *v.* Delaware & L. W. R. Co., 229 U. S. 146 [1913]; Young *v.* Central R. Co., 232 U. S. 602 [1914].

Where a court conditions its decision on a motion for a new trial upon a remission of a part of the damage found by the jury, it is not a reexamination of the facts by the court within the prohibition of this amendment.[1] Otherwise should the decision be conditioned upon an increase in the amount of damages found.[2]

[1] Arkansas Valley Land & Cattle Co. *v.* Mann, 130 U. S. 69 [1889].

[2] Dimick *v.* Schiedt, 293 U. S. 474 [1935].

* For other instances of applicability of common law, *see* pp. 134, 502.

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Amdt. 7.—Civil Trials

REVIEW OF MOTION FOR NEW TRIAL.

The rule that the Supreme Court will not review the action of a Federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions.[1] Its denial may be reviewed if the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion,[2] or if it acted on the mistaken view that there was no jurisdiction to grant it, or that there was no authority to grant it on the ground advanced.[3]

[1] Fairmont Glass Works *v.* Cub Fork Coal Co., 287 U. S. 474, 481 [1933]. *See also* Henderson *v.* Moore, 5 Cr. 11, 12 [1809]; Marine Ins. Co. *v.* Young, 5 Cr. 187, 191 [1809]; The "Abbotsford" *v.* Johnson, 98 U. S. 440, 445 [1879]; Kansas P. R. Co. *v.* Twombly, 100 U. S. 78, 81 [1879].

[2] Fairmont Glass Works *v.* Cub Fork Coal Co., 287 U. S. 474, 482 [1933]. *See also* Mattox *v.* United States, 146 U. S. 140 [1892].

[3] Fairmount Glass Works *v.* Cub Fork Coal Co., 287 U. S. 474, 482 [1933]. *See also* Felton *v.* Spiro, 78 Fed. 576, 581 [1897]; Dwyer *v.* United States, 170 Fed. 160, 165 [1909]; Paine *v.* St. Paul Union Stockyards Co., 35 F. (2d) 624, 626–628 [1929].

REMOVALS FROM STATE COURTS.

This clause has no application to a case which has been removed from a State court into a United States court after a judgment in the State court had been vacated, the verdict set aside, and a new trial granted.[1]

[1] Home L. Ins. Co. *v.* Dunn, 19 Wall. 214, 227 [1874]; Justices of Supreme Court *v.* United States ex rel. Murray, 9 Wall. 274, 277 [1870]; Maxwell *v.* Dow, 176 U. S. 581, 598 [1900]; Stevenson *v.* Williams, 19 Wall. 572, 576 [1874].

WRIT OF ERROR FROM FEDERAL SUPREME COURT.

The last clause of this amendment is not restricted in its application to suits at common law tried before juries in United States courts. It applies equally to a case tried before a jury in a State court and brought to the United States Supreme Court by a writ of error from the highest court of the State.[1]

[1] Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226, 242 [1897].

This clause applies to the appellate powers of the United States in all common-law cases coming up from an inferior Federal court, and also to the circuit court in like cases in the exercise of its appellate power, and also in cases of Federal cognizance coming up from a State court.[1]

[1] Justices of Supreme Court *v.* United States ex rel. Murray, 9 Wall. 274 [1870], in which the court held unconstitutional under this amendment the act of Congress of March 3, 1863, providing for removal to United States circuit courts of cases brought in State courts against Federal officers for arrests, etc., made under authority of the President, the circuit court to try the facts and the law as though the case had been originally brought there.

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AMENDMENT 8

PUNISHMENT FOR CRIME

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AMENDMENT 8—PUNISHMENT FOR CRIME

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AMENDMENT 8

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

Amdt. 8. Excessive bail or fines and cruel punishments prohibited.

Origin of Amendment.

"* * * The provision in reference to cruel and unusual punishments was taken from the well-known act of Parliament of 1688, entitled 'An act declaring the rights and liberties of the subject and settling the succession of the crown.' And this act, it is to be observed, was but in regular form a crystallization of the declaration of rights of the same year." This amendment "is an exact transcript of a clause in the bill of rights framed in the revolution of 1688." [1]

[1] Weems *v.* United States, 217 U. S. 349, 371, 389 [1910], citing Story, Constitution, vol. 2, sec. 1903, and Hallam, Const. Hist., vol. 3, p. 106. *See also* ex parte Kemmler, 136 U. S. 436, 446 [1890].

Nonapplication to States.*

"The Eighth Amendment is addressed to courts of the United States [including those of the Territories [1]] exercising criminal jurisdiction, and is doubtless mandatory to them and a limitation upon their discretion" and does not apply to the States.[2]

[1] Wilkerson *v.* Utah, 99 U. S. 130, 133 [1879].

[2] Ex parte Watkins, 7 Pet. 568, 574 [1833], holding that the Supreme Court has no appellate jurisdiction to revise the sentence of an inferior court, even though the excessiveness of a fine is apparent on the face of the record. *See also* Pervear *v.* Massachusetts, 5 Wall. 475, 480 [1867]; Ellenbecker *v.* District Court, 134 U. S. 31, 34 [1890]; McElvaine *v.* Brush, 142 U. S. 155, 158 [1891]; O'Neil *v.* Vermont, 144 U. S. 323, 332 [1892]; Ughbanks *v.* Armstrong, 208 U. S. 481, 487 [1908]; Collins *v.* Johnston, 237 U. S. 502, 511 [1915].

Excessive Bail.

To require larger bail than the prisoner could give in a case clearly bailable by law [1] would be to require excessive bail.

[1] United States *v.* Brawner, 7 Fed. 86, 89 [1881]; United States *v.* Motlow, 10 F. (2d) 657 [1926].

* For extent to which similar rights are protected against State action by the 14th Amendment, *see* p. 941.

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Amdt. 8.—Punishment for Crime

In United States *v.* Lawrence,[1] the court said that the discretion of the magistrate in taking bail in a criminal case is to be guided by the compound consideration of the ability of the prisoner to give bail and the atrocity of the offense.

[1] 4 Cr. [C. C.] 518 [1835].

Excessive Fines, Cruel and Unusual Punishments.

It would be difficult to define with exactitude the limits of the prohibition against cruel and unusual punishments, but punishments of torture, formerly inflicted for atrocious crimes and for high treason, and all others involving unnecessary cruelty may safely be said to be within them.[1] In construing almost identical language used in the constitution of the State of New York, the Court said: "So that, if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition" and further that "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there is something inhuman and barbarous, something more than the mere extinguishment of life."[2]

[1] Wilkerson *v.* Utah, 99 U. S. 130, 135 [1879].

[2] Ex parte Kemmler, 136 U. S. 436, 446–447 [1890], upholding the New York statute providing for execution of the death penalty by electrocution.

In Pervear *v.* Massachusetts,[1] it was argued that the imposition of a $50 fine and 3 months' hard labor for the illegal sale of liquor in violation of a State statute was cruel and unusual within the prohibition of the Eighth Amendment; and the Supreme Court, while holding that the amendment did not apply to the States, said further: "We perceive nothing excessive, or cruel, or unusual in this."

[1] 5 Wall. 475, 480 [1867].

Again in Howard *v.* Fleming,[1] where three persons were tried together and convicted by a State court of the crime of conspiracy and one was sentenced to 7 years in the penitentiary while the other two were sentenced to 10 years each, the court said: "Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one."

[1] 191 U. S. 126, 136 [1903].

Where, in Tincher *v.* United States,[1] the defendants were convicted on four counts for fraudulent use of the mails and were fined $500 each and sentenced to terms of imprisonment aggregating 10 years for each defendant, the circuit court in holding that this did not

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Amdt. 8.—Punishment for Crime

amount to a cruel and unusual punishment nor to an abuse of discretion on the part of the trial judge said: "The sentences imposed were within the limit prescribed by the statute; and it is well settled that in such a case the action of the trial judge will not be reviewed on appeal, except in case of gross and palpable abuse, which does not exist here."

[1] 11 F. (2d) 18, 21 [1926].

The following have been held not to be cruel and unusual punishments:

(1) Exclusion from the United States of the alien wife of a citizen, because of her commission of a crime.[1]

(2) Shooting, as a mode of executing the death penalty.[2]

(3) Punishing as a separate offense each act of placing a letter in the mails in pursuance of a single scheme to defraud.[3]

[1] United States ex rel. Ulrich v. Kellogg, 30 Fed. (2d) 984 [1929], certiorari denied, 279 U. S. 868 [1929].

[2] Wilkerson v. Utah, 99 U. S. 130, 135 [1879].

[3] Badders v. United States, 240 U. S. 391 [1916].

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AMENDMENT 9

RIGHTS RETAINED BY THE PEOPLE

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AMENDMENT 9

Amdt. 9. Rights retained by the people.

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

In General.

This amendment is in terms referred to as a ground of the argument in Livingston *v.* Moore, 7 Pet. 469, 551 [1833], and the Court meets the argument with a general statement that "the amendments of the Constitution" do not extend to the States. But the context shows clearly that the reference intended was the Seventh Amendment. The whole sentence involved is as follows: "They [certain laws of Pennsylvania] are charged with being contrary to the ninth article of the amendments of the Constitution of the United States, and the sixth section of the Pennsylvania bill of rights, securing the trial by jury." The argument of Mr. Ingersoll (p. 482) specifically makes the point (5): "They violate the right of trial by jury; * * * contrary to * * * the Seventh Amendment of the Constitution of the United States." The discrepancy is doubtless to be explained by the fact that numbers 1 and 2 of the 12 amendments proposed for adoption in 1789 were never ratified, and consequently number 9 became number 7 of the amendments adopted. A similar example of reference to an amendment by its number among the proposed amendments rather than among those adopted, may be seen in Re Burford, 3 Cr. 448, 451 [1806], where counsel referred to the "Sixth Article" relating to issue of warrants, i. e., Amendment 4.

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AMENDMENT 10

RESERVED STATE POWERS

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AMENDMENT 10—RESERVED STATE POWERS

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AMENDMENT 10

Amdt. 10. Powers reserved to the States.

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.

Scope and Purpose.

"The reservation to the States respectively can only mean the reservation of the rights of sovereignty which they respectively possessed before the adoption of the Constitution of the United States and which they had not parted from by that instrument."[1] The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of the word "expressly" in the Articles of Confederation, and probably omitted it to avoid those embarrassments.[2]

[1] Gordon *v.* United States, 117 U. S. 697, 705 [1864]. *See also* United States ex rel. Turner *v.* Williams, 194 U. S. 279, 295 [1904]; United States *v.* Butler, 297 U. S. 1 [1936].

[2] McCulloch *v.* Maryland, 4 Wheat. 316, 404 [1819].

"This Amendment * * * disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. * * * Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted",[1] and, while it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule the exact limitations which the States must observe in its exercise, the existence of such a power in the States has been unformly recognized in this court.[2]

[1] Kansas *v.* Colorado, 206 U. S. 46, 90 [1907].

[2] Keller *v.* United States, 213 U. S. 138 [1909], citing Patterson *v.* Kentucky, 97 U. S. 501 [1879]; Gibbons *v.* Ogden, 9 Wheat. 1 [1824]; Thurlow *v.* Massachusetts (License Cases), 5 How. 504 [1847]; Gilman *v.* Philadelphia, 3 Wall. 713 [1866]; Henderson *v.* New York, 92 U. S. 259 [1876]; Hannibal & St. J. R. Co. *v.* Husen, 95 U. S. 465 [1878]; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25 [1878].

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Amdt. 10.—Reserved State Powers

"It is a familiar rule of construction of the Constitution of the Union that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the Government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments",[1] and such article added nothing to the instrument as originally ratified and has no limited and special operation upon the people's delegation by article V of certain functions to the Congress.[2]

[1] Buffington (Collector) *v.* Day, 11 Wall. 113, 124 [1871].
[2] United States *v.* Sprague, 282 U. S. 716, 733 [1931].

"* * * a State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive." [1]

[1] New York *v.* Miln, 11 Pet. 102, 138 [1837].

Effect of a National Emergency.

"The conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional powers.[1] The Constitution established a National Government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the National Government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment." [1]

[1] A. L. A. Schechter Poultry Corp. *v.* United States, 295 U. S. 490 528 [1935], citing Ex parte Milligan, 4 Wall. 2, 120, 121 [1866]; Home Bldg. & L. Asso. *v.* Blaisdell, 290 U. S. 398, 426 [1934].

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Amdt. 10.—Reserved State Powers

What Powers Are Reserved.

The Tenth Amendment may be effective either to condemn a particular exercise of Federal authority, as without constitutional basis, or to uphold an exercise of State authority as against the challenge of conflict with the Federal Constitution. The primary question in either case is, the constitutional existence or scope of the Federal power exercised or challenged. Thus, in Pollard's Lessee *v.* Hagan [1] the court held that the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. In Everard's (James) Breweries *v.* Day,[2] the supplemental Prohibition Act of 1921 (regulating prescriptions for the medicinal use of liquor) was challenged as an interference with the legislative power of the States, and the Court stated "if the act is within the power confided to Congress, the Tenth Amendment, by its very terms, has no application, since it only reserves to the States 'powers not delegated to the United States by the Constitution' "; and proceeded to consider the power of Congress under the Eighteenth Amendment. In McCray *v.* United States,[3] the Court found the tax on oleomargarine within the taxing power and therefore valid, regardless of the argument that by discriminatory rates upon oleomargarine artificially colored the act in effect created an unreasonable distinction in aid of the butter industry.

[1] 3 How. 212, 229 [1845].

[2] 265 U. S. 545, 558 [1924]. *See also* Ashwander *v.* Tennessee Valley Authority, 297 U. S. 288, 330 [1936]; Ashton *v.* Cameron County Water Improv. Dist., 298 U. S. 513 [1936]; Steward Machine Co. *v.* Davis, 301 U. S. 548 [1937]; Helvering *v.* Davis, 301 U. S. 619 [1937].

[3] 195 U. S. 27 [1904].

Police Power.*

State laws have been upheld under the reserved power of internal police, which prohibited sale of intoxicating liquor [1] or penalized its manufacture [2] [if not inconsistent with the subsequent Federal law enacted under the Eighteenth Amendment]; or which required passenger trains to stop at every town within the State on its line, of 3,000 inhabitants.[3]

[1] Bartemeyer *v.* Iowa, 18 Wall. 129 [1874]. *See also* Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 33 [1878]; Mugler *v.* Kansas, 123 U. S. 623 [1887].

[2] Hebert *v.* Louisiana, 272 U. S. 312 [1926].

[3] Lake Shore & M. S. R. Co. *v.* Ohio ex rel. Lawrence, 173 U. S. 285 [1899].

A provision in an act of Congress which penalized generally the sale of "illuminating oils * * * inflammable at less temperature or fire-test than 110° Fahrenheit" was held invalid except as applied

* *See also* pp. 149, 154, 174, 337, 565, 827, 969.

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Amdt. 10.—Reserved State Powers

in places over which Congress had exclusive legislative authority, e. g., the District of Columbia.[1]

[1] United States *v.* Dewitt, 9 Wall. 41 [1870]. In reaching this conclusion the Court successively held the act not sustainable as in aid of the taxing power or the regulation of interstate commerce.

Taxation.*

Federal laws imposing "taxes" have been considered and held invalid as in effect invasions of State reserved powers, as follows:

(1) Income tax on salary of State judge.[1]

(2) Excise tax on profits of factories, etc., in which child labor was employed.[2]

(3) Tax of 20 cents a bushel on grain futures not sold upon "contract" markets.[3]

(4) Tax on coal of 15 percent of sale price at mine, with a drawback of 90 percent thereof to members of the Coal Code.[4]

(5) "Processing" tax on first processing of agricultural commodities, the same to be used for payments to farmers agreeing to a reduction of acreage or production.[5]

(6) Special excise tax (subsequent to repeal of Eighteenth Amendment) of $1,000 on brewers, etc., carrying on business contrary to local State law.[6]

[1] Buffington (Collector) *v.* Day, 11 Wall. 113 [1871].

[2] Bailey *v.* Drexel Furniture Co. (Child Labor Tax Case), 259 U. S. 20, 36, 38 [1922].

[3] Hill *v.* Wallace, 259 U. S. 44 [1922]. *See also* Trusler *v.* Crooks, 269 U. S. 475 [1926].

[4] Carter *v.* Carter Coal Co., 298 U. S. 238 [1936].

[5] United States *v.* Butler, 297 U. S. 1 [1936]. *See also* Rickert Rice Mills *v.* Fontenot, 297 U. S. 110 [1936].

[6] United States *v.* Constantine, 296 U. S. 287 [1935]. The "tax" was found to be "grossly disproportionate to the amount of the normal tax."

Interstate Commerce.

Acts of Congress have been upheld under the commerce power, against the objection that they invaded the reserved powers of the States, in the following circumstances:

(1) Act prohibiting interstate transportation of lottery tickets.[1]

(2) Act providing for recapture of excess earnings of railroads under jurisdiction of the Interstate Commerce Commission, one-half thereof to constitute a general revolving fund, although such recapture incidentally reduced the net income from intrastate rates.[2] The power of Congress to exercise incidental and partial control of intrastate commerce when necessary to an adequate maintenance of interstate commerce, is established.[3]

(3) Act penalizing assault on employees of Bureau of Animal Industry while in discharge of official duties, as applied to a case

* *See also* pp. 122, 649, 663, 720, 1025 on Federal taxation.

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Amdt. 10.—Reserved State Powers

involving the dipping of cattle within a State. Everything authorized to be done under the act was expressly intended to prevent interstate spread of contagious disease. The requirement of dipping was a reasonable condition of allowing cattle from a suspected district to pass into another State.[4]

[1] Champion *v.* Ames (Lottery Case), 188 U. S. 321 [1903].
[2] Dayton-Goose Creek R. Co. *v.* United States, 263 U. S. 456 [1924].
[3] Simpson *v.* Shepard (Minnesota Rate Cases), 230 U. S. 352 [1913]; Illinois C. R. Co. *v.* Behrens, 233 U. S. 473 [1914]; Houston E. & W. T. R. Co. (The Shreveport Case), 234 U. S. 342 [1914]; Railroad Commission *v.* Chicago, B. & Q. R. Co., 257 U. S. 563 [1922].
[4] Thornton *v.* United States, 271 U. S. 414 [1926].

On the other hand, acts have been held invalid on the ground they went beyond the commerce power, in the following cases:

(1) Act of 1906 (34 Stat. 232) making every carrier engaged in commerce in the District of Columbia, Territories, or between the States, liable to "any" of its employees for injuries caused by negligence, etc. The act thus in terms would apply to employees possibly engaged exclusively within a State.[1]

(2) Act of 1916 (39 Stat. 675) prohibiting shipment in interstate commerce of products of mills, etc., in which child labor had been employed within 30 days of removal of goods.[2]

[1] Howard *v.* Illinois C. R. Co. (Employers' Liability Cases), 207 U. S. 463 [1908].
[2] Hammer *v.* Dagenhart, 247 U. S. 251 [1918].

Miscellaneous.

The Civil Rights Act of 1875 which penalized (secs. 1, 2) any person depriving another of equal accommodations at inns, etc., being unsupported by the Thirteenth or Fourteenth Amendments, was invalid as an invasion of reserved powers.[1]

[1] Civil Rights Cases, 109 U. S. 3 [1883]. *See also* United States *v.* Harris, 106 U. S. 629 [1883]; Hodges *v.* United States, 203 U. S. 1 [1906]; Butts *v.* Merchants & M. Transp. Co., 230 U. S. 126 [1913].

The State liquor prohibition laws (not inconsistent with the Eighteenth Amendment) derived their force not from that amendment but from power originally belonging to the States and reserved to them by the Tenth Amendment.[1]

[1] McCormick & Co. *v.* Brown, 286 U. S. 131, 141 [1932], citing United States *v.* Lanza, 260 U. S. 377, 381 [1922]; Hebert *v.* Louisiana, 272 U. S. 312, 315 [1926]; Van Oster *v.* Kansas, 272 U. S. 465, 469 [1926].

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Amdt. 10.—Reserved State Power

The Home Owners' Loan Act (48 Stat. 128), to the extent that it permits the conversion of a State building and loan association into a Federal savings and loan association without consent of the State, is an unconstitutional encroachment upon the reserved powers of the States.[1]

[1] Hopkins Fed. Sav. & Loan Asso. v. Cleary, 296 U. S. 315 [1935].

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AMENDMENT 11

SUITS AGAINST STATES

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AMENDMENT 11

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.

Amdt. 11. Suits against States.

Purpose of Amendment.

"It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures." [1]

[1] Cohens v. Virginia, 6 Wheat. 264, 406 [1821].

The Eleventh Amendment was proposed, almost unanimously, at the first meeting of Congress after the decision in Chisholm v. Georgia,[1] which held that a State was liable to be sued by a citizen of another State or of a foreign country. "This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court." [2]

[1] 2 Dall. 419 [1793].

[2] Hans v. Louisiana, 134 U. S. 1, 11 [1890]. *See also* Monaco v. Mississippi, 292 U. S. 313, 329 [1934].

"The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residium of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and con-

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trolled by the mandates of judicial tribunals without their consent, and in favor of individual interests." [1]

[1] Ex parte Ayers, 123 U. S. 443, 505 [1887].

In Law or Equity.

While the amendment speaks only of suits in law or equity, that language is the natural result of the intention to overrule the Chisholm case, which was a suit at law; the amendment cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its own citizens or not.[1] Where the proceeds of sale of certain slaves, seized as having been illegally brought into the State, were in the State treasury, an attempt to reach them was held to be not a case within admiralty jurisdiction but a personal suit against the State and unsustainable.[2]

[1] Ex parte New York, 256 U. S. 490, 497 [1921].
[2] Ex parte Madrazzo, 7 Pet. 627 [1833].

The recognized primary purpose of the amendment, viz, to overrule the Chisholm case, cannot be regarded as restricting the scope of its express terms. It necessarily embraces demands for the enforcement of equitable rights.[1]

[1] Missouri v. Fiske, 290 U. S. 18 [1933].

What Cases Unaffected by the Amendment.

While the amendment took from the Supreme Court all jurisdiction, past,[1] present, and future, of all controversies between States and individuals; it left its exercise over those between States as free as it had been before.[2] It does not comprehend controversies between a State and a foreign State.[3] Nor did the amendment, though limited in terms to suits by citizens of other or foreign States, operate to authorize suits against a State (without its consent) by its own citizens.[4] Those who deal in bonds of a sovereign State are aware that they must rely altogether on the sense of justice and good faith of the State, and the courts of the United States are expressly prohibited from exercising jurisdiction.[5]

[1] *See* Hollingsworth v. Virginia, 3 Dall. 378, 382 [1798].
[2] Rhode Island v. Massachusetts, 12 Pet. 657, 731 [1838]. *See also* Virginia v. West Virginia, 206 U. S. 290, 318 [1907].
[3] *See* Cohens v. Virginia, 6 Wheat. 264, 406 [1821].
[4] Hans v. Louisiana, 134 U. S. 1 [1890]; North Carolina v. Temple, 134 U. S. 22 [1890]; Fitts v. McGhee, 172 U. S. 516, 524 [1899]; Duhne v New Jersey, 251 U. S. 311, 313 [1920].
[5] Bank of Washington v. Arkansas, 20 How. 530 [1858].

It remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, where a State is not necessarily a defendant.[1]

[1] United States v. Peters, 5 Cr. 115, 137 [1809].

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Amdt. 11.—Suits Against States

Suit Commenced or Prosecuted.

Prosecution of a writ of error to review a judgment of a State court claimed to be in violation of the Constitution or laws of the United States, does not "commence or prosecute a suit against the State." [1]

[1] Cohens v. Virginia, 6 Wheat. 264, 411–412 [1821].

Record Not Conclusive as to Parties in Interest.

"It must be regarded as a settled doctrine of this court, established by its recent decisions, that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record," but is determined by a consideration of the nature of the case as presented on the whole record. [1]

[1] Ex parte Ayers, 123 U. S. 443, 487 [1887], distinguishing Poindexter v. Greenhow, 114 U. S. 270 [1885], from Osborn v. Bank of United States, 9 Wheat. 738 [1824].

A suit nominally against individuals, but restraining or otherwise affecting their action as State officers may be in substance a suit against the State which the Constitution forbids.[1]

[1] Worcester County Trust Co. v. Riley, 302 U. S. 292 [1937], citing Louisiana v. Jumel, 107 U. S. 711 [1883]; Hagood v. Southern, 117 U. S. 52 [1886]; In re Ayers, 123 U. S. 443 [1887]; North Carolina v. Temple, 134 U. S. 22, 30 [1890]; Smith v. Reeves, 178 U. S. 436 [1900]; Lankford v. Platte Iron Works, 235 U. S. 461 [1915]; Ex parte State of New York, No. 1, 256 U. S. 490, 500 [1921]; Missouri v. Fiske, 290 U. S. 18, 28 [1933]; Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446 [1883]; Wells v. Roper, 246 U. S. 335 [1918].

Suits Against State Officers Not Upheld.

A suit against the governor solely in his official capacity, to recover moneys in the State treasury, was considered a suit against the State.[1]

[1] Governor of Georgia v. Madrazo, 1 Pet. 110 [1828]. Confirmed in Kentucky v. Dennison, 24 How. 66, 98 [1861].

Where it was sought affirmatively to compel the performance of a State's contract by mandamus against its officers requiring the application of funds in the State treasury, and the collection of a specific tax authorized by law for the retirement of State bonds, it was held to be a suit against the State, and an attempt to secure judicial interference with political activities.[1]

[1] Louisiana v. Jumel, 107 U. S. 711 [1883]. Applied in Hagood v. Southern, 117 U. S. 52 [1886], to a suit to compel performance of an act authorizing receipt of scrip for taxes; and in Christian v. Atlantic & N. C. R. Co., 133 U. S. 233 [1890], to a proceeding to declare a lien on railroad stock held by the States, and further to enforce that lien by sale, etc. *See also* North Carolina v. Temple, 134 U. S. 22 [1890].

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Amdt. 11.—Suits Against States

Where the State was nominally a party on the record, but examination of the pleadings showed it was suing for the use and on behalf of certain of its citizens to compel an officer to pay out public money in his possession on the State's obligations, the suit was held within the inhibition.[1]

[1] New Hampshire *v.* Louisiana, 108 U. S. 76 [1883]. *See also* North Dakota *v.* Minnesota, 263 U. S. 365 [1923], and South Dakota *v.* North Carolina, 192 U. S. 286 [1904].

The Court will refuse to take jurisdiction of a suit to compel an officer to exercise the State's power of taxation, when it is clearly seen upon the record that the State is an indispensable party.[1]

[1] Cunningham *v.* Macon & B. R. Co., 109 U. S. 446 [1883].

A suit filed by aliens against the auditor, attorney general, and other officials of Virginia to enjoin the prosecution of suits in the name and for the use of the State, under a State act, against taxpayers who had tendered in payment of taxes tax-receivable coupons cut from bonds of the State, was a suit against the State and within the meaning of the Eleventh Amendment.[1]

[1] Ex parte Ayers, 123 U. S. 443 [1887].

A suit against commissioners appointed under a State law to wind up the affairs of the State dispensary system, is also prohibited.[1]

[1] Murray *v.* Wilson Distilling Co., 213 U. S. 151 [1909]. *See also* Carolina Glass Co. *v.* South Carolina, 240 U. S. 305 [1916].

A suit by a depositor in an Oklahoma bank against members of the State Banking Board and the Bank Commissioner to compel payments from the Depositors' Guaranty fund, is likewise within the prohibition.[1]

[1] Lankford *v.* Platte Iron Works Co., 235 U. S. 461 [1915]. Followed in American Water Softener Co. *v.* Lankford, 235 U. S. 496 [1915]; Farish *v.* State Banking Board, 235 U. S. 498 [1915]. Distinguished in Johnson *v.* Lankford, 245 U. S. 541 [1918], and Martin *v.* Lankford, 245 U. S. 547 [1918], where the action sought relief against the Commissioner and his surety personally, and not against the Guaranty Fund as such.

A suit by an executor to interplead the tax officers of two States, claiming the domicil of the testator, is a suit against a State forbidden by the Eleventh Amendment, when, under the laws of neither State would a death tax be imposed if the testator was not domiciled there, and when the only reason for the suit is an apprehension lest the courts of both States decide that the testator died domiciled within their respective jurisdictions.[1]

[1] Worcester County Trust Co. *v.* Riley, 302 U. S. 292 [1937].

Suits Against State Officers Upheld.

Suits by individuals against defendants who claim to act as officers of a State and, under color of an unconstitutional statute, to

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recover for injury to property; or to recover money or property unlawfully taken from them in behalf of the State; or, for compensation for damages; or, in a proper case, for an injunction to prevent such wrong and injury; or, for a mandamus to enforce the performance of a plain legal duty, purely ministerial; are not, within the meaning of the amendment, suits against the State.[1]

[1] Re Tyler, 149 U. S. 164, 190 [1893]. Followed in Scott *v.* Donald, 165 U. S. 58, 67; 165 U. S. 107 [1897].

An injunction against sale by a State land commission, under a statute adjudged unconstitutional, of swamp lands purchased under an earlier act was held not a suit against the State.[1]

[1] Pennoyer *v.* McConnaughy, 140 U. S. 1 [1891]. In reaching this conclusion the Court cited Osborn *v.* Bank of United States, 9 Wheat. 738 [1824]; Davis *v.* Gray, 16 Wall. 203 [1873] (suit to restrain sale of railroad land grants, declared forfeited by State law); Tomlinson *v.* Branch, 15 Wall. 460 [1873]; Litchfield *v.* Webster County, 101 U. S. 773 [1880]; Board of Liquidation *v.* McComb, 92 U. S. 531 [1876] (restraint of State commission from issuing, in liquidation of State debt to a certain Levee Co., of certain of the same kind of bonds as held by petitioner); Allen *v.* Baltimore & O. R. Co., 114 U. S. 311 [1885] (similar to McComb case); Poindexter *v.* Greenhow, 114 U. S. 270 [1885] (detinue against a tax-collector who, under color of State law, held unconstitutional, refused tender of tax-receivable coupons and distrained on certain property of petitioner).

A suit against State officers to enjoin them from enforcing a tax alleged to be in violation of the Constitution of the United States is not a suit against a State within the prohibition of the Eleventh Amendment.[1] This doctrine announced in many previous cases on the subject was stated by Mr. Justice Harlan, in Smyth *v.* Ames, wherein it was said: "It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment."[2]

[1] Gunter *v.* Atlantic Coast Line R. Co., 200 U. S. 273, 283 [1906].

[2] 169 U. S. 466, 518–519 [1898]. *See also* Prout *v.* Starr, 188 U. S. 537 [1903]; Reagan *v.* Farmers' Loan & T. Co., 154 U. S. 362 [1894].

Generally suits to restrain action of State officials can, consistently with the constitutional prohibition, be prosecuted only when the action sought to be restrained is without the authority of State law or contravenes the statutes or Constitution of the United States.[1]

[1] Worcester County Trust Co. *v.* Riley, 302 U. S. 292 [1937], citing Ex parte Young, 209 U. S. 123 [1908]; Scully *v.* Bird, 209 U. S. 481 [1908]; Old Colony Trust Co. *v.* Seattle, 271 U. S. 426 [1926]; Louisiana *v.* Jumel, 107 U. S. 711 [1883]; Hagood *v.* Southern, 117 U. S. 52 [1886]; In re Ayers, 123 U. S. 443 [1887]; Lankford *v.* Platte Iron Works, 235 U. S. 461 [1915].

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A distinction is made between cases where the State officer sued is charged with some special duty in the enforcement of the statute complained of (and the suit is therefore to prevent him, under sanction of the statute, from committing some wrong or injury by positive act) and a case where the suit is merely to test the constitutionality of the statute, in the enforcement of which the officers sued will act only by formal judicial proceedings in the courts.[1] When officials are charged with a mere ministerial duty, any person who will be injured by refusal to perform or by positive official act in violation of such duty, may have a mandamus or injunction, and such suit is not a suit against the State.[2]

[1] Fitts *v.* McGhee, 172 U. S. 516 [1899]. *See also* Smith *v.* Reeves, 178 U. S. 436 [1900]; Chandler *v.* Dix, 194 U. S. 590, 591 [1904]; Tindal *v.* Wesley, 167 U. S. 204, 212 [1897].

[2] Board of Liquidation *v.* McComb, 92 U. S. 531, 541 [1876]. *See also* Houston *v.* Ormes, 252 U. S. 469, 472 [1920]; Rolston *v.* Missouri, 120 U. S. 390, 411 [1887].

A suit to restrain a State officer from executing an unconstitutional statute, in violation of plaintiff's rights and to his irreparable damage, is not a suit against the State, and "individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."[1] This principle is not confined to the maintenance of suits to restrain enforcement of statutes which are unconstitutional, but applies also when the attempted administration of a valid statute is unconstitutional.[2]

[1] Ex parte Young, 209 U. S. 123 [1908].

[2] Greene *v.* Louisville & I. R. Co., 244 U. S. 499 [1917], followed in Louisville & N. R. Co. *v.* Greene, 244 U. S. 522 [1917]; Illinois C. R. Co. *v.* Greene, 244 U. S. 555 [1917]. *See also* Tanner *v.* Little, 240 U. S. 369 [1916]; Harrison *v.* St. Louis & S. F. R. Co., 232 U. S. 318 [1914]; Herndon *v.* Chicago, R. I. & P. R. Co., 218 U. S. 135 [1910]; Ludwig *v.* Western Union, 216 U. S. 146 [1910]; Hunter *v.* Wood, 209 U. S. 205 [1908]; General Oil Co. *v.* Crain, 209 U. S. 211 [1908]; Philadelphia Co. *v.* Stimson, 223 U. S. 605, 621 [1912]; Truax *v.* Raich, 239 U. S. 33, 37 [1915]; Worcester County Trust Co. *v.* Riley, 302 U. S. 292 [1937].

Immunity from suit is a high attribute of sovereignty which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. "The many claims of immunity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by public officers. If they were indeed agents, acting for the State, they—though not exempt

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from suit—could successfully defend by exhibiting the valid power of attorney or lawful authority under which they acted. * * * But if it appeared that they proceeded under an unconstitutional statute their justification failed and their claim of immunity disappeared on the production of the void statute * * *. In such cases the law of agency has no application—the wrongdoer is treated as a principal and individually liable for the damages inflicted and subject to injunction against the commission of acts causing irreparable injury." [1]

[1] Hopkins *v.* Clemson Agricultural College, 221 U. S. 636, 643 [1911], holding a State agricultural college liable to suit for damages caused by its corporate act in constructing a dyke which caused overflow of plaintiff's property. *See also* Belknap *v.* Schild, 161 U. S. 10, 18 [1896.]

The test laid down in the Clemson College case was followed in Old Colony Trust Co. *v.* Seattle,[1] sustaining a suit against State tax-collecting agents to enjoin distraint of property to satisfy taxes. Under the circumstances, it was not the collection of the tax, but the wrongful and abusive use of the process of collecting that was sought to be enjoined.

[1] 271 U. S. 426 [1926].

"The Eleventh Amendment, which denies to the citizen the right to resort to a Federal court to compel or restrain State action, does not preclude suit against a wrongdoer merely because he asserts that his acts are within an official authority which the State does not confer." [1]

[1] Worcester County Trust Co. *v.* Riley, 320 U. S. 292 [1937].

Restraint of Enforcement of State Statute.

Federal jurisdiction to enjoin execution of a State law on the ground of unconstitutionality should be exercised only in clear cases and when necessary to prevent great and irreparable injury.[1] "Only a case of manifest oppression" will justify such interference; the reluctance of the Court to interfere by injunction with the activities of State officials conscientiously endeavoring to fulfill their duty, was of itself adequate ground for refusing an injunction against certain State and county highway officials, to restrain interference with maintenance of a bridge, and collection of tolls—a matter which depended upon the construction of the local law against perpetuities.[2]

[1] Cavanaugh *v.* Looney, 248 U. S. 453 [1919]; followed in Hygrade Provision Co. *v.* Sherman, 266 U. S. 497, 500 [1925]; Massachusetts State Grange *v.* Benton, 272 U. S. 525 [1926].

[2] Hawks *v.* Hamill, 288 U. S. 52 [1933].

"Ordinarily, there should be no interference with such officers; primarily they are charged with the duty of prosecuting offenders against the laws of the State, and must decide when and how this is to be done. The accused should first set up and rely upon his defense

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in the State courts even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection." [1]

[1] Fenner *v.* Boykin, 271 U. S. 240, 243 [1926], refusing injunction to restrain law officers from enforcing by arrest and prosecution a State law penalising certain gambling contracts on the ground of interference with interstate commerce and deprivation of constitutional rights.

State officers may be restrained from carrying into effect a law allegedly unconstitutional, even though the injunction may cause the law to remain inoperative until the question of constitutionality is judicially determined.[1]

[1] Public Service Co. *v.* Corboy, 250 U. S. 153, 159 [1919].

Claim That State is a Party not Jurisdictional.

Where suit is against an individual by name and he desires to plead an exemption by reason of his representative character, he should raise the question either by demurrer to the bill, or by other pleadings in the regular course of the cause.[1]

[1] Illinois C. R. Co. *v.* Adams, 180 U. S. 21, 28, 37, 38 [1901]. *See also* Scully *v.* Bird, 209 U. S. 481 [1908]; Fitts *v.* McGhee, 172 U. S. 516 [1899].

A claim that a Federal court was without jurisdiction of a suit against State officers to restrain enforcement of unconstitutional statutes because in effect a suit against the State was dismissed.[1]

[1] Looney *v.* Crane Co., 245 U. S. 178, 191 [1917], on the strength of Ex parte Young, 209 U. S. 123 [1908]; Western U. Teleg. Co. *v.* Andrews, 216 U. S. 165 [1910]; Home Teleph. & Teleg. Co. *v.* Los Angeles, 227 U. S. 278 [1913]. *See also* McNeill *v.* Southern R. Co., 202 U. S. 543 [1906]; Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210 [1908].

Suits Against State Officers Abated on Retirement of Officer.

Suit against an Attorney General, to restrain threatened action under an allegedly unconstitutional statute, abates upon his retirement from office and cannot be revived against his successor except under authority of law.[1]

[1] Ex parte La Prade, 289 U. S. 444 [1933]. The question was reserved, in what circumstances a successor who was of the same mind with reference to the threatened prosecution might be substituted in a pending suit.

Waiver of Immunity.

The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always

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open to it as a suitor in controversies between it and citizens of other States.[1] Such waiver of immunity from suit, however, does not extend to a surrender of any essential attribute of sovereignty.[2]

[1] Clark *v.* Barnard, 108 U. S. 436, 447 [1883].
[2] Ashton *v.* Cameron County Water Impr. Dist. No. 1, 298 U. S. 513, 531 [1936].

"It is elementary that even if a State has consented to be sued in its own court by one of its creditors, a right would not exist in such creditor to sue the State in a court of the United States."[1]

[1] Murray *v.* Wilson Distilling Co., 213 U. S. 151, 172 [1909], citing Smith *v.* Reeves, 178 U. S. 436 [1900]; Chandler *v.* Dix, 194 U. S. 590 [1904]. *See also* Graves *v.* Texas Co., 298 U. S. 393, 403–404 [1936].

There is no waiver of immunity from suit in a particular case from the fact that the State had previously appeared in and had defended a similar suit against the same State officers.[1] So also, where a State intervened, not to seek a determination of any right or title, but to ask that Federal court make no distribution of property involved until the rights in the premises were decided in the State courts, such intervention was too limited in character to constitute a waiver of immunity.[2]

[1] Farish *v.* State Banking Board, 235 U. S. 498 [1915].
[2] Missouri *v.* Fiske, 290 U. S. 18 [1933].

In 1844 it was held no objection to Federal jurisdiction that a State was a member of the defendant railroad corporation.[1] The Court there followed Osborn *v.* Bank of United States, 9 Wheat. 738 [1824]; United States *v.* Peters, 5 Cr. 115 [1809]; and Bank of United States *v.* Planters' Bank, 9 Wheat. 904 [1824], in the last of these cases it was held that the State by becoming a partner in a trading concern divested itself of its sovereign character so far as concerned the transactions of the company, and waived its privilege of immunity. It had already been held that where a State was sole proprietor of a corporation, a suit against the corporation was not a suit against the State.[2]

[1] Louisville, C. & C. R. Co. *v.* Letson, 2 How. 497, 550 [1844].
[2] Bank of Kentucky *v.* Wister, 2 Pet, 318 [1829].

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AMENDMENT 12

ELECTION OF PRESIDENT

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AMENDMENT 12

Amdt. 12. Meeting of electors; transmittal of their votes; election of President and Vice President by the House and Senate in certain cases.

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 the death or other constitutional disability of

* By the 20th Amendment, adopted in 1933, the term of the President is to begin on the 20th of January.

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Amdt. 12.—Election of President

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.

In General.

This amendment supersedes clause 3 of section 1 of article II. The States are to act as units in the choice of President by the House of Representatives [the representation from each State having one vote] but that vote is arrived at through the votes of representatives elected by districts; and it has never been doubted that representatives thus chosen represent the entire people of the State acting in their sovereign capacity.[1]

[1] McPherson *v.* Blacker, 146 U. S. 1, 26 [1892].

The only rights and duties, expressly vested by the Constitution in the National Government, with regard to the appointment or the votes of presidential electors, are by the provisions of article II, section 1 [time of choosing and of giving votes] and this amendment [opening of votes in presence of both Houses, and counting]. Under this latter authority, Congress has regulated the transmission of votes to the seat of government and the course of proceeding in the opening and counting of them [see U. S. C. 3: 11–20] but it has never undertaken to interfere with the manner of appointing electors.[1]

[1] Fitzgerald *v.* Green, 134 U. S. 377 [1890].

* Under the 20th Amendment, sec. 3, in case a President is not chosen before the time for beginning of his term, the Vice President-elect shall act as President, until a President shall have qualified.

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AMENDMENT 13

SLAVERY AND INVOLUNTARY SERVITUDE

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AMENDMENT 13—SLAVERY AND INVOLUNTARY SERVITUDE

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AMENDMENT 13

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Amdt. 13. Sec. 1. Prohibition of slavery and involuntary servitude.

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

Amdt. 13. Sec. 2. Power of Congress.

Origin and Purpose.

The language of the Thirteenth Amendment "reproduced the historic words of the ordinance of 1787 for the government of the Northwest Territory and gave them unrestrained application within the United States and all places subject to their jurisdiction." [1] The general purpose in view was "liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers." [2]

[1] Bailey *v.* Alabama, 219 U. S. 219, 240 [1911].
[2] Butler *v.* Perry, 240 U. S. 328, 333 [1916].

The first case in which the Supreme Court was called upon to give construction to this amendment was the Slaughter House Cases.[1] It was argued that the restriction imposed by the law of Louisiana on use of land in Orleans, Jefferson, and St. Bernard Parishes for purposes of slaughterhouses, etc., constituted a "servitude" on that land; in answer to which the Court stated that "with microscopic search [to] endeavor to find in it [the amendment] a reference to servitudes, which may have been attached to property in certain localities, requires an effort * * *. That a personal servitude was meant is proved by the use of the word 'involuntary' which can only apply to human beings * * *. The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery." But the Court later amplified this, by remarking that "undoubtedly while Negro slavery alone was in the mind of the Congress which proposed the Thirteenth Amendment, it forbids any other kind of slavery," and might "safely be trusted" to make void slavery developed through Mexican peonage or the

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Chinese coolie labor system. This aspect of the case was confirmed in Hodges *v.* United States,[2] "[the amendment] is not an attempt to commit [the colored race] to the care of the Nation. It is the denunciation of a condition and not a declaration in favor of a particular people."

[1] 16 Wall. 36, 67, 69, 72 [1873].
[2] 203 U. S. 1, 16 [1906].

Enforcement.

While the amendment is self-executing so far as its terms were applicable to existing conditions,[1] Congress was authorized to secure complete enforcement by appropriate legislation.[2] It is not open to doubt that Congress may enforce the amendment by direct legislation, punishing the holding of a person in slavery or in involuntary servitude except as a punishment for crime.[3] The amendment, besides abolishing slavery, "gives power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it it was the object of the amendment to secure." [4]

[1] *Cf.* United States *v.* Choctaw Nation, 38 Ct. Cl. 558, 566 [1903], as to effect on slaves of the Choctaw Indians; In re Sah Quah, 31 Fed. 327 [1886], as to slavery among uncivilized Indians of Alaska.
[2] Bailey *v.* Alabama, 219 U. S. 219, 240 [1911].
[3] Clyatt *v.* United States, 197 U. S. 207, 218 [1905].
[4] United States *v.* Harris, 106 U. S. 629, 640 [1883], holding unconstitutional an act of Congress (R. S. 5519) which provided a penalty in case "two or more persons in any State * * * conspire * * * for the purpose of depriving * * * any person * * * of the equal protection of the laws or of equal privileges or immunities under the laws." Such statute was broader than the amendment would justify.

Involuntary Servitude.

"It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person [a mere individual] may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business." [1]

[1] Civil Rights Cases, 109 U. S. 3, 24 [1883], holding that secs. 1 and 2 of the act of March 1, 1875 (penalizing the denial of such privileges by "any person within the jurisdiction of the United States"), were not supported by the 13th Amendment. *See also* Butts *v.* Merchants & M. Trans. Co., 230 U. S. 126 [1913].

It was settled, in the Slaughter House Cases, above noted, that the servitude referred to in the amendment is personal. "All understand by these terms [slavery and involuntary servitude] a condition

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of enforced compulsory service of one to another."[1] There is a further class of cases which lies outside the amendment, although involving elements of servitude. Thus, the contracts of seamen, which have from earliest historical times been treated as exceptional, and involving, to a certain extent, the surrender of personal liberty during the life of the contract, may be enforced without regard to the amendment. "Services which have from time immemorial been treated as exceptional shall not be regarded as within its provisions."[2] The amendment was not intended to introduce any novel doctrine with respect of such services "and certainly was not intended to interdict enforcement of those duties which individuals owe the State, such as services in the Army, militia, on the jury, etc."[3]

[1] Hodges *v.* United States, 203 U. S. 1, 16 [1906].

[2] Robertson *v.* Baldwin, 165 U. S. 275, 282 [1897].

[3] Butler *v.* Perry, 240 U. S. 328, 333 [1916], sustaining a State law requiring of every able-bodied man a certain amount of work upon the public roads annually. "In view of ancient usage and the unanimity of judicial opinion, it must be taken as settled that, unless restrained by some constitutional limitation, a State has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation." *Cf.* Adair *v.* United States, 208 U. S. 161, 175 [1908].

As was foreshadowed in the Slaughter House Cases, this amendment has been invoked in restraint of peonage. Congress early enacted legislation prohibiting peonage ["the holding of any person to service or labor under the system known as peonage"] and declaring void all laws by virtue of which any attempt should be made to enforce "directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise" (R. S. 1990, 5526). These provisions were sustained in Clyatt *v.* United States.[1] Further, a State law was held unconstitutional under which the mere refusal to perform a contract for rental of land, after obtaining an advance of money thereunder, was made *prima facie* evidence of a fraudulent intent in the making of the contract, and punishable by fine or imprisonment. It was held that the Federal statute above cited was concerned with a condition, however named, and wherever it might be established, maintained, or enforced. It necessarily embraces all legislation which seeks to compel the service or labor by making it a crime to refuse or fail to perform it. The exception ("except as punishment for crime") does not destroy the prohibition. "It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other."[2] And where under the laws of the same State a criminal defendant, contracting for the performance of labor in consideration of the payment of his fine and costs and subsequently failing to perform, was made liable to separate

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punishment therefor, the relation established between him and the surety is peonage within the prohibition of the amendment.[3]

[1] 197 U. S. 207 [1905], which was an indictment for returning a person to a condition of peonage. For a discussion of peonage and of the legislation of Congress on the subject, *see* Peonage Cases, 123 Fed. 671 [1903]. *See also* Franklin *v.* South Carolina, 218 U. S. 161 [1910].

[2] Bailey *v.* Alabama, 219 U. S. 219 [1911].

[3] United States *v.* Reynolds, 235 U. S. 133 [1914].

The claim of "involuntary servitude" has failed of establishment in the following circumstances:

(1) Revised Statutes 1977, which undertook to penalize conspiracy by individuals to prevent citizens of African descent, because of their race and color, from making and carrying out contracts of labor.[1]

(2) An argument that the selective draft law, exacting from citizens the performance of the supreme and noble duty of contributing to the defense of the rights and honor of the Nation, was an imposition of involuntary servitude, was "refuted by its mere statement." [2]

(3) Where State law provided for separate railway carriages for the white and colored races, it was held "too clear for argument" that the statute merely implied a legal distinction, founded in the color of the two races, and "has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude." Slavery, it was said, implied the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another and the absence of a legal right to the disposal of his own person, property, and services." [3]

(4) A State law making it a misdemeanor for a lessor or his agent or janitor intentionally to fail to furnish such water, heat, light, elevator, telephone, or other service as may be required by the terms of the lease, and necessary to the proper and customary use of the building, does not create an involuntary servitude.[4]

(5) An argument that a covenant prohibiting transfer of land to any person of Negro blood is void under the Thirteenth Amendment, is "entirely lacking in substance or color of merit." [5]

[1] Hodges *v.* United States, 203 U. S. 1, 16 [1906].

[2] Arver *v.* United States (Selective Draft Law Cases), 245 U. S. 366, 390 [1918]. *See also* Jones *v.* Perkins, 245 U. S. 390, 392 [1918].

[3] Plessy *v.* Ferguson, 163 U. S. 537, 542 [1896].

[4] Marcus Brown Holding Co. *v.* Feldman, 256 U. S. 170, 199 [1921].

[5] Corrigan *v.* Buckley, 271 U. S. 323, 330 [1926].

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AMENDMENT 14

RIGHTS OF CITIZENS

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AMENDMENT 14

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.

Amdt. 14. Sec. 1. Citizenship; due process; equal protection.

Citizenship.

General Purpose of Provision.

This first provision of the amendment put at rest two questions upon which there had been differences of opinion: (1) The definition of citizenship, and (2) the distinction between citizenship of the United States and of a State. No definition of citizenship "was previously found in the Constitution, nor had any attempt been made to define it by act of Congress.† * * * It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the States composing the Union. * * * Whether this proposition was sound or not had never been judicially decided. But it had been held by this Court, in the celebrated Dred Scott case, only a few years before the outbreak of the Civil War, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision * * * had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the Negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution. To remove this difficulty primarily and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship

† But compare the Civil Rights Act of April 9, 1866 (14 Stat. 27, ch. 31), enacted 2 years prior to the 14th Amendment: "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States * * *."

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of the United States, and also citizenship of a State the first clause of the first section was framed. * * * That its main purpose was to establish the citizenship of the Negro can admit of no doubt." [1] But while the main purpose was doubtless "to establish the citizenship of free Negroes, which had been denied in the opinion delivered by Chief Justice Taney in Dred Scott *v.* Sandford, * * * the opening words 'All persons born' are general, not to say universal, restricted only by place and jurisdiction, and not by color or race * * *." [2]

[1] Slaughter House Cases, 16 Wall. 36, 72–73 [1873]. *See also* Strauder *v.* West Virginia, 100 U. S. 303, 306 [1880]; Elk *v.* Wilkins, 112 U. S. 94, 101 [1884]; Ex parte Virginia, 100 U. S. 339, 345 [1880]; Neal *v.* Delaware, 103 U. S. 370, 386 [1881].

[2] United States *v.* Wong Kim Ark, 169 U. S. 649, 676 [1898].

Definition of Citizenship.

The word "citizen" is here used in a political sense to designate one who has the rights and privileges of a citizen of a State or of the United States.[1]

[1] Baldwin *v.* Franks, 120 U. S. 678, 690 [1887].

"* * * the opening sentence * * * is throughout affirmative and declaratory, intended to allay doubts and to settle controversies which had arisen, and not to impose any new restrictions upon citizenship.[1] * * * [This provision] contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution." [2]

[1] *Cf.* Minor *v.* Happersett, 21 Wall. 162, 165 [1875], where it was shown that women had always been considered citizens the same as men, irrespective of the 14th Amendment.

[2] United States *v.* Wong Kim Ark, 169 U. S. 649, 687–688, 702 [1898], holding that a person born in the United States of Chinese subjects, permanently residing in the United States and not in any official capacity, becomes a citizen by birth.

The phrase "subject to the 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 real object of these qualifying words "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 * * * from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship

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by birth within the country." [2] The phrase relates to time of birth, and one not owing allegiance at birth cannot become a citizen save by subsequent naturalization, individually or collectively. The words do not mean merely geographical location, but "completely subject to the political jurisdiction."[3]

[1] Slaughter House Cases, 16 Wall. 36, 73 [1873].

[2] United States v. Wong Kim Ark, 169 U. S. 649, 682 [1898].

[3] Elk v. Wilkins, 112 U. S. 94, 102 [1884], holding that an Indian born within the United States in a recognized tribe, although he surrender his tribal relations, if that surrender is not accepted by the United States, does not become a citizen of the United States by virtue of the first sentence of the 14th Amendment.

The mere acquisition of citizenship by an Indian, through operation of the Allotment Act of 1887 (24 Stat. 388), did not *ipso facto* dissolve the tribal relationship and render the Indian completely *sui juris*. While patent to an allotment was held in trust by the United States, the Indian remained under national guardianship and the United States could legislate with respect to him under the grant of article I, section 8.[1]

[1] United States v. Nice, 241 U. S. 591 [1916], overruling Re Heff, 197 U. S. 488 [1905].

Citizenship of the United States and of a State.

The distinction between citizenship of the United States and citizenship of a State is here 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." [1]

[1] Slaughter House Cases, 16 Wall. 36, 74 [1873].

While the amendment did not create a national citizenship it has the effect of making that citizenship "paramount and dominant" instead of "derivative and dependent" upon State citizenship.[1]

[1] Colgate v. Harvey, 296 U. S. 404, 427 [1935], citing Arver v. United States (Selective Draft Law Cases), 245 U. S. 366, 377, 388–389 [1918].

The amendment did not change the presumption with respect to the jurisdiction of the circuit courts—viz, that a cause was without its jurisdiction unless the contrary affirmatively appeared. The

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Court therefore declined to modify that rule and admit that the mere allegation of residence in a State made a *prima facie* case of citizenship within that State giving the diversity of citizenship necessary for Federal jurisdiction.[1]

[1] Robertson *v.* Cease, 97 U. S. 646, 649 [1878].

In Bradwell *v.* Illinois[1] the Court recognized the possibility of a temporary residence within a State, with intent to return to another, which would not create citizenship in the former State. And where, upon a motion to dismiss, a circuit court treated the question of jurisdiction as raised, the Supreme Court went beyond the mere averment of residence and concluded from the evidence on the point that plaintiff's residence in a State other than State of original citizenship, "is not shown to be otherwise than temporary, without any fixed purpose to abandon citizenship in Massachusetts."[2]

[1] 16 Wall. 130, 138 [1873].
[2] Steigleder *v.* McQuesten, 198 U. S. 141 [1905].

It was argued in McKenzie *v.* Hare[1] that the Citizenship Act of 1907 (34 Stat. 1228) was invalid in that it purported to divest of citizenship a woman citizen marrying an alien; that the Fourteenth Amendment, while it left with Congress the power to regulate naturalization, conferred no authority on Congress to restrict the effect of birth declared by the Constitution to constitute a complete right of citizenship. The Court held that it might be conceded that a change of citizenship cannot be arbitrarily imposed, and yet the act be upheld as an exercise of sovereign power in the field of international relations.

[1] 239 U. S. 299 [1915].

Privileges and Immunities.*

Prohibition on States and State Agencies.

The prohibitions of this amendment are restrictions upon State action.[1] They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken.[2] Civil rights such as are guaranteed by the Constitution against State aggression cannot be impaired by the wrongful act of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State or not done under State authority, his rights remain

* *See also* p. 528.

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in full force, and presumably may be vindicated by resort to the laws of the State for redress.[3]

[1] Hodges *v.* United States, 203 U. S. 1, 14 [1906], holding that "beyond dispute" the 14th Amendment did not apply to a case of conspiracy by individuals to prevent Negroes from carrying out their contracts.

[2] Ex parte Virginia, 100 U. S. 339, 346 [1880].

[3] Civil Rights Cases, 109 U. S. 3, 17 [1883]. *See also* Ex parte Virginia (Virginia *v.* Rives), 100 U. S. 313, 318 [1880]; Scott *v.* McNeal, 154 U. S. 34, 45 [1894]; Reagan *v.* Farmers' Loan & T. Co., 154 U. S. 362, 390 [1894]; Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226, 234 [1897]; Missouri ex rel. Hill *v.* Dockery, 191 U. S. 165 [1903]; Owensboro Water Works Co. *v.* Owensboro, 200 U. S. 38 [1906]; Raymond *v.* Chicago Union Traction Co., 207 U. S. 20 [1907]; Home Teleph. & Teleg. Co. *v.* Los Angeles, 227 U. S. 278 [1913]; Reinman *v.* Little Rock, 237 U. S. 171 [1915].

Purpose of the Clause.

The plain object of this and the following clauses of section 1 "was to place the colored race, in respect of civil rights, upon a level with whites";[1] but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.[2]

[1] Ex parte Virginia (Virginia *v.* Rives), 100 U. S. 313, 318 [1880]; Ex parte Virginia, 100 U. S. 339, 345 [1880]; Nixon *v.* Herndon, 273 U. S. 536 [1927].

[2] Plessy *v.* Ferguson, 163 U. S. 537, 544 [1896].

One purpose of this clause was "to bridge the gap left by [art. IV] so as also to safeguard citizens of the United States against any legislation of their own States having the effect of denying equality of treatment in respect of the exercise of their privileges of national citizenship in other States." [1]

[1] Colgate *v.* Harvey, 296 U. S. 404, 431 [1935].

Privileges, Rights, and Liberties.

A right entitled to protection as a "liberty" under the due process clause may at the same time constitute a privilege protected under the immunities clause.[1] Thus, in Hamilton *v.* University of California,[2] where separate contentions were made under the two clauses, it was held that the "immunity" claimed [viz, freedom from obligation to take the prescribed military course while attending the State agricultural college] was indistinguishable from the "liberty" of which plaintiff claimed to have been deprived by enforcement of the regents' order prescribing such courses. "If the regents' order is not repugnant to the due process clause, then it does not violate the privileges and immunities clause."

[1] Colgate *v.* Harvey, 296 U. S. 404, 433 [1935]. *See also* Allgeyer *v.* Louisiana, 165 U. S. 578, 589–592 [1897].

[2] 293 U. S. 245, 261 [1934].

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Who Are Within Protection.

"* * * it is well settled [1] that a corporation cannot claim the protection of the clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State." [2]

[1] The similar language of the "privileges and immunities" clause of art. IV, sec. 2: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" was early held not to apply to corporations in Paul *v.* Virginia, 8 Wall. 168 [1869]; and that decision was stated as the basis for the assertion that "a corporation is not a citizen within the meaning of the provision [the privileges and immunities clause of the 14th Amendment], and hence has not 'privileges and immunities' secured to 'citizens' against State legislation" (Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 561 [1899]). So, in Grosjean *v.* American Press Co., 297 U. S. 233, 244 [1936], it was stated, "a corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause. Paul *v.* Virginia, 8 Wall. 168 [1870]." For other instances of decisions holding corporations to be citizens or persons, *see* pp. 487, 528, 772, 952.

[2] Selover, B. & Co. *v.* Walsh, 226 U. S. 112, 126 [1912], citing Western Turf Asso. *v.* Greenberg, 204 U. S. 359 [1907]. *See also* Berea College *v.* Kentucky, 211 U. S. 45 [1908]; Liberty Warehouse Co. *v.* Burley Tobacco Growers Co-op. Marketing Asso., 276 U. S. 71, 89 [1928].

While there remains some latitude as to the extent of State power under article IV [i. e., in the protection it will afford to its own citizens], this amendment prohibits any abridgment of privileges or immunities belonging to citizens of the United States as such, regardless of whether they may at the same time be citizens of the particular State.[1] And where a challenged Federal statute enforces without discrimination the rule of the State law as interpreted by the State courts, with respect to convict-made goods, a contention under this clause was rejected as without substance.[2]

[1] Colgate *v.* Harvey, 296 U. S. 404, 428 [1935], holding the right to do business or make loans in any State other than State of residence, is attributable to national citizenship.

[2] Whitfield *v.* Ohio, 297 U. S. 431, 437 [1936].

What Privileges Are Protected.

"The 'privileges and immunities' protected are only those that belong to citizens of the United States as distinguished from citizens of the States—those that arise from the Constitution and laws of the United States as contrasted with those that spring from other sources." [1]

[1] Hamilton *v.* University of California, 293 U. S. 245, 261 [1934], holding that the 14th Amendment does not confer on a conscientious objector the right to attend State university without taking the prescribed military training course. *See also* Slaughter House Cases, 16 Wall. 36, 74 [1873]; Ex parte Kemmler, 136 U. S. 436, 448 [1890]; Duncan *v.* Missouri, 152 U. S. 377, 382 [1894]; Twining *v.* New Jersey, 211 U. S. 78, 97 [1908]; Rosenthal *v.* New York, 226 U. S. 260, 266 [1912]; Maxwell *v.* Bugbee, 250 U. S. 525, 538 [1919]; Ownbey *v.* Morgan, 256 U. S. 94 [1921]; Prudential Ins. Co. *v.* Cheek, 259 U. S. 530, 539 [1922].

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The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had.[1]

[1] Minor *v.* Happersett, 21 Wall. 162, 171 [1875], holding the right of suffrage not one added by the amendment; and the question of the right of a woman to vote was governed by the State constitution at the time of the amendment. *See also* United States *v.* Cruikshank, 92 U. S. 542, 554 [1876].

The amendment does not define the specific privileges and immunities of citizens of the United States; and "no attempt has been made by the courts comprehensively to define or enumerate the privileges and immunities which the Fourteenth Amendment thus protects." [1] However, in the Slaughter House Cases [2] the Court suggested "some which owe their existence to the Federal Government, its National character, its Constitution or its laws," as follows: Right of access to the seat of Government, and to the seaports, subtreasuries, land offices, and courts of justice in the several States; right to demand protection of the Federal Government on the high seas or abroad; right of assembly and privilege of writ of habeas corpus (specifically guaranteed by the Constitution); right to use the navigable waters of the United States; rights secured by treaty.

[1] Colgate *v.* Harvey, 296 U. S. 404, 429 [1935].
[2] 16 Wall. 36, 79 [1873].

In 1823 Justice Washington in Corfield *v.* Coryell [1] gave a partial enumeration of the fundamental privileges and immunities of the citizens of all free governments, and hence of the several States of the Union. He listed: "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 prescribe for the good of the whole." This definition was adopted in substance in Paul *v.* Virginia,[2] and Ward *v.* Maryland,[3] and "the argument is not labored which gives the same meaning to it [the expression 'privileges and immunities'] when used in the Fourteenth Amendment." [4]

[1] 4 Wash. (U. S.) 371 [1823].
[2] 8 Wall. 168, 180 [1869].
[3] 12 Wall. 418, 430 [1871].
[4] Maxwell *v.* Dow, 176 U. S. 581, 591, 592 [1900].

In 1908, the Court listed "among the rights and privileges of national citizenship recognized by this Court": [1] The right to pass freely from State to State; [2] the right to petition Congress for a redress of grievances; [3] the right to vote for national officers; [4] the right to enter public lands; [5] the right to be protected against violence while

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in the lawful custody of a United States marshal;[6] and the right to inform the United States authorities of violations of its laws.[7]

[1] Twining v. New Jersey, 211 U. S. 78, 97 [1908].
[2] Crandall v. Nevada, 6 Wall. 35 [1868].
[3] United States v. Cruikshank, 92 U. S. 542 [1876].
[4] Ex parte Yarbrough, 110 U. S. 651 [1884]; Wiley v. Sinkler, 179 U. S. 58 [1900].
[5] United States v. Waddell, 112 U. S. 76 [1884].
[6] Logan v. United States, 144 U. S. 263 [1892].
[7] Re Quarles, 158 U. S. 532 [1895].

The following privileges have specifically been held to belong to United States citizenship and to lie within the protection of the amendment against restrictive State legislation:

(1) The right to pass freely from one State to another.[1]

(2) The right to engage in business, to transact any lawful business, or to make a lawful loan of money in any State other than that in which the citizen resides.[2]

[1] Williams v. Fears, 179 U. S. 270, 274 [1900], upholding a law taxing the business of hiring persons to labor outside the State. Freedom of egress was affected only incidentally and remotely. But compare, Mahon v. Justice, 127 U. S. 700, 707 [1888], where it was "not conceded" by the Court that a fugitive has a "right of asylum" in another State. The case of Crandall v. Nevada, 6 Wall. 35 [1868], has been cited to the point that "the right to pass freely from State to State" is "among the rights and privileges of national citizenship" (Twining v. New Jersey, 211 U. S. 78, 97 [1908]), but as was pointed out in United States v. Wheeler, 254 U. S. 281, 299 [1920], the statute involved in that case was held to directly burden the performance by the United States of its governmental functions. It is also to be noted that the Crandall case was decided in 1868 before adoption of the 14th Amendment.
[2] Colgate v. Harvey, 296 U. S. 404, 430 [1935].

Privileges not Within Protection of the Amendment.

On the other hand, State action has been upheld against the challenge that it abridged the immunities or privileges of citizens of the United States in violation of this clause, as follows:

(1) Statute limiting hours of labor in mines.[1]

(2) Statute requiring employment of only licensed mine managers and examiners, and imposing liability on the mine owner for failure to furnish a reasonably safe place for workmen.[2]

(3) Statute restricting employment under public works of the State to citizens of the United States, with a preference to citizens of the State.[3]

(4) Statute making railroads liable to employees for injuries caused by negligence of fellow servants, and abolishing the defense of contributory negligence.[4]

(5) Statute prohibiting a stipulation against liability for negligence in delivery of interstate telegraph messages.[5]

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(6) Refusal of State court to license a woman to practice law.[6]

(7) Municipal ordinance restricting public addresses "in or upon any of the public grounds, except upon permit from the mayor." [7]

(8) Succession tax law imposing tax upon transfer before the funds come within the State.[8]

(9) Law taxing in the hands of a resident citizen a debt owing from a resident of another State and secured by mortgage of land in the debtors' State.[9]

(10) Statutes regulating the manufacture and sale of intoxicating liquors,[10] imitation butter, etc.,[11] and sales-in-bulk (requiring notice to creditors of such transfers).[12]

(11) Statute regulating the method of capital punishment.[13]

(12) Statute restricting the franchise to male citizens [14] or requiring registration a specified time before voting.[15] But a Texas statute prohibiting participation by Negroes in State primary elections was held invalid as a denial of equal protection.[16]

(13) Statute restricting dower, in case wife at time of husband's death is a nonresident, to lands of which he died seised.[17]

(14) Statute restricting right to jury trial in suits at common law.[18]

(15) Statute restricting drilling or parading in any city by any body of men without license of the Governor. "The right voluntarily to associate together as a military company or organization, or to drill * * * without, and independent of, an act of Congress or law of the State authorizing the same, is not an attribute of national citizenship." [19]

(16) Constitutional provision for prosecution upon information, and for a jury (except in capital cases) of eight persons.[20] Upon an extended review of the cases, the Court held that "the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government"; and specifically, that the right to be tried for an offense only upon indictment, and by a jury of 12, rests with the State governments and is not protected by the Fourteenth Amendment. "Those are not distinctly privileges or immunities [of national citizenship] where everyone has the same as against the Federal Government, whether citizen or not."

(17) Statute penalizing the becoming or remaining a member of any oath-bound association (other than benevolent orders, etc.) with knowledge that the association has failed to file its constitution and membership lists. The privilege of remaining a member of such an association, "if it be a privilege arising out of citizenship at all", is an incident of State rather than United States citizenship.[21]

(18) Statute allowing a State to appeal in criminal cases for errors of law and to retry the accused.[22]

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(19) Statute making the payment of poll taxes a prerequisite to the right to vote.[23]

[1] Holden *v.* Hardy, 169 U. S. 366, 380 [1898].
[2] Wilmington Star Min. Co. *v.* Fulton, 205 U. S. 60 [1907].
[3] Heim *v.* McCall, 239 U. S. 175 [1915]; Crane *v.* New York, 239 U. S. 195 [1915].
[4] Missouri P. R. Co. *v.* Castle, 224 U. S. 541 [1912].
[5] Western U. Teleg. Co. *v.* Commercial Milling Co., 218 U. S. 406 [1910].
[6] Bradwell *v.* Illinois, 16 Wall. 130, 139 [1873]; Re Lockwood, 154 U. S. 116 [1894].
[7] Davis *v.* Massachusetts, 167 U. S. 43, 44 [1897].
[8] Blackstone *v.* Miller, 188 U. S. 189 [1903]; Orr *v.* Gilman, 183 U. S 278, 287 [1902].
[9] Kirtland *v.* Hotchkiss, 100 U. S. 491, 498 [1879].
[10] Bartemeyer *v.* Iowa, 18 Wall. 129 [1874]; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25 [1878]; Foster *v.* Kansas ex rel. Johnston, 112 U. S. 201 [1884]; Mugler *v.* Kansas, 123 U. S. 623 [1887], followed in Kidd *v.* Pearson, 128 U. S. 1 [1888], and Rippey *v.* Texas, 193 U. S. 504 [1904]; Crowley *v.* Christensen, 137 U. S. 86, 91 [1890], cited in Cronin *v.* Adams, 192 U. S. 108, 114 [1904]; Giozza *v.* Tiernan, 148 U. S. 657 [1893]; Gray *v.* Connecticut, 159 U. S. 74 [1895].
[11] Powell *v.* Pennsylvania, 127 U. S. 678 [1888].
[12] Kidd, D. & P. Co. *v.* Musselman Grocer Co., 217 U. S. 461 [1910], citing Lemieux *v.* Young, 211 U. S. 489 [1909].
[13] Ex parte Kemmler, 136 U. S. 436 [1890].
[14] Minor *v.* Happersett, 21 Wall. 162 [1875].
[15] Pope *v.* Williams, 193 U. S. 621 [1904].
[16] Nixon *v.* Herndon, 273 U. S. 536 [1927].
[17] Ferry *v.* Spokane, P. & S. R. Co., 258 U. S. 314 [1922]
[18] Walker *v.* Sauvinet, 92 U. S. 90 [1876].
[19] Presser *v.* Illinois, 116 U. S. 252, 267 [1886].
[20] Maxwell *v.* Dow, 176 U. S. 581, 596, 597 [1900]. *See also* Hurtado *v.* California, 110 U. S. 516 [1884].
[21] New York ex rel. Bryant *v.* Zimmerman, 278 U. S. 63, 71 [1928].
[22] Palko *v.* Connecticut, 302 U. S. 319 [1937].
[23] Breedlove *v.* Suttles, 302 U. S. 277 [1937].

Due Process of Law.

In General.

ORIGIN AND MEANING.

"While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the National Government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States."[1]

[1] Munn *v.* Illinois, 94 U. S. 113, 123–124 [1877].

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"In England the requirement of due process of law, in cases where life, liberty, and property were affected, was originally designed to secure the subject against the arbitrary action of the Crown, and to place him under the protection of the law. The words were held to be the equivalent of 'law of the land.' And a similar purpose must be ascribed to them when applied to a legislative body in this country; that is, that they are intended, in addition to other guaranties of private rights, to give increased security against the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property." [1]

[1] Missouri P. R. Co. *v.* Humes, 115 U. S. 512, 519 [1885]. *See also* Hurtado *v.* California, 110 U. S. 535 [1884]; Walker *v.* Sauvinet, 92 U. S. 90 [1875].

The words due process of law refer to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.[1]

[1] Ex parte Kemmler, 136 U. S. 436, 448–449 [1890].

"The due process clause does not take up the laws of the several States and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the State courts upon questions of State law." [1] It is for the State court to define rights in land located within the State, and the Fourteenth Amendment, in the absence of an attempt to forestall review of the constitutional question, affords no protection to supposed rights of property which the State courts determine to be nonexistent.[2]

[1] Enterprise Irrig. Dist. *v.* Farmers Mut. Canal Co., 243 U. S. 157, 166 [1917], citing Sayward *v.* Denny, 158 U. S. 180, 186 [1895]; Central Land Co. *v.* Laidley, 159 U. S. 103, 112 [1895]; Del Castillo *v.* McConnico, 168 U. S. 674, 683–684 [1898]. *See also* Patterson *v.* Colorado ex rel. Attorney General, 205 U. S. 454 [1907].

[2] Fox River Paper Co. *v.* Railroad Commission, 274 U. S. 651, 657 [1927].

"But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." [1]

[1] Davidson *v.* New Orleans, 96 U. S. 97, 104 [1878].

"If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice,

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and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law." [1]

[1] Missouri P. R. Co. *v.* Humes, 115 U. S. 512, 520 [1885].

"* * * in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction." [1]

[1] Sentell *v.* New Orleans & C. R. Co., 166 U. S. 698, 705 [1897].

DUE PROCESS IN THE FIFTH AMENDMENT COMPARED.*

"The Fourteenth Amendment, it has been held, legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary State legislation, affecting life, liberty, and property, as is offered by the Fifth Amendment against similar legislation by Congress * * *." [1]

[1] Hibben *v.* Smith, 191 U. S. 310, 325 [1903]. *See also* French *v.* Barber Asphalt Paving Co., 181 U. S. 324, 329 [1901].

"While we need not affirm that in no instance could a distinction be taken, ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a State law in like terms was void under the Fourteenth." [1]

[1] Carroll *v.* Greenwich Ins. Co., 199 U. S. 401, 410 [1905]. *See also* French *v.* Barber Asphalt Paving Co., 181 U. S. 324, 328 [1901].

"PERSON" DEFINED.†

The meaning of the word "person" as used in this amendment is not to be restricted by the definition of the word "citizens" in the first clause. Person is to be taken in its broadest significance, and includes all individuals within the United States regardless of race, color, or nationality.[1]

[1] Yick Wo *v.* Hopkins, 118 U. S. 356 [1886].

Alien inhabitants of a State, as well as all other persons within its jurisdiction, may invoke the protection of the due process clause.[1]

[1] Terrace *v.* Thompson, 263 U. S. 197, 216 [1923]. *See also* Truax *v.* Raich, 239 U. S. 33, 39 [1915]; Home Ins. Co. *v.* Dick, 281 U. S. 397, 411 [1930].

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* *See also* p. 632.

† For other instances of decisions holding corporations to be citizens or persons, *see* pp. 487, 528, 766, 952.

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Corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law.[1] Although the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law has been held to be the liberty of natural, not artificial persons,[2] yet the Supreme Court has invalidated a Louisiana law attacked by a corporation as depriving it of liberty of press guaranteed by the Fourteenth Amendment.[3]

[1] Covington & L. Turnp. Road Co. *v.* Sandford, 164 U. S. 578 [1896]; Smyth *v.* Ames, 169 U. S. 466, 522, 526 [1898]; Kentucky Finance Corp. *v.* Paramount Auto Exch. Corp., 262 U. S. 544, 550 [1923]; Pierce *v.* Society of the Sisters, 268 U. S. 510, 535 [1925]; Power Mfg. Co. *v.* Saunders, 274 U. S. 490, 496–497 [1927]; Frost *v.* Railroad Commission, 271 U. S. 583, 594 [1926]; Liggett (Louis K.) Co. *v.* Baldridge, 278 U. S. 105 [1928]; Grosjean *v.* American Press Co., 297 U. S. 233, 244 [1936].

[2] Northwestern Nat. L. Ins. Co. *v.* Riggs, 203 U. S. 243 [1906]; Western Turf Asso. *v.* Greenberg, 204 U. S. 359 [1907]. *See also* Pierce *v.* Society of the Sisters, 268 U. S. 510, 535 [1925].

[3] Grosjean *v.* American Press Co., 297 U. S. 233, 244 [1936].

A State law classifying "Massachusetts trusts" as corporations and requiring those organized in other States to obtain a certificate of authority to do local business does not deprive them of property without due process of law, merely because such trusts are thereby prevented from claiming the privileges and immunities guaranteed to individuals (but not to corporations) by the Constitution.[1]

[1] Hemphill *v.* Orloff, 277 U. S. 537 [1928].

A foreign corporation permitted to do business in a State may not be subjected to State statutes in conflict with the Federal Constitution.[1] But the action of a State requiring a foreign corporation to operate its local, private oil pipe line as a common carrier does not deprive it of property without due process of law when done pursuant to constitutional and statutory provisions in force when the corporation entered the State and by it accepted in applying for and obtaining the privilege of doing local business.[2]

[1] Liggett (Louis K.) Co. *v.* Baldridge, 278 U. S. 105 [1928].

[2] Pierce Oil Corp. *v.* Phoenix Ref. Co., 259 U. S. 125 [1922].

The protection of the Fourteenth Amendment against State action is only for the benefit of those who are injured through the invasions of personal or property rights,[1] and does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law.[2]

[1] Del Castillo *v.* McConnico, 168 U. S. 674, 680 [1898]; Straus *v.* Foxworth, 231 U. S. 162 [1914]; Tyler *v.* Judges of the Court of Registration, 179 U. S. 405, 410 [1900].

[2] Columbus & G. R. Co. *v.* Miller, 283 U. S. 96 [1931]. *See also* Pennie *v.* Reis, 132 U. S. 464 [1889]; Taylor *v.* Beckham (No. 1), 178 U. S. 548 [1900].

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LIMITATION ON STATE AGENCIES.

"But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State, 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with power to annul or evade it.' Ex parte Virginia, 100 U. S. 339, 346–347 [1880]; Neal *v.* Delaware, 103 U. S. 370 [1881]; Yick Wo *v.* Hopkins, 118 U. S. 356 [1886]; Gibson *v.* Mississippi, 162 U. S. 565 [1896]. These principles were enforced in the recent case of Scott *v.* McNeal, 154 U. S. 34 [1894], in which it was held that the prohibitions of the Fourteenth Amendment extended to 'all acts of the State, whether through its legislative, its executive, or its judicial authorities'; and, consequently, it was held that a judgment of the highest court of a State, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the Fourteenth Amendment." [1]

[1] Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226, 233–234 [1897]. *See also* Virginia *v.* Rives, 100 U. S. 313 [1880]; North American Cold Storage Co. *v.* Chicago, 211 U. S. 306, 313 [1908]; Home Teleph. & Teleg. Co. *v.* Los Angeles, 227 U. S. 278 [1913]; Georgia Power Co. *v.* Decatur, 281 U. S. 505, 508 [1930].

An advisory statement issued by a State official, not controlling official conduct, is not of such a legislative character as can impair rights under the due process clause.[1]

[1] Standard Computing Scale Co. *v.* Farrell, 249 U. S. 571 [1919].

"And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute State action within the purview of the Fourteenth Amendment. That amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers.' "[1]

[1] Mooney *v.* Holohan, 294 U. S. 103, 112–113 [1935], citing Carter *v.* Texas, 177 U. S. 442, 447 [1900]; Rogers *v.* Alabama, 192 U. S. 226, 231 [1904]; Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226, 233, 234 [1897]

"And the prohibitions of the Fourteenth Amendment 'have reference to State action exclusively, and not to any action of private individuals.' Virginia *v.* Rives, 100 U. S. 313, 318 [1880]; United States *v.* Harris, 106 U. S. 629, 639 [1883]. 'It is State action of a

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particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment.' Civil Rights Cases, 109 U. S. 3, 11 [1883]. It is obvious that none of these amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void." [1]

[1] Corrigan v. Buckley, 271 U. S. 323, 330 [1926].

CONTROL OF STATE OVER LOCAL UNITS.

The Fourteenth Amendment does not deprive a State of the power to determine what duties may be performed by local officers, nor whether they shall be appointed or elected by the people.[1] The power of the State, unrestrained by the Fourteenth Amendment, over the rights and property of cities held and used for governmental purposes cannot be questioned.[2] A statute requiring counties to reimburse cities of the first class but not other classes for rebates allowed for prompt payment of taxes is not unconstitutional under the due process clause.[3]

[1] Soliah v. Heskin, 222 U. S. 522 [1912].
[2] Trenton v. New Jersey, 262 U. S. 182 [1923].
[3] Steward v. Kansas City, 239 U. S. 14 [1915].

Statutes providing for the taxation for city purposes of farm lands brought within the city limits by an extension of boundaries,[1] the alteration of school district boundaries,[2] and the union of contiguous municipalities with consequent changes in the tax burden,[3] do not deprive taxpayers of their property without due process of law.

[1] Kelly v. Pittsburgh, 104 U. S. 78 [1881].
[2] Attorney General ex rel. Kies v. Lowrey, 199 U. S. 233 [1905].
[3] Hunter v. Pittsburgh, 207 U. S. 161 [1907].

A statute indemnifying owners of property for damages by mobs and riots is not unconstitutional as depriving cities of their property without due process of law because liability is imposed irrespective of the power of the city to have prevented the violence.[1]

[1] Chicago v. Sturges, 222 U. S. 313 [1911].

A person holding a judgment against a municipality for damages resulting from a riot is not deprived of his property without due process because of a law so limiting the taxing power as to prevent a sufficient amount of funds to pay it; there is no deprivation of property without due process so long as the judgment continues an existing liability.[1]

[1] Louisiana ex rel. Folsom Bros. v. New Orleans, 109 U. S. 289 [1883].

OPERATION AS TO LAW PREVIOUSLY IN FORCE.

Proceedings under a State statute enacted before the adoption of the Fourteenth Amendment which, if taken before its adoption, would

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not have violated the Constitution, may, when taken after its adoption, violate it.[1]

[1] Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254 [1891].

Liberty of Contract in General.

The right to make contracts is subject in the field of State action to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction.[1]

[1] Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 568 [1911]. *See also* Schmidinger v. Chicago, 226 U. S. 578 [1913]; Miller v. Wilson, 236 U. S. 373, 380 [1915]; Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398 [1934]; Hartford Acci. & Indem. Co. v. Nelson (N. O.) Mfg. Co., 291 U. S. 352, 360 [1934]; West Coast Hotel Co. v. Parrish, 300 U. S. 379 [1937].

While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances.[1]

[1] Wolff (Charles) Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 534 [1923].

As to contracts to be performed outside the State, the Supreme Court has said that: "The due process clause denies to a State any power to restrict or control the obligation of contracts executed and to be performed without the State, as an attempt to exercise power over a subject matter not within its constitutional jurisdiction. * * * [cases cited [1]]. Similarly, a State may not penalize or tax a contract entered into and to be performed outside the State, although one of the contracting parties is within the State * * * [cases cited [2]]. But where the contract is entered into within the State, even though it is to be performed elsewhere, its terms, its obligation, and its sanctions are subject, in some measure, to the legislative control of the State. The fact that the contract is to be performed elsewhere does not of itself put these incidents beyond reach of the power which a State may constitutionally exercise * * * [cases cited [3]]." [4]

[1] New York L. Ins. Co. v. Head, 234 U. S. 149, 162–164 [1914]; New York L. Ins. Co. v. Dodge, 246 U. S. 357, 377 [1918]; Home Ins. Co. v. Dick, 281 U. S. 397, 407, 408 [1930]. *Cf.* National Union F. Ins. Co. v. Wanberg, 260 U. S. 71, 75 [1922].

[2] Allgeyer v. Louisiana, 165 U. S. 578 [1897]; St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 358 [1922]; Compania General de Tabacos v. Collector of Internal Revenue, 275 U. S. 87 [1927].

[3] Selover, B. & Co. v. Walsh, 226 U. S. 112, 123 [1912]; Mutual L. Ins. Co. v. Liebing, 259 U. S. 209, 214 [1922]; Manhattan L. Ins. Co. v. Cohen, 234 U. S. 123, 136 [1914]. *Cf.* Aetna L. Ins. Co. v. Dunken, 266 U. S. 389, 397–400 [1924].

[4] Alaska Packers' Asso. v. Industrial Acci. Commission, 294 U. S. 532, 540–541 [1935].

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Obligations of a contract lawfully made in another jurisdiction may not be enlarged by a State to accord with all its own statutory policies upon the ground that one of the parties is its own citizen. And a legislative policy which attempts to draw to the State of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment.[1]

[1] Hartford Acci. & Indem. Co. *v.* Delta & Pine Land Co., 292 U. S. 143, 144 [1934].

Personal Liberty.

IN GENERAL.

Some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against State action, because a denial of them would be a denial of due process of law. This is so, not because they are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law.[1]

[1] Twining *v.* New Jersey, 211 U. S. 78, 99 [1908]. *See also* Powell *v.* Alabama, 287 U. S. 45 [1932]; Grosjean *v.* American Press Co., 297 U. S. 233 [1936].

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." [1]

[1] Meyer *v.* Nebraska, 262 U. S. 390, 399 [1923], citing Slaughter House Cases, 16 Wall. 36 [1873]; Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 746 [1884]; Yick Wo *v.* Hopkins, 118 U. S. 356 [1886]; Minnesota *v.* Barber, 136 U. S. 313 [1890]; Allgeyer *v.* Louisiana, 165 U. S. 578 [1897]; Lochner *v.* New York, 198 U. S. 45 [1905]; Twining *v.* New Jersey, 211 U. S. 78 [1908]; Chicago, B. & Q. R. Co. *v.* McGuire, 219 U. S. 549 [1911]; Truax *v.* Raich, 239 U. S. 33 [1915]; Adams *v.* Tanner, 244 U. S. 590 [1917]; New York L. Ins. Co. *v.* Dodge, 246 U. S. 357 [1918]; Truax *v.* Corrigan, 257 U. S. 312 [1921]; Adkins *v.* Children's Hospital, 261 U. S. 525 [1923].

SPEECH, PRESS, AND ASSEMBLY.*

But a State may punish (1) publications advocating and encouraging a breach of its criminal laws;[1] (2) utterances teaching

* *See also* under the 1st Amendment, p. 597.

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or advocating that its citizens should not assist the United States in prosecuting or carrying on war;[2] (3) utterances advocating the overthrow of organized Government by violence or unlawful means.[3] A State may also require associations having an oath-bound membership to file sworn copies of their constitutions, oaths of memberships, etc., with lists of their members and officers, and provide that persons who become or remain members, or attend meetings, knowing that such requirement has not been complied with, shall be punished.[4]

[1] Fox v. Washington, 236 U. S. 273 [1915].
[2] Gilbert v. Minnesota, 254 U. S. 325 [1920].
[3] Gitlow v. New York, 268 U. S. 652 [1925]; Whitney v. California, 274 U. S. 357 [1927].
[4] New York ex rel. Bryant v. Zimmerman, 278 U. S. 63 [1928].

"Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment * * * [citing cases [1]]. The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." [2] Thus laws have been held unconstitutional which as interpreted punished (1) solicitation of membership in the Communist party where there was no evidence that the organization advocated any crime, violence, or other unlawful acts or methods as a means of effecting industrial or political changes or revolution [3] or that the defendant circulated or read any literature in his possession advocating combined resistance to Government;[4] (2) publication of newspaper charging neglect of duty or corruption on the part of law-enforcing officers;[5] (3) participation in the conduct of a public meeting, otherwise lawful merely because held under the auspices of an organization which taught or advocated the use of violence, or other unlawful acts or methods to effect industrial or political change or revolution, though no such teaching or advocacy attended the meeting in question.[6] A State license tax imposed on the owners of newspapers for the privilege of selling or charging for the advertising therein, and measured by a percent of the gross receipts from such advertisements, but applicable only to newspapers enjoying a circulation of more than 20,000 copies per week, is also unconstitutional.[7]

[1] Gitlow v. New York, 268 U. S. 652, 666 [1925]; Stromberg v. California, 283 U. S. 359, 368 [1931]; Near v. Minnesota ex rel. Olson, 283 U. S. 697, 707 [1931]; Grosjean v. American Press Co., 297 U. S. 233, 243, 244 [1936]. *See also* Palko v. Connecticut, 302 U. S. 319 [1937].
[2] De Jonge v. Oregon, 299 U. S. 353, 364 [1937].
[3] Fiske v. Kansas, 274 U. S. 380 [1927].
[4] Herndon v. Lowry, 301 U. S. 242 [1937].
[5] Near v. Minnesota ex rel. Olson, 283 U. S. 697 [1931].
[6] De Jonge v. Oregon, 299 U. S. 353 [1937].
[7] Grosjean v. American Press Co., 297 U. S. 233 [1936].

The Fourteenth Amendment does not have the effect of creating a particular and personal right in citizens to use public property in

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defiance of State laws, and so an ordinance requiring a permit for making an address on any public grounds is not unconstitutional.[1]

[1] Davis v. Massachusetts, 167 U. S. 43 [1897].

A statute prohibiting Greek-letter fraternities and other societies in the educational institutions of the State is not violative of the due process clause.[1]

[1] Waugh v. University of Mississippi, 237 U. S. 589 [1915].

EDUCATION.

A State law forbidding the teaching in any private, denominational, parochial, or public school, of any modern language, other than English, to any child who has not successfully passed the eighth grade [1] and a State law requiring compulsory public-school education of children between the ages of 8 and 16,[2] invade the liberty guaranteed by the Fourteenth Amendment. However the liberty guaranteed by the Fourteenth Amendment does not confer any right upon citizens to attend land grant State universities free from the obligation of compulsory military training when prescribed as part of the curriculum.[3]

[1] Meyers v. Nebraska, 262 U. S. 390 [1923]; Bartels v. Iowa, 262 U. S. 404 [1923].
[2] Pierce v. Society of the Sisters, 268 U. S. 510 [1925].
[3] Hamilton v. University of California, 293 U. S. 245 [1934].

RED FLAG LAWS.

A statute condemning display of a red flag as a sign, symbol, or emblem of opposition to organized government, which, as construed by the State court to include peaceful and orderly opposition to government by legal means, is unconstitutional.[1]

[1] Stromberg v. California, 283 U. S. 359 [1931].

COMPULSORY VACCINATION.

It is within the police power of a State to enact a compulsory vaccination law, and it is for the legislature and not the courts, to determine in the first instance whether vaccination is or is not the best mode for the prevention of smallpox and the protection of public health.[1]

[1] Jacobson v. Massachusetts, 197 U. S. 11 [1905]; Zucht v. King, 260 U. S. 174 [1922].

SEXUAL STERILIZATION.

A statute providing for sexual sterilization of inmates of institutions supported by the State who shall be found to be afflicted with an hereditary form of insanity or imbecility is within power of State under the Fourteenth Amendment.[1]

[1] Buck v. Bell, 274 U. S. 200 [1927].

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Labor Relations.

IN GENERAL

"Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."[1] But " * * * in dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."[2]

[1] Coppage *v.* Kansas, 236 U. S. 1, 14 [1915].

[2] Chicago, B. & Q. R. Co. *v.* McGuire, 219 U. S. 549, 570 [1911]. *See also* West Coast Hotel Co. *v.* Parrish, 300 U. S. 379 [1937].

The right to conduct business in the form of a corporation, and as such to enter into relations of employment with individuals, is not a natural or fundamental right. It is a creature of the law; and a State in authorizing its own corporations or those of other States to carry on business and employ men within its borders may qualify the privilege by imposing such conditions and duties as reasonably may be deemed expedient in order that the corporation's activities may not operate to the detriment of the rights of others with whom it may come in contact.[1]

[1] Prudential Ins. Co. *v.* Cheek, 259 U. S. 530 [1922].

LABOR RELATIONS—LAWS REGULATING THE EMPLOYMENT AND DISCHARGE OF WORKMEN.

A statute making it a misdemeanor for an employer or his agent to prescribe, as a condition upon which one may secure employment under or remain in the service of such employer, that the employee shall enter into an agreement not to become or remain a member of any labor organization while so employed, is repugnant to the due process clause.[1]

[1] Coppage *v.* Kansas, 236 U. S. 1 [1915].

A statute requiring every corporation to furnish, upon request, to any employee, when discharged or leaving its service, a letter signed by the superintendent or manager, setting forth the nature and duration of his service to the corporation and stating truly the cause of his leaving, is not an arbitrary interference with freedom of contract amounting to a deprivation of liberty or property without due process of law.[1] Provisions that such letters shall be on plain paper selected

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by the employee, signed in ink and sealed, and free from superfluous figures, words, etc., are likewise valid.[2]

[1] Prudential Ins. Co. v. Cheek, 259 U. S. 530 [1922]; Chicago, R. I. & P. R. Co. v. Perry, 259 U. S. 548 [1922].
[2] Chicago, R. I. & P. R. Co. v. Perry, 259 U. S. 548 [1922].

A decision of a State court holding that an agreement of several insurance companies having a monopoly of a line of insurance business in a city, that none of them would employ within 2 years any man who had been discharged from or left the service of any of the others, was unlawful, and sustaining an action against one of the companies by a former employee for damages resulting from the agreement, does not deprive the defendant of property without due process of law in violation of the Fourteenth Amendment.[1]

[1] Prudential Ins. Co. v. Cheek, 259 U. S. 530 [1922].

HOURS OF LABOR FOR WOMEN.

While the limitation of the hours of labor of women may be pushed to an indefensible extreme, the limit of reasonable exertion of the protective authority of the State is not overstepped and liberty of contract unduly abridged by statutes prescribing 8 hours a day or a maximum of 48 hours a week.[1]

[1] Miller v. Wilson, 236 U. S. 373 [1915]; Bosley v. McLaughlin, 236 U. S. 385 [1915]. *See also* Muller v. Oregon, 208 U. S. 412 [1908]; Riley v. Massachusetts, 232 U. S. 671 [1914]; Hawley v. Walker, 232 U. S. 718 [1914].

HOURS OF LABOR FOR MEN.*

An act limiting the hours of labor in mines and smelters to 8 hours a day is not a denial of due process of law.[1] Neither is it unlawful to provide that no person shall work in any mill, etc., more than 10 hours per day (with exceptions) but permitting overtime not exceeding 3 hours a day if paid for at the rate of one and one-half times the regular wage.[2] However, the Supreme Court has held that a statute limiting hours of labor in bakeries to 10 hours a day and 60 hours in 1 week, is not a legitimate exercise of the police power but rather an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to labor.[3]

[1] Holden v. Hardy, 169 U. S. 366 [1898].
[2] Bunting v. Oregon, 243 U. S. 426 [1917].
[3] Lochner v. New York, 198 U. S. 45 [1905]. *See* dissenting opinion of Justice Brandeis in Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 408 (note) [1932], intimating that this case has been qualified by Muller v. Oregon, 208 U. S. 412 [1908] and Bunting v. Oregon, 243 U. S. 426 [1917].

A statute limiting the hours of labor on public works is not invalid.[1]

[1] Atkin v. Kansas, 191 U. S. 207 [1903].

* *See also* pp. 160, 962.

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MINIMUM WAGE LAWS.*

A statute prescribing minimum wages for women and children is not unconstitutional on the theory that it violates due process by impairing the freedom of contract.[1]

[1] West Coast Hotel Co. *v.* Parrish, 300 U. S. 379 [1937], overruling Adkins *v.* Children's Hospital, 261 U. S. 525 [1923] (a 5th Amendment case). *Cf.* Morehead *v.* New York ex rel. Tipaldo, 298 U. S. 587 [1936]. *See also* Stettler *v.* O'Hara, 243 U. S. 629 [1917].

A statute imposing severe cumulative punishments upon contractors with the State who pay their workmen less than the "current rate of per diem wages in the locality where the work is performed" is void for uncertainty.[1]

[1] Connally *v.* General Constr. Co., 269 U. S. 385 [1926].

PAYMENT OF WAGES.

A statute requiring redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employees is not an unconstitutional deprivation of liberty of contract.[1]

[1] Knoxville Iron Co. *v.* Harbison, 183 U. S. 13 [1901]; Dayton Coal & I. Co. *v.* Barton, 183 U. S. 23 [1901]; Keokee Consol. Coke Co. *v.* Taylor, 234 U. S. 224 [1914].

An act requiring that miners paid on the basis of weight of coal mined be paid according to coal in the mine car instead of at a rate per ton for screened lump coal, with limitations on the amount of slate, rock, etc., and other impurities to be fixed by the Industrial Commission is not unconstitutional.[1]

[1] Rail & River Coal Co. *v.* Yaple, 236 U. S. 338 [1915]. *See also* McLean *v.* Arkansas, 211 U. S. 539 [1909].

A statute requiring semimonthly payment of wages of railway employees is valid;[1] so, too, is a statute requiring railroads to pay employees funds due them, without abatement or deduction, on the day of discharge.[2]

[1] Erie R. Co. *v.* Williams, 233 U. S. 685 [1914].
[2] St. Louis, I. M. & S. R. Co. *v.* Paul, 173 U. S. 404 [1899].

LABOR IN MINES.

The regulations of mines is so obviously within the police power that no citation of authorities is necessary to vindicate the general principle, and it is within the power of a State to provide for the appointment of inspectors and payment of their fees by the mine owners.[1] It is an appropriate exercise of the police power to require the employment of only licensed mine managers and mine examiners, and impose upon mines liability for willful failure of the manager

* *See also* p. 160.

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and examiner to furnish a reasonably safe place for workmen.[2] Other regulations for mines such as requiring entries to be of a specified width,[3] boundary pillars between adjoining coal properties as a protection against flood in case of abandonment,[4] and washhouses for employees.[5]

[1] Consolidated Coal Co. v. Illinois, 185 U. S. 203 [1902].
[2] Wilmington Star Min. Co. v. Fulton, 205 U. S. 60 [1907].
[3] Barrett v. Indiana, 229 U. S. 26 [1913].
[4] Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531 [1914].
[5] Booth v. Indiana, 237 U. S. 391 [1915].

CHILD LABOR IN DANGEROUS OCCUPATIONS.

A State is entitled to prohibit the employment of persons under 16 years of age in dangerous occupations; and in order to make the prohibition effective it may compel employers at their peril to ascertain whether their employees are in fact below that age.[1]

[1] Sturges & B. Mfg. Co. v. Beauchamp, 231 U. S. 320 [1914].

LABOR CONTROVERSIES.

A State law regulating injunctions in labor controversies, and granting employees immunity from civil or criminal action for acts resulting in injury to employer's business, violates due process.[1]

[1] Truax v. Corrigan, 257 U. S. 312 [1921].

A statute compelling employers and employees to submit their controversies over wages and hours of labor to State arbitration is unconstitutional as part of a system compelling employers and employees to continue in business on terms not of their own making.[1]

[1] Wolff (Charles) Packing Co. v. Court of Industrial Relations, 262 U. S. 522 [1923], 267 U. S. 552 [1925]; Dorchy v. Kansas, 264 U. S. 286 [1924].

Neither the common law nor the Fourteenth Amendment confers the absolute right to strike, and so a State may punish the officers of a labor union ordering a strike for the purpose of enforcing payment of a stale claim by a former employee of the business alleged to be due and unpaid.[1]

[1] Dorchy v. Kansas, 272 U. S. 306 [1926].

A statute is not unconstitutional so far as construed to authorize peaceful picketing of the place of business of a tile contractor by a union because the owner refused to enter into a contract which would keep him from working personally as a tile layer.[1]

[1] Senn v. Tile Layers Protective Union, 301 U. S. 468 [1937].

WORKMEN'S COMPENSATION.*

The decisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or

* *See also* pp. 159, 162, 182, 235, 257, 964.

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death of an employee arising in the course of the employment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change. And so an act allowing an injured employee an election of remedies, permitting restricted recovery under a "compensation" law although guilty of contributory negligence, and full compensatory damages under the "employers' liability" act if not, does not deprive an employer of property without due process of law.[1] Similarly, where a State allowed employers under a compensation act to pay employees directly, but afterwards took away that right and required payments into a State insurance fund, *held* that the change did not impair property rights of an employer who had elected to pay directly and had procured insurance before the change was made.[2]

[1] Arizona Copper Co. *v.* Hammer (Arizona Employers' Liability Cases), 250 U. S. 400, 419–420 [1919].

[2] Thornton *v.* Duffy, 254 U. S. 361 [1920].

"This court repeatedly has upheld the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee." [1]

[1] New York C. R. Co. *v.* White, 243 U. S. 188, 200 [1917], citing Missouri P. R. Co. *v.* Mackey, 127 U. S. 205, 208 [1888]; Minneapolis & St. L. R. Co. *v.* Herrick, 127 U. S. 210 [1888]; Minnesota Iron Co. *v.* Kline, 199 U. S. 593, 598 [1905]; Tullis *v.* Lake Erie & W. R. Co., 175 U. S. 348 [1899]; Louisville & N. R. Co. *v.* Melton, 218 U. S. 36, 53 [1910]; Chicago, I. & L. R. Co. *v.* Hackett, 228 U. S. 559 [1913]; Wilmington Star Min. Co. *v.* Fulton, 205 U. S. 60, 73 [1907]; Missouri P. R. Co. *v.* Castle 224 U. S. 541, 544 [1912].

A State has power to prohibit contracts limiting liability for injuries made in advance of the injury received, and to provide that the subsequent acceptance of benefits under such contracts shall not constitute satisfaction of the claim for injuries received after the contract; such a statute does not impair the liberty of contract guaranteed by the Fourteenth Amendment.[1]

[1] Chicago, B. & Q. R. Co. *v.* McGuire, 219 U. S. 549 [1911].

A State may provide for protection of employees engaged in hazardous occupations by requiring that dangerous machinery be safeguarded and further provide that in actions brought under such a statute the doctrines of contributory negligence, assumption of risk, and fellow servant rule shall not bar recovery, and that the burden shall be on the employer to show compliance.[1]

[1] Bowersock *v.* Smith, 243 U. S. 29 [1917].

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A State statute providing an exclusive system to govern the liabilities of employers and the rights of employees, and their dependents, in respect of compensation for disabling injuries and death caused by accident in certain hazardous occupations, does not work a deprivation of property without due process of law, in rendering the employer liable irrespective of the doctrines of negligence, contributory negligence, assumption of risk, and negligence of fellow servants nor in depriving the employee, or his dependents, of the higher damages which, in some cases, might be rendered under these doctrines.[1] An elective workmen's compensation act has also been upheld which provided that in an action against employers so rejecting the system, the injury should be presumed to have resulted directly from the employer's negligence, the burden of rebutting the presumption resting upon him.[2]

[1] New York C. R. Co. *v.* White, 243 U. S. 188 [1917]. *See also* Mountain Timber Co. *v.* Washington, 243 U. S. 219 [1917].
[2] Hawkins *v.* Bleakly, 243 U. S. 210 [1917].

In determining what occupations may be brought under the designation of "hazardous", the legislature may carry the idea to the "vanishing point." [1]

[1] Ward & Gow *v.* Krinsky, 259 U. S. 503, 520 [1922].

A State workmen's compensation act is not invalid because it requires payment of benefits to nonresident aliens.[1] Similarly, a statute forbidding contracts exempting employers from liability for injuries outside the State does not deny due process to an employer as applied to a nonresident alien employee hired within the State but injured on the outside.[2]

[1] Madera Sugar Pine Co. *v.* Industrial Acci. Commission, 262 U. S. 499 [1923].
[2] Alaska Packers Asso. *v.* Industrial Acci. Commission, 294 U. S. 532 [1935].

In providing for the compensation of workmen injured in hazardous industries, the State need not base it exclusively on loss of earning power, and the award authorized by statute for injuries resulting in serious facial or head disfigurement, independent of inability to work, is not an arbitrary or oppressive exercise of the police power.[1]

[1] New York C. R. Co. *v.* Bianc, 250 U. S. 596 [1919].

A workmen's compensation act making findings of fact of an industrial commission conclusive if there be any evidence to support them is not violative of the Fourteenth Amendment by depriving an employer of a judicial review of the facts on which an award is made against him, because the act is elective and does not bind an employer who has not voluntarily accepted its provisions.[1]

[1] Booth Fisheries Co. *v.* Industrial Commission, 271 U. S. 208 [1926].

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A workmen's compensation law, requiring employers, upon death by accident of an employee leaving no beneficiaries, to make payments to special funds out of which compensation may be made to employees of other employers, in cases in which they are not otherwise compensated or for their rehabilitation is not unconstitutional.[1]

[1] Sheehan (R. E.) Co. v. Shuler, 265 U. S. 371 [1924]; New York State R. Co. v. Shuler, 265 U. S. 379 [1924].

For wrongful death, a State may subject the wrongdoer to liability to dependents and to indemnity of employer's insurer under a workmen's compensation act.[1]

[1] Staten Island Rapid Transit R. Co. v. Phoenix Indemnity Co., 281 U. S. 98 [1930].

A State statute making a railroad company liable for injury to a railway postal clerk as if he were an employee of the railroad and not as a passenger does not deprive an injured postal clerk of any property right within the meaning of this clause.[1]

[1] Martin v. Pittsburg & L. E. R. Co., 203 U. S. 284 [1906].

A State may restrict the fees chargeable by attorneys at law in cases arising under the State workmen's compensation act without depriving them of property or liberty of contract.[1]

[1] Yeiser v. Dysart, 267 U. S. 540 [1925].

Businesses Affected With Public Interest.

IN GENERAL.

When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good, as long as he maintains the use. He may withdraw his grant by discontinuing the use.[1] "The Court has repeatedly sustained curtailment of enjoyment of private property in the public interest. The owners' rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interest of the community."[2]

[1] Munn v. Illinois, 94 U. S. 113, 135 [1877].

[2] Nebbia v. New York, 291 U. S. 502, 525 [1934], citing Clark v. Nash, 198 U. S. 361 [1905]; Strickley v. Highland Boy Gold Min. Co., 200 U. S. 527 [1906].

"* * * it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some

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or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property."[1]

[1] Munn *v.* Illinois, 94 U. S. 113, 125 [1877].

"* * * a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby, in effect, granted to the public."[1]

[1] Tyson & Bro.-United Theatre Ticket Offices *v.* Banton, 273 U. S. 418, 434 [1927].

"Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers, and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and grist mills. State *v.* Edwards, 86 Me. 102 [1893]; Terminal Taxicab Co. *v.* District of Columbia, 241 U. S. 252, 254 [1916].

"(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some Government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly. Munn *v.* Illinois, 94 U. S. 113 [1877]; Spring Valley Water Works *v.* Schottler, 110 U. S. 347 [1884]; Budd *v.* New York, 117 N. Y. 1, 27 [1892], s. c. 143 U. S. 517 [1892]; Brass *v.* North Dakota ex rel. Stoeser, 153 U. S. 391 [1894]; Noble State Bank *v.* Haskell, 219 U. S. 104 [1911]; German Alliance Ins. Co. *v.* Lewis, 233 U. S. 389 [1914]; Van Dyke *v.* Geary, 244 U. S. 39, 47 [1917]; Block *v.* Hirsh, 256 U. S. 135 [1921]."[1]

[1] Wolff (Charles) Packing Co. *v.* Court of Industrial Relations, 262 U. S. 522, 535–536 [1923].

A declaration by a legislature that a business has become affected by a public interest is not conclusive of the question whether attempted regulation on that ground is justified. And one's property or business

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is not devoted to a public use, or clothed with a public interest, merely by making commodities for, and selling them to, the public.[1]

[1] Wolff (Charles) Packing Co. *v.* Court of Industrial Relations, 262 U. S. 522 [1923].

FIXING OF PRICES AND CHARGES.

It has been generally held that the power to fix prices and charges "exists only where the business or the property involved has become 'affected with a public interest.' "[1] Thus, while laws fixing the charges for service made by grain elevators,[2] stock yards,[3] and tobacco warehouses,[4] have been upheld, all such businesses being held to be affected with a public interest, laws fixing the price at which gasoline may be sold,[5] or at which ticket brokers may resell tickets purchased from theaters,[6] or the charges that employment agencies may make,[7] have been held unconstitutional, no public interest being found.

[1] Tyson & Bro.-United Theatre Ticket Offices *v.* Banton, 273 U. S. 418, 430 [1927].
[2] Munn *v.* Illinois, 94 U. S. 113 [1877]; Budd *v.* New York, 143 U. S. 517, 546 [1892]; Brass *v.* North Dakota ex rel. Stoeser, 153 U. S. 391 [1894].
[3] Cotting *v.* Godard, 183 U. S. 79 [1901].
[4] Townsend *v.* Yeomans, 301 U. S. 441 [1937].
[5] Williams *v.* Standard Oil Co., 278 U. S. 235 [1929].
[6] Tyson & Bro.-United Theatre Ticket Offices *v.* Banton, 273 U. S. 418 [1927].
[7] Ribnik *v.* McBride, 277 U. S. 350 [1928].

The business of fire insurance is affected with a public interest, rates may be prescribed [1] and excessive commissions restricted.[2]

[1] German Alliance Ins. Co. *v.* Lewis, 233 U. S. 389 [1914]; Aetna Ins. Co. *v.* Hyde, 275 U. S. 440 [1928].
[2] O'Gorman & Young *v.* Hartford F. Ins. Co., 282 U. S. 251 [1931].

But in Nebbia *v.* New York [1] it was declared that the decisions denying the power to control prices in businesses found not to be affected with a public interest or clothed with a public use must rest finally upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect; hence, as the court stated "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." There was thus upheld a statute fixing prices to be charged by the milk industry which was apparently considered not affected with a public interest.

[1] Nebbia *v.* New York, 291 U. S. 502, 539 [1934]. *See also* Hegeman Farms Corp. *v.* Baldwin, 293 U. S. 163 [1934].

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OTHER REGULATIONS.

It has been conceded that the business of operating a cotton gin is one clothed with a public interest.[1]

[1] Frost v. Corporation Commission, 278 U. S. 515, 519–521 [1929].

But the business of manufacturing ice and selling it is essentially a private business and not so affected with a public interest that a legislature may constitutionally limit the number of those who mav engage in it, in order to control competition.[1]

[1] New State Ice Co. v. Liebmann, 285 U. S. 262 [1932].

Public Utilities.

IN GENERAL.

"* * * it has been customary in England from time immemorial and in this country from its first colonization, to regulate ferries, common carriers * * *, &c., and in so doing to fix a maximum of charge to be made * * *."[1] The scope of this power over carriers is very great and comprehensive,[2] and reasonable assessments may be imposed to pay the cost of their regulation.[3]

[1] Munn v. Illinois, 94 U. S. 113, 125 [1877].

[2] Mississippi R. Commission v. Mobile & O. R. Co., 244 U. S. 388, 391 [1917].

[3] Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386 [1892]; New York ex rel. New York Electric Lines Co. v. Squire, 145 U. S. 175, 191 [1892]. *See also* Great Northern R. Co. v. Washington, 300 U. S. 154 [1937].

A municipal ordinance will not be held unconstitutional as an unreasonable grant of power because it permits the use of streets by a public service corporation only in such manner as is satisfactory to the municipal officers in charge of such streets.[1]

[1] Western U. Teleg. Co. v. Richmond, 224 U. S. 160 [1912].

But the property which is invested in the railways of the country is nevertheless under the protection of the fundamental guaranties of the Constitution and is entitled to as full protection of the law as any other private property devoted to a public use, and it cannot be taken from its owners without just compensation or without due process of law. Whether a statute enacted by the legislature of a State or an order passed by a railroad commission exceeds the bounds which the law thus sets to such authority is a question of law arising on the facts of each case.[1]

[1] Mississippi R. Commission v. Mobile & O. R. Co., 244 U. S. 388, 391 [1917].

A State in pursuance of its public policy may adopt regulations of public service corporations and limit their liability for negligence,

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and a statute to that effect does not deprive them of property without due process of law.[1]

[1] Western U. Teleg. Co. v. Commercial Milling Co., 218 U. S. 406, 407 [1910].

A State by mere legislative fiat or by any regulating order of a commission cannot convert a private carrier into a common carrier, for that would be taking private property for public use without compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment.* On the other hand, if in the beginning or during its subsequent operation, a carrier has been devoted to the use of the public, and such use has not been withdrawn, there can be no doubt that it is a common carrier, the rates and practices of which are subject to public regulations.[1] But the action of a State requiring a foreign corporation to operate its local private oil pipe line as a common carrier does not deprive it of property without due process of law when done pursuant to constitutional and statutory provisions in force when the corporation entered the State.[2]

[1] Producers Transp. Co. v. Railroad Commission, 251 U. S. 228, 230–231 [1920].
[2] Pierce Oil Corp. v. Phoenix Ref. Co., 259 U. S. 125 [1922].

A city cannot take possession of the equipment of a railway the franchise of which has expired,[1] but an ordinance prescribing conditions upon which such a railway may continue to occupy the streets or requiring it to remove its tracks, does not deprive it of property rights without due process of law.[2]

[1] Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116 [1907].
[2] Detroit United R. Co. v. Detroit, 229 U. S. 39 [1913].

Subjecting a street railway company, the franchise of which has expired, to the alternative of accepting an inadequate price for its property or of ceasing to operate and removing its property from the streets, does not take property without due process of law.[1]

[1] Detroit United R. Co. v. Detroit, 255 U. S. 171 [1921]. *See also* Denver v. New York Trust Co., 229 U. S. 123 [1913].

When the charter of a water company is not exclusive, no deprivation of property without due process of law arises from an act of the legislature empowering a city to erect its own waterworks.[1]

[1] Newburyport Water Co. v. Newburyport, 193 U. S. 561 [1904]. *See also* Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354 [1902]; Helena Waterworks Co. v. Helena, 195 U. S. 383]1904]; Madera Waterworks v. Madera, 228 U. S. 454 [1913].

But merely for the sake of establishing a lighting system of its own, a city has no right to displace or remove without compensation

* *See also* discussion on p. 818 with reference to motor carriers.

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the fixtures of a lighting company already occupying the streets by virtue of rights guaranteed by its franchise.[1]

[1] Los Angeles v. Los Angeles Gas & E. Corp., 251 U. S. 32 [1919].

RATES.*

Powers of State.

GENERAL POWERS.—The authority of the States to control by appropriate legislation the rates of fare to be charged by common carriers wholly within their borders and subject to their laws is unquestionable,[1] unless hampered by contract.[2] A municipality cannot, by contract with a street railway, foreclose the exercise by the State of its power, unless clearly authorized to do so by the supreme legislative authority.[3] The right of the State to limit the charges which a railway may make "cannot be granted away by its legislature unless by words of positive grant or words equivalent in law." [4]

[1] Portland Railway, Light & P. Co. v. Railroad Commission, 229 U. S. 397, 410 [1913]. *See also* Chicago, B. & Q. R. Co. v. Cutts, 94 U. S. 155, 161 [1877]; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 179 [1888]; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339 [1892]; Reagan v. Farmers Loan & T. Co., 154 U. S. 362, 420 [1894]; Smyth v. Ames, 169 U. S. 466, 522 [1898]; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 687 [1899].

[2] Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 179 [1888]; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 687 [1899].

[3] Puget Sound Traction, Light & P. Co. v. Reynolds, 244 U. S. 574 [1917].

[4] Chicago, M. & St. P. R. Co. v. Minnesota, ex rel. Railroad & W. Commission, 134 U. S. 418, 455 [1890]. *See also* Southern P. Co. v. Campbell, 230 U. S. 537, 551 [1913], citing Stone v. Farmers' Loan & T. Co., 116 U. S. 307, 330 [1886]; Dow v. Beidelman, 125 U. S. 680, 688 [1888]; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 181 [1888]; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 215 [1894]; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 696 [1896]; Owensboro v. Owensboro Waterworks Co., 191 U. S. 358, 370 [1903].

The legislature may act directly, or, in the absence of constitutional restriction, it may commit the authority to fix rates to a subordinate body.[1] A city or municipality has no power to regulate rates of public service corporations, in the absence of express or plain legislative authority to do so.[2]

[1] Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 305–306 [1914], citing Stone v. Farmers' Loan & T. Co., 116 U. S. 307, 336 [1886]; Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 393, 394 [1894]; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 19 [1907]; Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282, 291 [1908]; Grand Trunk Western R. Co. v. Railroad Commission, 221 U. S. 400, 403 [1911].

[2] Winchester v. Winchester Waterworks Co., 251 U. S. 192 [1920].

The rate-making power is a legislative power and necessarily implies a range of legislative discretion,[1] and the Supreme Court

* *See also* pp. 157, 177, 342, 644.

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does not sit as a revisory board to substitute its judgment for that of the legislature or its administrative agent.[2] However, in the absence of a legislative rate, courts will apply the common law and pass on the reasonableness of rates; but after legislative rates have been established the courts apply those rates unless there are constitutional objections.[3]

[1] Simpson *v.* Shepard (Minnesota Rate Cases), 230 U. S. 352, 433 [1913]. *See also* Peik *v.* Chicago & N. W. R. Co., 94 U. S. 164, 178 [1877]; Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210 [1908]; Home Teleph. & Teleg. Co. *v.* Los Angeles, 211 U. S. 265 [1908]; Knoxville *v.* Knoxville Water Co., 212 U. S. 1, 8 [1909]; Lousiville & N. R. Co. *v.* Garrett, 231 U. S. 298, 305 [1914].

[2] Northern P. R. Co. *v.* North Dakota ex rel. McCue, 236 U. S. 585 [1915].

[3] Louisville & N. R. Co. *v.* Garrett, 231 U. S. 298 [1914].

The State has power to annul and supersede rates previously established by contracts between utilities and their customers.[1] When plaintiff's vendor sold gas to plaintiff for redistribution (the vendor's compensation therefor to be determined by plaintiff's gross receipts), the effect of a rate ordinance on the constitutional rights of the vendor was held immaterial to plaintiff's case.[2]

[1] Midland Realty Co. *v.* Kansas City Power & Light Co., 300 U. S. 109 113 [1937], citing Union Dry Goods Co. *v.* Georgia Pub. Service Corp. 248 U. S. 372 [1919]; Producers Transp. Co. *v.* Railroad Commission, 251 U. S. 228, 232 [1920]; Kansas City Bolt & Nut Co. *v.* Kansas City Light & P. Co., 252 U. S. 571 [1920]; Sutter Butte Canal Co. *v.* Railroad Commission, 279 U. S. 125, 137–138 [1929].

[2] Newark Natural Gas & Fuel Co. *v.* Newark, 242 U. S. 405 [1917].

A gas company charging the maximum rates allowed is not deprived of due process by an order reducing bills to compensate for poor service (insufficient gas pressure) and requiring corresponding refunds to consumers.[1]

[1] Oklahoma Natural Gas Co. *v.* Oklahoma, 258 U. S. 234 [1922].

The fact that a railway is organized under a Federal statute does not relieve it from the police regulations of the States.[1]

[1] Reagan *v.* Mercantile Trust Co., 154 U. S. 413 [1894].

General Limitations.—The property of a public utility, although devoted to the public service and impressed with a public interest, is still private property; and neither the corpus of that property nor the use thereof can be taken constitutionally for a compulsory price which falls below the measure of just compensation. One is confiscation no less than the other.[1] "The established principle is that as the due process clauses (Amendments V and XIV) safeguard private property against a taking for public use without just compensation, neither Nation nor State may require the use of privately owned property without just compensation."[2] It is indis-

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putable that although governmental agencies may fix and enforce reasonable rates to be paid public utility corporations for the service by them rendered, "that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations." [3]

[1] United R. & Electric Co. *v.* West, 280 U. S. 234, 249 [1930]. *See also* Newton *v.* Consolidated Gas Co., 258 U. S. 165 [1922]; Public Serv. Commission *v.* Great Northern Utilities Co., 289 U. S. 130, 135 [1933].

[2] West *v.* Chesapeake & P. Teleph. Co., 295 U. S. 662, 671 [1935].

[3] Southern Iowa Electric Co. *v.* Chariton, 255 U. S. 539, 541–542 [1921], citing Reagan *v.* Farmers' Loan & T. Co., 154 U. S. 362 [1894]; Smyth *v.* Ames, 169 U. S. 466 [1898]; San Diego Land & Town Co. *v.* Jasper, 189 U. S. 439, 442 [1903]; Knoxville *v.* Knoxville Water Co., 212 U. S. 1, 19, 41 [1909]; Simpson *v.* Shepard (Minnesota Rate Cases), 230 U. S. 352, 434 [1913]; Cedar Rapids Gas Light Co. *v.* Cedar Rapids, 223 U. S. 655 [1912]; Des Moines Gas Co. *v.* Des Moines, 238 U. S. 153 [1915]; Denver *v.* Denver Union Water Co., 246 U. S. 178, 194 [1918]. *See also* Stone *v.* Farmers' Loan & T. Co., 116 U. S. 307, 325 [1886]; Georgia R. & Bkg. Co. *v.* Smith, 128 U. S. 174, 179 [1888]; Chicago, M. & St. P. R. Co. *v.* Minnesota ex rel. Railroad & W. Commission, 134 U. S. 418, 455–456 [1890]; St. Louis & S. F. R. Co. *v.* Gill, 156 U. S. 649 [1895]; San Diego Land & Town Co. *v.* National City, 174 U. S. 739 [1899]; Missouri P. R. Co. *v.* Tucker, 230 U. S. 340 [1913]; Missouri *v.* Chicago, B. & Q. R. Co., 241 U. S. 533 [1916]; Paducah *v.* Paducah R. Co., 261 U. S. 267, 272 [1923]; Bluefield Waterworks & Improv. Co. *v.* Public Service Commission, 262 U. S. 679 [1923].

Review by Courts.

In General.—A public service company, suffering from confiscatory rates, is not required to await indefinitely a decision by the rate-making tribunal on a pending application before applying to a court for equitable relief.[1]

[1] Smith *v.* Illinois Bell Teleph. Co., 270 U. S. 587 [1926].

A State statute which permits a carrier to have the question of sufficiency of rates determined by a court of competent jurisdiction, but which imposes such conditions upon the appeal for judicial relief as works an abandonment of the right rather than face those conditions, is unconstitutional as depriving the carrier of its property without due process of law.[1]

[1] Missouri P. R. Co. *v.* Tucker, 230 U. S. 340 [1913], citing Ex parte Young, 209 U. S. 123, 147 [1908].

While a State may permit appeals to the courts from the rate-making orders of its railroad commission, failure to provide for such an appeal does not deny the carrier due process of law.[2] "If the Commission establishes rates that are so unreasonably low as to be confiscatory, an appropriate mode of obtaining relief is by bill in equity to restrain the enforcement of the order [cases cited [3]]. * * * Presumably, the courts of the State, as well as the Federal courts,

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would be open to the carrier for this purpose (Home Telephone Co. *v.* Los Angeles, 211 U. S. 265, 278) without express statutory provision to that effect."[4]

[1] Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210 [1908].
[2] Louisville & N. R. Co. *v.* Garrett, 231 U. S. 298 [1914].
[3] Chicago, M. & St. P. R. Co. *v.* Minnesota ex rel. Railroad & W. Commission, 134 U. S. 418, 459, 460 [1890]; St. Louis & S. F. R. Co. *v.* Gill, 156 U. S. 649, 659, 666 [1895]; Ex parte Young, 209 U. S. 123, 166 [1908]. *See also* Missouri *v.* Chicago, B. & Q. R. Co., 241 U. S. 533 [1916].
[4] Louisville & N. R. Co. *v.* Garrett, 231 U. S. 298, 311 [1914].

A carrier's right to contest the validity of rates is not impaired by putting the rates into effect.[1]

[1] Allen *v.* St. Louis, I. M. & S. R. Co., 230 U. S. 553 [1913].

A consumer of gas has no vested interest in the method of fixing rates or in funds impounded.[1]

[1] Wright *v.* Central Kentucky Natural Gas Co., 297 U. S. 537 [1936].

In Smyth *v.* Ames,[1] the Court declared it to be settled that "while rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry." And a public utility corporation challenging, as confiscatory, rates imposed by a State commission is entitled to the independent judgment of the court as to both law and facts.[2] The courts, however, are limited to an approval or a condemnation of a rate; they are without power to prepare a new schedule or prescribe new rates.[3]

[1] 169 U. S. 466, 526 [1898]. *See also* Covington & L. Turnp. Road Co. *v.* Sandford, 164 U. S. 578 [1896]; Ex parte Young, 209 U. S. 123 [1908]; Missouri P. R. Co. *v.* Tucker, 230 U. S. 340 [1913].
[2] Bluefield Waterworks & Improv. Co. *v.* Public Service Commission, 262 U. S. 679 [1923]. *See also* Ohio Valley Water Co. *v.* Ben Avon, 253 U. S. 287, 289 [1920]; United R. & Electric Co. *v.* West, 280 U. S. 234, 251 [1930].
[3] Reagan *v.* Farmers' Loan & T. Co., 154 U. S. 362, 420 [1894]; Central Kentucky Natural Gas Co. *v.* Railroad Commission, 290 U. S. 264 [1933].

The inquiry of the Supreme Court in rate cases coming from State courts "is whether the action of the State officials in the totality of its consequences is consistent with the enjoyment by the regulated utility of a revenue something higher than the line of confiscation. If this level is attained, and attained with suitable opportunity through evidence and argument (Southern R. Co. *v.* Virginia, 290 U. S. 190

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[1933]) to challenge the result, there is no denial of due process, though the proceeding is shot through with irregularity or error." [1]

[1] West Ohio Gas Co. *v.* Public Utilities Commission, 294 U. S. 63, 70 [1935]. *See also* Los Angeles Gas & E. Corp. *v.* Railroad Commission, 289 U. S. 287, 304–305 [1933].

Where the carrier has full opportunity to test whether rates are confiscatory in a suit against the rate-fixing commission, provision of the State law making the judgment conclusive against the carrier in subsequent actions for reparation is consistent with the Fourteenth Amendment.[1]

[1] Detroit & M. R. Co. *v.* Fletcher Paper Co., 248 U. S. 30 [1918].

BURDEN OF PROOF.—A legislative rate for a public service corporation is presumed to be sufficient to produce a fair return on the plant, and the burden of showing that it is confiscatory rests upon those attacking it.[1] It is well established that in a question of rate making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing.[2]

[1] Lincoln Gas & E. L. Co. *v.* Lincoln, 223 U. S. 349 [1912]. *See also* Railroad Commission *v.* Cumberland Teleph. & Teleg. Co., 212 U. S. 414 [1909]; Missouri P. R. Co. *v.* Tucker, 230 U. S. 340 [1913]; Northern P. R. Co. *v.* North Dakota ex rel. McCue, 236 U. S. 585 [1915]; Des Moines Gas Co. *v.* Des Moines, 238 U. S. 153 [1915].

[2] Darnell *v.* Edwards, 244 U. S. 564, 569 [1917].

The Court should override the decision of the rate-making body only when its action is of such an arbitrary character as to constitute an abuse of powers.[1] Where the record does not clearly disclose all facts necessary on which to base conclusions, the Supreme Court will not overrule the State tribunal and declare rates fixed by it to be confiscatory and violative of rights secured by the Fourteenth Amendment.[2] Where it would not be impracticable, although it would be very difficult, to collect data to establish the inadequacy of certain rates, the company assailing their constitutionality is bound to establish its case, and it is not entitled to rest on expressions of judgment when it has it in its power to present adequate data which would permit the Court to draw the right conclusion.[3]

[1] Southern P. Co. *v.* Campbell, 230 U. S. 537 [1913].

[2] Portland Railway, Light & P. Co. *v.* Railroad Commission, 229 U. S. 397 [1913]. *See also* Dow *v.* Beidelman, 125 U. S. 680 [1888]; Chicago, M. & St. P. R. Co. *v.* Tompkins, 176 U. S. 167 [1900]; Seaboard Air Line R. Co. *v.* Florida ex rel. Ellis, 203 U. S. 261 [1906]; Southern P. Co. *v.* Campbell, 230 U. S. 537 [1913]; Wood *v.* Vandalia R. Co., 231 U. S. 1 [1914].

[3] Simpson *v.* Shepard (Minnesota Rate Cases), 230 U. S. 352, 466 [1913]; Knott *v.* Chicago, B. & Q. R. Co. (Missouri Rate Cases), 230 U. S. 474 [1913]; Allen *v.* St. Louis, I. M. & S. R. Co., 230 U. S. 553 [1913].

Courts should not declare an ordinance fixing rates unconstitutional and suspend its operation before it goes into effect unless the rate is clearly confiscatory. On failure to show such effect, the bill

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should be dismissed without prejudice to a further application to the courts if the rate after going into effect is actually confiscatory.[1]

[1] Knoxville v. Knoxville Water Co., 212 U. S. 1 [1909]; Willcox v. Consol. Gas Co., 212 U. S. 19, 41 [1909].

Just Compensation.

IN GENERAL.—What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties.[1]

[1] Bluefield Waterworks & Improv. Co. v. Public Service Commission, 262 U. S. 679, 692 [1923].

What will constitute a fair return in a given case is not capable of exact mathematical demonstration. It is a matter more or less of approximation about which conclusions may differ.[1]

[1] United R. & Electric Co. v. West, 280 U. S. 234, 251 [1930].

What the public is entitled to demand is that no more be exacted from it than the services rendered are reasonably worth.[1] In determining the adequacy of rates, the circumstance that the railroad has been unwisely built in an unfavorable locality, and the nature and value of the service actually rendered by it to the public, are matters to be considered.[2] A railroad tariff is not necessarily conclusively unreasonable because it fails to produce a profit for investors.[3] The loss of, or the failure to obtain, patronage, due to competition, does not justify the imposition of charges that are exorbitant and unjust to the public. The clause of the Constitution here invoked does not protect public utilities against such business hazards.[4]

[1] Smyth v. Ames, 169 U. S. 466, 547 [1898].
[2] Darnell v. Edwards, 244 U. S. 564 [1917].
[3] Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 420 [1894].
[4] Public Serv. Commission v. Great Northern Utilities Co., 289 U. S. 130, 135 [1933], citing Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 412 [1894]; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 596 [1896]; Smyth v. Ames, 169 U. S. 466, 544–545 [1898]; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446 [1903]; Darnell v. Edwards, 244 U. S. 564, 569–570 [1917]; Aetna Ins. Co. v. Hyde, 275 U. S. 440, 447, 448 [1928].

RATE OF RETURN.—A rule as to the rate of return properly allowable which will apply uniformly to all sorts of utilities cannot be laid down. What may be a fair return for one may be inadequate for another.[1] A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market, and business conditions generally.[2] A

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decree enjoining a city from enforcing street-railway fares found to be confiscatory, should be so framed as to protect the city's right to prescribe the same fares, if through change of conditions they become just and reasonable.[8]

[1] Smith v. Illinois Bell Telph. Co., 282 U. S. 133 [1930]. *See also* Willcox v. Consol. Gas Co., 212 U. S. 19 [1909]; United R. & Electric Co. v. West, 280 U. S. 234, 249 [1930].

[2] Bluefield Waterworks & Improv. Co. v. Public Service Commission, 262 U. S. 679 [1923]. *See also* Lincoln Gas & E. L. Co. v. Lincoln, 250 U. S. 256, 268 [1919]; Banton v. Belt Line R. Corp., 268 U. S. 413, 418 [1925]; United R. & Electric Co. v. West, 280 U. S. 234, 249 [1930]; Smith v. Illinois Bell Teleph. Co., 282 U. S. 133 [1930].

[3] Paducah v. Paducah R. Co., 261 U. S. 267 [1923].

A commission or other legislative body, in its discretion, may determine to be reasonable and just a rate that is substantially higher than one merely sufficient to yield a just and reasonable return on the value of the property used to perform the service covered by the rate. The mere fact that a rate is nonconfiscatory does not indicate that it must be deemed to be just and reasonable. It is well known that rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable, and not excessive or extortionate.[1]

[1] Banton v. Belt Line R. Corp., 268 U. S. 413, 422–423 [1925].

The following rates have been held nonconfiscatory: 6 percent,[1] 6½ percent,[2] 7 percent,[3] 7¼ percent,[4] 8 percent, [5] 10 percent.[6]

[1] Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co., 192 U. S. 201, 213–214 [1904]; Willcox v. Consol. Gas. Co., 212 U. S. 19 [1909]; Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655 [1912]; Des Moines Gas Co. v. Des Moines, 238 U. S. 153 [1915].

[2] Dayton Power & Light Co. v. Public Utilities Commission, 292 U. S. 290 [1934].

[3] McCardle v. Indianapolis Water Co., 272 U. S. 400, 419 [1926]; Wabash Valley Electric Co. v. Young, 287 U. S. 488, 501–502 [1933]; Los Angeles Gas & E. Corp. v. Railroad Commission, 289 U. S. 287 [1933]; Clark's Ferry Bridge Co. v. Public Serv. Commission, 291 U. S. 227 [1934].

[4] Georgia R. & Power Co. v. Railroad Commission, 262 U. S. 625 [1923].

[5] Galveston Electric Co. v. Galveston, 258 U. S. 388 [1922].

[6] Van Dyke v. Geary, 244 U. S. 39 [1917] (water company).

The following rates have been held confiscatory: 4.3 percent,[1] 4.53 percent,[2] less than 5 percent,[3] 5½ percent,[4] 6 percent,[5] less than 7.44 percent.[6]

[1] Denver v. Denver Union Water Co., 246 U. S. 178 [1918].

[2] West Ohio Gas Co. v. Public Utilities Com., 294 U. S. 63 [1935].

[3] Ohio Utilities Co. v. Public Utilities Com., 267 U. S. 359 [1925].

[4] Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission, 262 U. S. 276 [1923].

[5] Lincoln Gas & E. L. Co. v. Lincoln, 250 U. S. 256 [1919].

[6] United R. & Electric Co. v. West, 280 U. S. 234, 252 [1930].

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EFFECT OF CONTRACT WITH STATE.—It is indisputable that where public-service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial.[1]

[1] Southern Iowa Electric Co. *v.* Chariton, 255 U. S. 539, 542 [1921], citing Freeport Water Co. *v.* Freeport, 180 U. S. 587, 593 [1901]; Detroit *v.* Detroit Citizens' Street R. Co., 184 U. S. 368 [1902]; Knoxville Water Co. *v.* Knoxville, 189 U. S. 434, 437 [1903]; Cleveland *v.* Cleveland City R. Co., 194 U. S. 517 [1904]; Home Teleph. & Teleg. Co. *v.* Los Angeles, 211 U. S. 265, 273 [1908]; Minneapolis *v.* Minneapolis Street R. Co., 215 U. S. 417 [1910]; Columbus R. Power & Light Co. *v.* Columbus, 249 U. S. 399 [1919]. *See also* Interstate Consol. Street R. Co. *v.* Massachusetts, 207 U. S. 79 [1907]; San Antonio *v.* San Antonio Public Service Co., 255 U. S. 547 [1921]; Paducah *v.* Paducah R. Co., 261 U. S. 267, 272–273 [1923]; Georgia R. & Power Co. *v.* Decatur, 262 U. S. 432 [1923]; Opelike *v.* Opelike Sewer Co., 265 U. S. 215 [1924]; St. Cloud Pub. Ser. Co. *v.* St. Cloud, 265 U. S. 352 [1924]; Southern Utilities Co. *v.* Palatka, 268 U. S. 232 [1925].

TRIAL PERIOD.—The case must be a clear one before the courts should be asked to interfere with State legislation upon the subject of rates, especially if there has been no actual experience of the practical result of such rate.[1] In the absence of a fair test of rates challenged as confiscatory, and in the presence of some doubt of their adequacy, dismissal of the bill should not be absolute, but should be without prejudice to another suit, in case they should prove confiscatory when fully and fairly tested.[2] However, the invalidity of an order arbitrarily lowering rates which the evidence shows are confiscatory is not averted by making it for an experimental period.[3]

[1] Willcox *v.* Consol. Gas Co., 212 U. S. 19, 41 [1909]. *See also* Knoxville *v.* Knoxville Water Co., 212 U. S. 1 [1909]; Northern P. R. Co. *v.* North Dakota ex rel. McCue, 216 U. S. 579 [1910]; Louisville *v.* Cumberland Teleph. & Teleg. Co., 225 U. S. 430, 436 [1912]; Lincoln Gas & E. L. Co. *v.* Lincoln, 250 U. S. 256 [1919].

[2] Darnell *v.* Edwards, 244 U. S. 564 [1917].

[3] Northern P. R. Co. *v.* Department of Public Works, 268 U. S. 39 [1925].

RATE ON PARTICULAR CLASS OF TRAFFIC.—A railroad rate fixed by State authority violates the Fourteenth Amendment if it does not yield the carrier a reasonable return upon the class of traffic to which it applies; and a rate which, so tested, is deficient, is not saved by the fact that the intrastate business as a whole is remunerative.[1] The State has no power to require the hauling of logs at a loss or without compensation that is reasonable and just, even if the railroad receives

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adequate revenues from the intrastate log haul and the interstate lumber haul taken together.[3]

[1] Vandalia R. Co. *v.* Schnull, 255 U. S. 113 [1921], citing Northern P. R. Co. *v.* North Dakota ex rel. McCue, 236 U. S. 585 [1915]; Norfolk & W. R. Co. *v.* Conley, 236 U. S. 605 [1915]. *See also* Brooks-Scanlon Co. *v.* Railroad Commission, 251 U. S. 396, 399 [1920]; Northern P. R. Co. *v.* Department of Public Works, 268 U. S. 39, 43 [1925]; Banton *v.* Belt Line R. Corp., 268 U. S. 413, 421 [1925].

[2] Chicago, M. & St. P. R. Co. *v.* Public Utilities Commission, 274 U. S. 344 [1927].

A statute requiring railroads to sell 1,000-mile tickets at rates lower than the general rates, is a deprivation of property without due process of law.[1] But a State regulation requiring a carrier to maintain commutation service at rates less than the general rate does not deprive the carrier of due process of law when the service so regulated was established by the carrier voluntarily and the rates fixed by the State are reasonable.[2]

[1] Lake Shore & M. S. R. Co. *v.* Smith, 173 U. S. 687 [1899].

[2] Pennsylvania R. Co. *v.* Towers, 245 U. S. 6 [1917], overruling Lake Shore & M. S. R. Co. *v.* Smith, 173 U. S. 684 [1899], so far as inconsistent.

A State law requiring a street-car company to carry city detectives free when in the discharge of their duty is not unreasonable.[1]

[1] Sutton *v.* New Jersey, 244 U. S. 258 [1917].

Relation to Interstate Commerce.—The reasonableness or unreasonableness of rates prescribed by a State for transportation wholly within its limits must be determined without reference to the interstate business done by the carrier. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business.[1] In order to determine whether rates prescribed by a State would cause confiscation, the court should find the rate of return which was realized from the intrastate business of the utility, and the rate of return which it would fairly conclude would have been realized by that business under the prescribed rates; extreme nicety in making the apportionment is not required.[2] The gross earnings method is not an acceptable method of apportionment.[3]

[1] Smyth *v.* Ames, 169 U. S. 466, 541 [1898]. *See also* Simpson *v.* Shepard (Minnesota Rate Cases), 230 U. S. 352, 434-435 [1913]; Chicago, M. & St. P. R. Co. *v.* Public Utilities Commission, 274 U. S. 344 [1927].

[2] Smith *v.* Illinois Bell Teleph. Co., 282 U. S. 133 [1930].

[3] Simpson *v.* Shepard (Minnesota Rate Cases), 230 U. S. 352, 459 [1913]; Knott *v.* Chicago, B. & Q. R. Co. (Missouri Rate Cases), 230 U. S. 474 [1913].

Return on Intrastate Business as Entirety.—In determining whether intrastate passenger railway rates are confiscatory, all parts of the system within the State (including sleeping cars, dining

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cars, and parlor cars) should be embraced in the computation, and the unremunerative parts should not be excluded because built primarily for interstate traffic or not required to supply local transportation needs.[1]

[1] Groesbeck *v.* Duluth, S. S. & A. R. Co., 250 U. S. 607 [1919].

A regulation requiring a street-railway company to abolish a second fare zone applied to a suburban extension without which the extension would be unprofitable, is not subject to constitutional objection if the extension be an integral part of the system and if fares be so readjusted as to yield a fair return upon the property as a whole.[1]

[1] United R. & Electric Co. *v.* West, 280 U. S. 234 [1930].

Where several street-railway lines, built under distinct franchises, are owned and operated as one system, a public regulation concerning car service and fares will not be adjudged confiscatory because of its financial results to the line immediately affected, if the system as a whole remains profitable.[1]

[1] Puget Sound Traction, Light & P. Co. *v.* Reynolds, 244 U. S. 574 [1917]. *See also* St. Louis & S. F. R. Co. *v.* Gill, 156 U. S. 649 [1895].

In fixing rates for part of the territory served by a public utility, conditions may be such as to require or permit that the property used and useful in serving the smaller area be treated as the rate base rather than the entire plant serving the whole territory, and so where a local electric plant became part of a larger system, it was held that the local property should be valued and a proportionate part of the value of the general distributing system added thereto.[1]

[1] Wabash Valley Electric Co. *v.* Young, 287 U. S. 488 [1933].

Where several street-railway lines, built under distinct franchises, are owned and operated as one system, it is clearly within the bounds of reasonable regulation to establish through service between them, for a single fare.[1] The cost of the transfer business of a street railway is not the amount by which the total operating expenses would be diminished by eliminating, or increased by adding, the transfer passengers; for those operating expenses which are incurred on account of all passengers carried and incapable of allocation to any class, should be attributed to the transfer passengers in fair proportion with others receiving like service.[2]

[1] Puget Sound Traction, Light & P. Co. *v.* Reynolds, 244 U. S. 574 [1917].

[2] Banton *v.* Belt Line R. Corp., 268 U. S. 413 [1925].

DISCRIMINATION.—A State may prohibit any unjust discrimination against localities, and it may leave it to the Railroad Commission to determine whether the rates are or are not discriminatory, provision

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being made for notice and judicial review.[1] A railroad setting low rates for some shippers cannot resist the power of the State to enforce the same rate for all shippers or claim that the rate so fixed deprives it of its property without due process of law.[2] Similarly, a rate regulation for preventing a company appropriating and distributing water for irrigation from discriminating between consumers under contract and others, is not unlawful as a taking of contract rights.[3]

[1] Portland Railway, Light and P. Co. *v.* Railroad Commission, 229 U. S. 397 [1913]. *See also* Seaboard Air Line R. Co. *v.* Florida ex rel. Ellis, 203 U. S. 261 [1906].

[2] Alabama & V. R. Co. *v.* Mississippi R. Commission, 203 U. S. 496 [1906].

[3] Sutter Butte Canal Co. *v.* Railroad Commission, 279 U. S. 125 [1929].

LONG AND SHORT HAUL.—A State, by enacting a rule of action for railroad companies, forbidding a greater rate of charge for a shorter than for a longer distance, does not deprive a railroad of its property without due process of law.[1]

[1] Louisville & N. R. Co. *v.* Kentucky, 183 U. S. 512 [1902]; Missouri P. R. Co. *v.* McGrew Coal Co., 244 U. S. 191 [1917].

ASCERTAINMENT OF EARNINGS.—In determining whether a rate is confiscatory the court is not confined to evidence as to the income for the year during, or preceding that in which the rate was fixed. It may receive evidence as to subsequent years.[1] In fixing rates for a series of past years, it is contrary to due process to adopt the gross income and operating expenses of the first year as an exclusive standard or test, and to ignore unimpeached evidence of the gross income and operating expenses of later years; to prefer forecast to experience in such cases is arbitrary.[2]

[1] Knoxville *v.* Knoxville Water Co., 212 U. S. 1 [1909].

[2] West Ohio Gas Co. *v.* Public Utilities Commission, 294 U. S. 79 [1935].

The proper annual charge for maintenance to be deducted from gross revenues in order to determine the net earnings of a street-railway company is the amount normally required for the purpose during the period; it is not necessarily the amount actually expended within the year.[1]

[1] Galveston Electric Co. *v.* Galveston, 258 U. S. 388 [1922].

In computing the operating expenses of a gas-distributing company, in the process of fixing its rates, the company's books are presumptively correct and, within the limits of reason, advertising or development expenses are legitimate charges upon income for rate purposes and a refusal by the commission to allow them on the ground that they were excessive and wasteful (but without any evidence to support such contention), is contrary to due process.[1] However, a public utility seeking to enjoin as confiscatory the enforcement of a

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rate order has the burden of making a convincing showing that the amounts charged to operating expenses for depreciation have not been excessive, and that burden is not sustained by proof that its general accounting system was correct.[2]

[1] West Ohio Gas Co. v. Public Utilities Commission, 294 U. S. 63 [1935].

[2] Lindheimer v. Illinois Bell Telep. Co., 292 U. S. 151 [1934].

In determining reasonable rates for supplying public service, it is proper to include in the operating expenses, that is, in the cost of producing the service, an allowance for consumption of capital depreciation in order to maintain the integrity of the investment in the service rendered.[1]

[1] Lindheimer v. Illinois Bell Teleph. Co., 292 U. S. 151, 167 [1934], citing Knoxville v. Knoxville Water Co., 212 U. S. 1, 13, 14 [1909]; Kansas City S. R. Co. v. United States, 231 U. S. 423, 448 [1914]; Denver v. Denver Union Water Co., 246 U. S. 178, 191 [1918]; Southwestern Bell Telephone Co. v. Public Service Comm'n, 262 U. S. 276, 278 [1923]; Georgia R. & Power Co. v. Railroad Comm'n, 262 U. S. 625, 633 [1923]; United R. & Electric Co. v. West, 280 U. S. 234, 253, 260 [1930]; Smith v. Illinois Bell Teleph. Co., 282 U. S. 133, 158 [1930]; Clark's Ferry Bridge Co. v. Public Service Comm'n, 291 U. S. 227 [1934].

Assets of a public utility represented by a credit balance in the reserve for depreciation cannot be used to make up the deficiency in current rates which are not sufficient to yield a just return after paying taxes and operating expenses including a proper allowance for current depreciation.[1]

[1] Public Utility Comrs. v. New York Teleph. Co., 271 U. S. 23 [1926].

A public-service corporation cannot make a rate confiscatory by reducing its net earnings through the device of a contract unduly favoring a subsidiary or a corporation owned by its own stockholders.[1] A telephone company is to be treated as a segregated enterprise for the purpose of determining whether a rate-fixing order is confiscatory, although it has the advantage of being a component part of a large system and through such relation obtains the cooperation of the manufacturing, research, engineering, and financing departments of the holding company.[2] The burden is upon the public utility to sustain the fairness of payments for the managerial service of an affiliated company.[3]

[1] United Fuel Gas Co. v. Railroad Commission, 278 U. S. 300 [1929].

[2] Smith v. Illinois Bell Teleph. Co., 282 U. S. 133 [1930].

[3] Dayton Power & Light Co. v. Public Utilities Commission, 292 U. S 290 [1934].

Valuation.

In General.—The just compensation safeguarded to a utility by the Fourteenth Amendment is a reasonable return on the value

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of the property used at the time that it is being used for the public service.[1]

[1] Public Utility Comrs. *v.* New York Teleph. Co., 271 U. S. 23, 31 [1926]. *See also* Smyth *v.* Ames, 169 U. S. 466, 546–547 [1898]; San Diego Land & Town Co. *v.* National City, 174 U. S. 739, 757 [1899]; San Diego Land & Town Co. *v.* Jasper, 189 U. S. 439, 442 [1903]; Wilcox *v.* Consol. Gas Co., 212 U. S. 19, 41 [1909]; Lincoln Gas & E. L. Co. *v.* Lincoln, 223 U. S. 349 [1912]; Simpson *v.* Shepard (Minnesota Rate Cases), 230 U. S. 352, 434–435 [1913]; Newark Natural Gas & Fuel Co. *v.* Newark, 242 U. S. 405 [1917]; Darnell *v.* Edwards, 244 U. S. 564 [1917]; Bluefield Water Works & Improv. Co. *v.* Public Service Commission, 262 U. S. 679 [1923]; Missouri ex rel. Southwestern Bell Teleph. Co. *v.* Public Service Commission, 262 U. S. 276, 287 [1923]; Georgia R. & Power Co. *v.* Railroad Commission, 262 U. S. 625, 631 [1923]; McCardle *v.* Indianapolis Water Co., 272 U. S. 400 [1926]; Los Angeles Gas & E. Corp. *v.* Railroad Commission, 289 U. S. 287, 305 [1933].

The determination of value is not controlled by artificial rules; it is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts.[1]

[1] Simpson *v.* Shepard (Minnesota Rate Cases), 230 U. S. 352, 434–435 [1913]; Georgia R. & Power Co. *v.* Railroad Commission, 262 U. S. 625, 630 [1896]; Bluefield Water Works & Improv. Co., *v.* Public Service Commission, 262 U. S. 679, 690 [1896]; Los Angeles Gas & E. Corp. *v.* Railroad Commission, 289 U. S. 287, 305–306 [1933].

"And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property." [1] The weight to be given to the original and present costs of construction, and other items or classes of evidence, is to be determined in the light of the facts of the case in hand.[2]

[1] Smyth *v.* Ames, 169 U. S. 466, 546–547 [1898].

[2] McCardle *v.* Indianapolis Water Co., 272 U. S. 400 [1926]; Los Angeles Gas & E. Corp. *v.* Railroad Commission, 289 U. S. 287, 308 [1933].

Actual Cost.—"The actual cost of the property—the investment the owners have made—is a relevant fact. Smyth *v.* Ames, 169 U. S. 466, 547. But while cost must be considered, the Court has held that it is not an exclusive or final test." [1]

[1] Los Angeles Gas & E. Corp. *v.* Railroad Commission, 289 U. S. 287, 306 [1933]. *See also* San Diego Land & Town Co. *v.* National City, 174 U. S. 739 [1899]; Simpson *v.* Shepard (Minnesota Rate Cases), 230 U. S. 352, 454 [1913].

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REPRODUCTION COST.—In estimating the value of the property of a public utility corporation, as a basis for rate regulation, evidence of present reproduction costs less depreciation, must be given consideration but it is not the only element to be considered.[1] "But in determining present value, consideration must be given to prices and wages prevailing at the time of the investigation; and in the light of all the circumstances, there must be an honest and intelligent forecast as to probable price and wage levels during a reasonable period in the immediate future. In every confiscation case, the future as well as the present must be regarded. It must be determined whether the rates complained of are yielding and will yield, over and above the amounts required to pay taxes and proper operating charges, a sum sufficient to constitute just compensation for the use of the property employed to furnish the service; that is, a reasonable rate of return on the value of the property at the time of the investigation and for a reasonable time in the immediate future.[2]

[1] Bluefield Waterworks & Improv. Co. *v.* Public Service Commission, 262 U. S. 679 [1923]. *See also* Smyth *v.* Ames, 169 U. S. 466 [1898]; Simpson *v.* Shepard (Minnesota Rate Cases), 230 U. S. 352 [1913]; Denver *v.* Denver Union Water Co., 246 U. S. 178 [1918]; Missouri ex rel. Southwestern Bell Teleph. Co. *v.* Public Service Commission, 262 U. S. 276 [1923]; Georgia R. & Power Co. *v.* Railroad Commission, 262 U. S. 625 [1923]; McCardle *v.* Indianapolis Water Co., 272 U. S. 400, 408–409 [1926]; Los Angeles Gas & E. Corp. *v.* Railroad Commission, 289 U. S. 287, 307 [1933].

[2] McCardle *v.* Indianapolis Water Co., 272 U. S. 400, 408–409 [1926]. *See also* Missouri ex rel. Southwestern Bell Teleph. Co. *v.* Public Service Commission, 262 U. S. 276, 287–288 [1923].

It is proper to estimate land at the present average market value of similar land in the vicinity.[1]

[1] Simpson *v.* Shepard (Minnesota Rate Cases), 230 U. S. 352, 455 [1913]; Denver *v.* Denver Union Water Co., 246 U. S. 178 [1918]

DEPRECIATION.—The depreciation in value of a waterworks plant, and in the value of the services rendered to consumers, due to a diminution in the water supply from a long continued drought from which the surrounding country has suffered since the passage of an ordinance regulating rates, may be considered in determining the reasonableness of such rates.[1]

[1] San Diego Land & Town Co. *v.* Jasper, 189 U. S. 439 [1903].

In estimating for rate-fixing purposes the value of a plant, cost of reproduction is not a fair measure of value unless a substantial allowance is made for depreciation.[1] In determining adequate rates for a public utility, the allowances for annual depreciation must be based, not upon cost, but upon present value.[2] Many items included in the overhead cost of original construction may properly be excluded in

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calculating the amount of depreciation annuity for the purpose of determing whether a street railway fare is confiscatory.[3]

[1] Knoxville v. Knoxville Water Co., 212 U. S. 1, 9 [1909]; Simpson v. Shepard (Minnesota Rate Cases), 230 U. S. 352, 458 [1913].
[2] United R. & Electric Co. v. West, 280 U. S. 234 [1930].
[3] Galveston Electric Co. v. Galveston, 258 U. S. 388 [1922].

The amount that shall be allowed for annual depreciation in fixing the charges of a public utility, is a question of fact. In reviewing the findings of a State court, the Supreme Court is not required to prescribe an invariable method of computation, and cannot overrule the State court's determination unless the results are seen to be unconstitutional.[1]

[1] Clark's Ferry Bridge Co. v. Public Serv. Commission, 291 U. S. 227 [1934]. *See also* Smith v. Illinois Bell Teleph. Co., 282 U. S. 133 [1930].

Where a public service corporation raises more money in a particular year than required for actual depreciation, it cannot carry the excess to capital for the purpose of estimating the amount on which it is entitled to pay dividends in determining whether a rate is unconstitutional as confiscatory, and the onus of showing that this has not been done is on the complainant where the books show that such an excess has been collected.[1]

[1] Railroad Commission v. Cumberland Teleph. & Teleg. Co., 212 U. S. 414 [1909].

GOING CONCERN VALUE AND GOOD WILL.—"This Court has declared it to be self-evident 'that there is an element of value in an assembled and established plant, doing business and earning money over one not thus advanced,' and that this element of value is 'a property right' which should be considered 'in determining the value of the property upon which the owner has a right to make a fair return' [citing cases [1]]. The going value thus recognized is not to be confused with good will, in the sense of that 'element of value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business,' which, as the Court has repeatedly said, is not to be considered in determining whether rates fixed for public service corporations are confiscatory [citing case [2]]." [3]

[1] Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 165 [1915]; Denver v. Denver Union Water Co., 246 U. S. 178, 191, 192 [1918]; McCardle v. Indianapolis Water Co., 272 U. S. 400, 414 [1926].
[2] Des Moines Gas Co. v. Des Moines, 238 U. S. 153 [1915].
[3] Los Angeles Gas & E. Corp. v. Railroad Commission, 289 U. S. 287, 313 [1933].

The omission of the going value of a gas company's business from the rate base is not so unreasonable or arbitrary as to overleap discretion and enter the zone of confiscation where the company is a

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small one and its organization simple; its physical assets are valued as parts of an assembled whole and an allowance is made of the cost of developing new business.[1] An allowance for going concern value will not be adjudged so insufficient as to result in confiscation, where the evidence offered to prove its insufficiency is highly uncertain and speculative.[2]

[1] Dayton Power & Light Co. *v.* Public Utilities Commission, 292 U. S. 290 [1934].

[2] Los Angeles Gas & E. Corp. *v.* Railroad Commission, 289 U. S. 287 [1933].

PAST LOSSES AND GAINS.—Past losses cannot be used to enhance the value of the property to support a claim that rates for the future are confiscatory.[1] And the law does not require a company to give up for the benefit of future subscribers any part of its accumulations from past operations; profits of the past cannot be used to sustain confiscatory rates for the future.[2]

[1] Galveston Electric Co. *v.* Galveston, 258 U. S. 388 [1922]; Georgia R. & Power Co. *v.* Railroad Commission, 262 U. S. 625 [1923]; Public Utility Commissioners *v.* New York Teleph. Co., 271 U. S. 23, 31–32 [1926].

[2] Newton *v.* Consolidated Gas Co., 258 U. S. 165, 175 [1922]; Public Utility Commissioners *v.* New York Teleph. Co., 271 U. S. 23, 31–32 [1926].

PRICE TREND INDICES.—"To an extent value must be a matter of sound judgment, involving fact data. To substitute for such factors as historical cost and cost of reproduction, a 'translator' of dollar value obtained by the use of price trend indices, serves only to confuse the problem and to increase its difficulty, and may well lead to results anything but accurate and fair. This is not to suggest that price trends are to be disregarded; quite the contrary is true. And evidence of such trends is to be considered with all other relevant factors." Thus, a valuation of the plant of a telephone company for rate purposes by taking its value as established in a prior rate proceeding and the annual net additions thereto, and trending them to present value by the use of price trend indices weighted upon an undisclosed principal, is inconsistent with due process.[1]

[1] West *v.* Chesapeake & P. Teleph. Co., 295 U. S. 661, 671 [1935]. *See also* Ohio Bell Teleph. Co. *v.* Public Utilities Commission, 301 U. S. 292 [1937].

OTHER VALUE FACTORS.—The book value placed by the producer of natural gas upon his property may be accepted at its value for the purpose of rate making, in the absence of clear and convincing evidence of a higher value.[1]

[1] United Fuel Gas Co. *v.* Railroad Commission, 278 U. S. 300 [1929].

A valuation of the plant of a telephone company arrived at by deducting the depreciation reserve from book cost and adding an

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allowance for working capital is so arbitrary as to violate the due process clause.[1]

[1] West v. Chesapeake & P. Teleph. Co., 295 U. S. 662 [1935].

The price which a waterworks plant brought on foreclosure is evidence which may be considered.[1]

[1] San Diego Land & Town Co. v. Jasper, 189 U. S. 439 [1903].

Franchise value should be excluded from the base value of property used in the public service when determining whether a rate is confiscatory.[1] But where a State has permitted public service corporations to capitalize their franchises, their value at the time of such capitalization should be included as an element for fixing rates; but no increased value of such franchises should be allowed.[2]

[1] Galveston Electric Co. v. Galveston, 258 U. S. 388 [1922]; Georgia R. & Power Co. v. Railroad Commission, 262 U. S. 625 [1923].
[2] Willcox v. Consolidated Gas Co., 212 U. S. 19 [1909].

In the case of a water company whose franchise has expired, but where there is no other source of supply, the plant should be valued as actually in use rather than at what the property would bring for some other use in case the city should build its own plant.[1]

[1] Denver v. Denver Union Water Co., 246 U. S. 178 [1918].

"If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged." [1] In valuing for rate-fixing the plant of a public service corporation, bonds and stocks issued for its purchase and construction in excess of its cost by and to parties interested in and controlling the company, afford neither measure nor guide.[2]

[1] Smyth v. Ames, 169 U. S. 466, 544–45 [1898].
[2] Knoxville v. Knoxville Water Co., 212 U. S. 1 [1909].

In determining the reproduction value of the plant of a public utility as a basis for fixing its rates, there should be a reasonable allowance for organization and other overhead charges that necessarily would be incurred in reproducing it; and the amount of such allowance is a matter of estimate not dependent on proof of actual expenditures originally made to defray such charges.[1] Hypothetical brokerage fees need not be included.[2]

[1] Ohio Utilities Co. v. Public Utilities Commission, 267 U. S. 359 [1925].
[2] Galveston Electric Co. v. Galveston, 258 U. S. 388 [1922].

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RAILROADS.*

Powers of States.

IN GENERAL.—"The elementary proposition that railroads from the public nature of business by them carried on and the interest which the public have in their operation are subject, as to their State business, to State regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."[1]

[1] Atlantic Coast Line R. Co. *v.* North Carolina Corp. Commission, 206 U. S. 1, 19 [1907], citing Chicago, B. & Q. R. Co. *v.* Cutts, 94 U. S. 155 [1877]; Peik *v.* Chicago & N. W. R. Co., 94 U. S. 164 [1877]; Chicago, M. & St. P. R. Co. *v.* Ackley, 94 U. S. 179 [1877]; Winona & St. P. R. Co. *v.* Blake, 94 U. S. 180 [1877]; Stone *v.* Wisconsin, 94 U. S. 181 [1877]; Ruggles *v.* Illinois, 108 U. S. 526 [1883]; Illinois C. R. Co. *v.* Illinois, 108 U. S. 541 [1883]; Stone *v.* Farmers' Loan & T. Co., 116 U. S. 307 [1886]; Stone *v.* Illinois C. R. Co., 116 U. S. 347 [1886]; Stone *v.* New Orleans & N. E. R. Co., 116 U. S. 352 [1886]; Dow *v.* Beidelman, 125 U. S. 680 [1888]; Charlotte, C. & A. R. Co. *v.* Gibbes, 142 U. S. 386 [1892]; Chicago & G. T. R. Co. *v.* Wellman, 143 U. S. 339 [1892]; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 665 [1896]; Louisville & N. R. Co. *v.* Kentucky, 161 U. S. 677, 695 [1896]; Wisconsin, M. & P. R. Co. *v.* Jacobson, 179 U. S. 287 [1901]; Minneapolis & St. L. R. Co. *v.* Minnesota ex rel. Railroad & W. Commission, 186 U. S. 257 [1902]; Minneapolis & St. L. R. Co. *v.* Minnesota ex rel Railroad & W. Commission, 193 U. S. 53 [1904]; Chicago, B. & Q. R. Co. *v.* Illinois ex rel. Grimwood, 200 U. S. 561, 584 [1906]; Atlantic Coast Line R. Co. *v.* Florida ex rel. Ellis, 203 U. S. 256 [1906]; Seaboard Air Line R. Co. *v.* Florida ex rel. Ellis, 203 U. S. 261 [1906]. *See also* Mississippi R. Commission *v.* Illinois C. R. Co., 203 U. S. 335 [1906]; Prentis *v.* At antic Coast Line Co., 211 U. S. 210 [1908]; Louisville & N. R. Co. *v.* Garrett, 231 U. S. 298 [1914]; Mississippi R. Commission *v.* Mobile & O. R. Co., 244 U. S. 388 [1917]; Denver & R. G. R. Co. *v.* Denver, 250 U. S. 241 [1919].

GENERAL LIMITATIONS.—"As the public power to regulate railways and the private right of ownership of such property coexist and do not the one destroy the other, it has been settled that the right of ownership of railway property like other property rights finds protection in constitutional guarantees, and, therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment."[1]

[1] Atlantic Coast Line R. Co. *v.* North Carolina Corp. Commission, 206 U. S. 1, 20 [1907], citing Stone *v.* Farmers' Loan & T. Co., 116 U. S. 307, 331 [1886]; Chicago, M. & St. P. R. Co. *v.* Minnesota ex rel. Railroad & W. Commission, 134 U. S. 418, 455 [1890]; Chicago & G. T. R. Co. *v.* Wellman, 143 U. S. 339, 344 [1892]; Reagan *v.* Farmers Loan & T. Co. (No. 1), 154 U. S. 362, 399 [1894]; St. Louis & S. F. R. Co. *v.* Gill, 156 U. S. 649, 657 [1895]; Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226, 241

* *See also* pp. 156, 177, 660, 966, 991.

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[1897]; Smyth *v.* Ames, 169 U. S. 466, 512 [1898]; Chicago, M. & St. P. R. Co. *v.* Tompkins, 176 U. S. 167, 172 [1900]; Minneapolis & St. L. R. Co. *v.* Minnesota ex rel. Railroad & W. Commission, 186 U. S. 257 [1902]; Chicago, B. & Q. R. Co. *v.* Illinois ex rel. Grimwood, 200 U. S. 561, 592 [1906]. *See also* Missouri P. R. Co. *v.* Nebraska, 217 U. S. 196 [1910]; Nashville, C. & St. L. R. Co. *v.* Walters, 294 U. S. 405, 415 [1935].

An order of a railroad commission requiring a railroad company to expend money and use its property in a specified manner is not a mere administrative order, but is a taking of property; to be valid there must be more than mere notice and opportunity to be heard; the order itself must be justified by public necessity and not unreasonable or arbitrary. The hearing which must precede an order taking property must not be a mere form, but one which gives the owner the right to secure and present material evidence; but a State statute which gives the privilege of introducing such evidence, affords compulsory process, and gives the right of cross-examination, does not deny due process by not affording sufficient opportunity to be heard. The hearing is sufficient if the person whose property is to be taken is put on notice as to the order to be made, and given opportunity to show that it is unjust or unreasonable. An opportunity given to test, by review in the courts, the lawfulness of an order made by a commission does not deny due process because on such review new evidence (other than newly discovered or necessary on account of surprise or mistake) is not allowed, and because the court must act on the evidence already taken, if the court is not bound by the findings, and the party affected had the right on the original hearing to introduce evidence as to all material points.[1]

[1] Washington ex rel. Oregon R. & Nav. Co. *v.* Fairchild, 224 U. S. 510 [1912].

A mere resolution of a city council directing a street-railway company to remove its tracks, poles, and wires from the streets, and upon failure of the company to comply, instructing the city solicitor to take steps for its enforcement, does not deprive the company of property without due process of law as the resolution merely contemplates a suit in court by the solicitor in case of disobedience.[1]

[1] Des Moines *v.* Des Moines City R. Co., 214 U. S. 179 [1909].

Compulsory Expenditures.

IN GENERAL.—The enforcement of uncompensated obedience to a regulation under the police power for the public health or safety is not an unconstitutional taking of property without compensation or without due process of law.[1]

[1] Atlantic Coast Line R. Co. *v.* Goldsboro, 232 U. S. 548, 558 [1914], citing Chicago, B. & Q. R. *v.* Chicago, 166 U. S. 226, 255 [1897]; New Orleans Gaslight Co. *v.* Drainage Commissioners, 197 U. S. 453, 462 [1905]; Chicago, B. & Q. R. Co., *v.* Illinois ex rel. Grimwood, 200 U. S. 561, 591, 592 [1906]. *See also* New Orleans Public Service, Inc. *v.* New Orleans, 281 U. S. 682 [1930].

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A public utility cannot, because of loss, escape obligations voluntarily assumed.[1] The fact that a company must make a large expenditure in re-laying its tracks does not render an order void; nor does the expected deficit from operation affect its validity.[2] A railway may be compelled to continue the service of a branch or part of a line, although the operation involves a loss.[3] This is true even where the system as a whole fails to earn a fair return upon the value of the property. But where a company is at liberty to surrender its franchise and discontinue operations, it cannot be compelled to continue to operate its system at a loss.[4]

[1] Milwaukee Elec. R. & Light Co. v. Wisconsin ex rel. Milwaukee, 252 U. S. 100 [1920].

[2] Ft. Smith Light & Traction Co. v. Bourland, 267 U. S. 330 [1925]. *See also* Phoenix R. Co. v. Geary, 239 U. S. 277 [1915].

[3] Missouri P. R. Co. v. Kansas ex rel. Taylor, 216 U. S. 262 [1910]; Chesapeake & O. R. Co. v. Public Service Commission, 242 U. S. 603 [1917].

[4] Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396 [1920]; Bullock v. Florida ex rel. Railroad Commission, 254 U. S. 513 [1921]; Railroad Commission v. Eastern Texas R. Co., 264 U. S. 79 [1924]; Ft. Smith Light & Traction Co. v. Bourland, 267 U. S. 330 [1925]; Georgia Power Co. v. Decatur, 281 U. S. 505 [1930]; Broad River Power Co. v. South Carolina ex rel. Daniel, 281 U. S. 537 [1930].

Grade Crossings.—The rule has long been settled that, ordinarily, a State may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof, as it deems appropriate,[1] even though the improvement benefits commercial highway users who make no contribution towards the cost.[2]

[1] Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, 413 [1935], citing New York & N. E. R. Co. v. Bristol, 151 U. S. 556 [1894]; Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336 [1910]; Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430 [1914]; Missouri P. R. Co. v. Omaha, 235 U. S. 121 [1914]; Erie R. Co. v. Public Utility Comrs., 254 U. S. 394 [1921]; Lehigh Valley R. Co. v. Public Utility Comrs., 278 U. S. 24 [1928].

[2] Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, 430 [1935], citing Chicago B. & Q. R. Co. v. Nebraska, ex rel. Omaha, 170 U. S. 57, 75 [1898]; Missouri P. R. Co. v. Omaha, 235 U. S. 121 [1914].

A State may under some circumstances impose upon a railroad the cost of the grade separation for a new highway, but "in every case in which this Court has sustained the imposition, the new highway was an incident of the growth or development of the municipality in which it was located." [1]

[1] Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, 430–431 [1935], citing Northern P. R. Co. v. Minnesota, 208 U. S. 583, 592 [1908]; Cincinnati, L. & W. R. Co. v. Connersville, 218 U. S. 336 [1910]; Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430 [1914]; Erie R. Co. v. Public Utility Comrs., 254 U. S. 394, 409 [1921].

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The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it.[1] And a State cannot put railroad companies to greater expense in the abolition of grade crossings than is reasonably necessary to avoid their dangers to the public.[2]

[1] Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, 428–429 [1935], citing Missouri P. R. Co. v. Nebraska ex rel. Board of Transportation, 164 U. S. 403 [1896]; Missouri P. R. Co. v. Nebraska, 217 U. S. 196 [1910]; Great Northern R. Co. v. Minnesota ex rel. Railroad & Warehouse Commission, 238 U. S. 340 [1915]; Great Northern R. Co. v. Cahill, 253 U. S. 71 [1920]; Chicago, St. P., M. & O. R. Co. v. Holmberg, 282 U. S. 162, 167 [1930].

[2] Lehigh Valley R. Co. v. Public Utility Comrs., 278 U. S. 24 [1928].

The failure of a State statute to provide for notice or hearing on the existence of the necessity for eliminating a grade crossing and to provide any means of reviewing an officer's decision therein, is a denial of due process of law.[1] So, too, it is unlawful for a court to refuse to consider whether the facts relied upon by a railway establish as arbitrary and unreasonable the imposition upon it of part of the cost of an underpass.[2]

[1] Southern Railway Co. v. Virginia, 290 U. S. 190 [1933].

[2] Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405 [1935].

Other Examples.—Regulations have been upheld which required railroads to repair viaducts over which they operated,[1] to construct a bridge or provide means for passing water for drainage, etc., through their embankment,[2] or require a street railway to sprinkle that part of the street occupied by it.[3]

[1] Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57 [1898].

[2] Chicago, B. & Q. R. Co. v. Illinois ex rel. Grimwood, 200 U. S. 561 [1906]; Chicago & A. R. Co. v. Transbarger, 238 U. S. 67 [1915]; Lake Shore & M. S. R. Co. v. Clough, 242 U. S. 375 [1917].

[3] Pacific Gas & E. Co. v. Police Ct., 251 U. S. 22 [1919].

But a requirement that a railroad pay part of the cost of an underground cattle-pass, not as a safety measure but merely to save the farmer from inconvenience attendant upon the use of an existing grade crossing otherwise adequate takes the railroad's property for a private use and without due process of law.[1]

[1] Chicago, St. P., M. & O. R. Co. v. Holmberg, 282 U. S. 162 [1930].

Safety Regulations.

The following safety regulations with reference to railroads have been upheld—prohibition on operation in certain street;[1] regulating operations, speed, etc., in business sections;[2] requiring construction of sidewalk across right of way[3] or removal of track crossing a thoroughfare;[4] requiring presence of flagman at crossing notwithstanding

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automatic devices might be cheaper and better;[5] compulsory examination of employees for color-blindness, a fee being exacted from the railroad;[6] full crews on certain trains;[7] specifications of a type of locomotive headlights;[8] safety appliance regulations;[9] prohibition on heating of passenger cars by stoves or furnaces inside or suspended from the cars.[10]

[1] Richmond, F. & P. R. Co. *v.* Richmond, 96 U. S. 521 [1878].
[2] Atlantic Coast Line R. Co. *v.* Goldsboro, 232 U. S. 548 [1914].
[3] Great Northern R. Co. *v.* Minnesota ex rel. Clara City, 246 U. S. 434 [1918].
[4] Denver & R. G. R. Co. *v.* Denver, 250 U. S. 241 [1919].
[5] Nashville, C. & St. L. R. Co. *v.* White, 278 U. S. 456 [1929].
[6] Nashville, C. & St. L. R. Co. *v.* Alabama, 128 U. S. 96 [1888].
[7] Chicago, R. I. & P. R. Co. *v.* Arkansas, 219 U. S. 453 [1911]; St. Louis, I. M. & S. R. Co. *v.* Arkansas, 240 U. S. 518 [1916]; Missouri P. R. Co. *v.* Norwood, 283 U. S. 249 [1931].
[8] Atlantic Coast Line R. Co. *v.* Georgia, 234 U. S. 280 [1914].
[9] Erie R. Co. *v.* Solomon, 237 U. S. 427 [1915].
[10] New York, N. H. & H. R. Co. *v.* New York, 165 U. S. 628 [1897].

A railroad company by constructing its road gains no vested right to the retention of a general rule of law, then in existence, laying the expense of installing and maintaining required safety devices, where one railroad exercises its right to cross another, upon the company making the crossing; and it is not deprived of its property without due process by a change of the rule under which it is required to share such expense equally with a junior company.[1]

[1] Northern P. R. Co. *v.* Puget Sound & W. H. R. Co., 250 U. S. 332 [1919].

The enforcement of a city ordinance requiring each street car to be operated by a motorman and a conductor, as against a company seeking to substitute, at less cost, cars run each by one man with the aid of automatic safety and other operating devices, cannot be declared an arbitrary and unreasonable exercise of police power in the absence of a clear demonstration that the substitutes, thus operated, would prove as safe and convenient for the public as cars operated by two men.[1]

[1] Sullivan *v.* Shreveport, 251 U. S. 169 [1919].

Service.

In General.—"The principle that the State, directly or through an authorized commission, may require railroad companies to provide reasonably adequate and suitable facilities for the convenience of the communities served by them, has frequently been applied." [1]

[1] Atchison, T. & S. F. R. Co. *v.* Railroad Commission, 283 U. S. 380, 394–395 [1931], citing Wisconsin, M. & P. R. Co. *v.* Jacobson, 179 U. S. 287, 296, 301 [1900]; Atlantic Coast Line R. Co. *v.* North Carolina Corp. Commission, 206 U. S. 1, 26, 27 [1907]; Missouri P. R. Co. *v.* Kansas ex rel. Taylor, 216 U. S. 262, 279 [1910]; Seaboard Air Line R. Co. *v.* Railroad

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Commission, 240 U. S. 324, 327 [1916]; Mississippi R. Commission *v.* Mobile & O. R. Co., 244 U. S. 388, 390, 391 [1917]; Erie R. Co. *v.* Public Utility Comrs., 254 U. S. 394, 409, 410 [1921]. *See also* Chesapeake & O. R. Co. *v.* Public Service Commission, 242 U. S. 603, 607 [1917]; Railroad Commission *v.* Eastern Texas R. Co., 264 U. S. 79, 85–86 [1924].

Railroad carriers may be compelled to establish stations at proper places for the convenience of their patrons,[1] stop all their intrastate trains at county seats,[2] run a regular passenger train instead of a mixed passenger and freight train,[3] or operate passenger service on a branch line theretofore exclusively devoted to carrying freight.[4]

[1] Minneapolis & St. L. R. Co. *v.* Minnesota ex rel. Railroad & W. Commission, 193 U. S. 53 [1904]; Atchison, T. & S. F. R. Co. *v.* Railroad Commission, 283 U. S. 380 [1931].

[2] Gladson *v.* Minnesota, 166 U. S. 427 [1897].

[3] Missouri P. R. Co. *v.* Kansas ex rel. Taylor, 216 U. S. 262 [1910].

[4] Chesapeake & O. R. Co. *v.* Public Service Commission, 242 U. S. 603 [1917].

In passing upon the reasonableness of a State order requiring transportation service, the fact that a pecuniary loss will result to the carrier is not the only circumstance to be considered; the nature and extent of the carrier's intrastate business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered, are to be considered also.[1]

[1] Chesapeake & O. R. Co. *v.* Public Service Commission, 242 U. S. 603 [1917].

A State requirement that railroads maintain cattle scales to facilitate trading in cattle has no substantial relation to transportation, and therefore violates due process of law.[1]

[1] Great Northern R. Co. *v.* Minnesota ex rel. Railroad & Warehouse Commission, 238 U. S. 340 [1915]; Great Northern R. Co. *v.* Cahill, 253 U. S. 71 [1920].

The prohibition on the letting down of an unengaged upper berth while the lower berth was occupied is an arbitrary taking of property without due process of law.[1]

[1] Chicago, M. & St. P. R. Co. *v.* Wisconsin, 238 U. S. 491 [1915].

INTERCOMPANY RELATIONS.—"Since the decision in Wisconsin, etc., R. R. *v.* Jacobson, 179 U. S. 287, there can be no doubt of the power of a State, acting through an administrative body, to require railroad companies to make track connection. But manifestly that does not mean that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in city, town, and country, regardless of the amount of business to be done, or the number of persons who may utilize the connection if built. The

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question in each case must be determined in the light of all the facts, and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier. For while the question of expense must always be considered (Chicago, etc., R. R. *v.* Thompkins, 176 U. S. 167, 174), the weight to be given that fact depends somewhat on the character of the facilities sought. If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' But even then the matter of expense is 'an important criteria to be taken into view in determining the reasonableness of the order.' Atlantic Coast Line R. R. *v.* North Carolina Commission, 206 U. S. 1, 27; Missouri Pacific Ry. *v.* Kansas, 216 U. S. 262. Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the court must consider all the facts, the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier. On a consideration of such and similar facts the question of public necessity and the reasonableness of the order must be determined. This was done in Wisconsin R. R. *v.* Jacobson, in which for the first time, it was decided that a State commission might compel two competing interstate roads to connect their tracks." [1]

[1] Washington ex rel. Oregon R. & N. Co. *v.* Fairchild, 224 U. S. 510, 528–529 [1912]. *See also* Michigan C. R. Co. *v.* Michigan Railroad Commission, 236 U. S. 615 [1915]; Seaboard Air Line R. Co. *v.* Railroad Commission, 240 U. S. 324, 327 [1916].

An order requiring two railroads owning a terminal to desist from making separate switching charges and thus discriminating against shippers on the tracks of a third company, all of whose stock was owned by the first two, does not deprive them of property without compensation or due process of law.[1] It is not unreasonable or arbitrary to require a railroad to desist from demanding freight in advance on merchandise received from one carrier while it accepts merchandise of the same character at the same point from another carrier without such prepayment.[2]

[1] Chicago, M. & St. P. Co. *v.* Minneapolis Civic & Commerce Asso., 247 U. S. 490 [1918].

[2] Wadley Southern R. Co. *v.* Georgia, 235 U. S. 651 [1915].

The duty of a carrier to accept goods tendered at its station may not be extended to require it to accept cars offered by competing roads at arbitrary points near its terminus for the purpose of using its terminal station, nor may the carrier be required to deliver its cars to connecting carriers without providing adequate protection for their

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return or compensation for their use.[1] But a carrier may be compelled to interchange its freight cars with other carriers under reasonable conditions [2] and accept, for further reshipment over its lines to points within the State, cars already loaded and in suitable condition.[3] An order requiring certain railroads doing an interstate business to use their tracks in Detroit for the interchange of intrastate traffic, was sustained as being within the regulating power of the railroad commission.[4]

[1] Louisville & N. R. Co. v. Central Stock Yards Co., 212 U. S. 132 [1909].

[2] Michigan C. R. Co. v. Michigan Railroad Commission, 236 U. S. 615 [1915].

[3] Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334 [1914].

[4] Grand Trunk R. Co. v. Michigan Railroad Commission, 231 U. S. 457 [1914].

SPURS AND SIDETRACKS.—The requirement that service rendered by a sidetrack should not be discontinued without notice and hearing is clearly within the police power, and the State may require a railroad at its own expense to restore a siding, used principally by a particular plant but available generally as a public track.[1] The mere fact that the switching may not be profitable by itself cannot be held to be a confiscation of property.[2]

[1] Chicago & N. R. Co. v. Ochs, 249 U. S. 416 [1919]; Lake Erie & W. R. Co. v. State Public Utilities Commission ex rel. Cameron, 249 U. S. 422 [1919]; Western & A. R. Co. v. Georgia Pub. Serv. Commission, 267 U. S. 493 [1925].

[2] Western A. R. Co. v. Georgia Pub. Serv. Commission, 267 U. S. 493 [1925].

It is beyond the police power of a State to compel a railroad to put in switches at its own expense on the application of the owners of any elevator erected within a specified limit.[1]

[1] Missouri P. R. Co. v. Nebraska, 217 U. S. 196 [1910].

PENALTIES AND LIABILITIES.

In General.

A State has power to impose penalties sufficiently heavy to secure obedience to orders of public utility commissions after they have been found lawful or after the parties affected have had ample opportunity to test the validity of administrative orders and failed so to do. A party affected by a statute passed without his having an opportunity to be heard is entitled to a safe and adequate judicial review of the legality thereof. It is a denial of due process of law if such review can be effected by appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality than to ask the protection of the law. Where, after reasonable notice of the making of an administrative order, a carrier fails to resort to the safe, adequate, and available remedy of testing its validity

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in the courts, and makes an unsuccessful defense by attacking such validity when sued for the penalty, it is subject to the penalty.[1]

[1] Wadley Southern R. Co. v. Georgia, 235 U. S. 651 [1915].

The cattle train speed act of Nebraska establishing a rate of speed on branch lines within the State and imposing a penalty of $10 per car per hour, is not unconstitutional under the Fourteenth Amendment as depriving the railroad company of its property without due process of law because it fixes an arbitrary amount as liquidated damages.[1]

[1] Chicago, B. & Q. R. Co. v. Cram, 228 U. S. 70 [1913].

Imposition of a penalty of $6,300 upon a telephone company for suspending the service of a patron in arrears takes the property of the company without due process of law.[1]

[1] Southwestern Teleg. & Teleph. Co. v. Danaher, 238 U. S. 482 [1915].

Penalty for Overcharging.

While it may be within the power of the State to impose double or treble damages on a carrier for overcharging transportation rates, it is beyond its power to impose a fixed amount as liquidated damages in every case regardless of, and as a general rule many times in excess of, the actual damages. To do so would deprive the carrier of its property without due process of law in violation of the Fourteenth Amendment; and therefore that part of a statute establishing maximum rates for transportation of oil, gasoline, etc., which fixes $500 as liquidated damages in favor of the shipper for any excess charge regardless of the amount thereof, is so arbitrary and oppressive as to render it unconstitutional under the Fourteenth Amendment as taking the property of the carriers without due process of law.[1]

[1] Missouri P. R. Co. v. Tucker, 230 U. S. 340 [1913].

However, the penalties prescribed by a statute giving to a passenger aggrieved by a carrier's exaction of a fare in excess of the prescribed rate the right to recover in a civil suit not less than $50 nor more than $300 and costs of suit, including a reasonable attorney's fee, cannot be said to be so severe and oppressive as to be wholly disproportionate to the offense or obviously unreasonable, and hence to amount to a denial of due process of law.[1]

[1] St. Louis, I. M. & S. R. Co. v. Williams, 251 U. S. 63 [1919].

Penalty for Failure to Erect Fences, Etc.

A statute requiring railroads to erect and maintain fences and cattle guards and making them liable in double amount of damages occasioned by their failure to so maintain them is not unconstitutional.[1]

[1] Missouri P. R. Co. v. Humes, 115 U. S. 520 [1885], Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 29 [1889].

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Penalty for Failure to Settle Claims.

A State may impose upon a railway double damages and an attorney's fee for failure to pay, within a reasonable time after demand, the amount claimed by an owner for stock killed, when a jury subsequently awards the amount claimed in an action thereon,[1] but such a statute is unconstitutional if applied to claims where the jury awards less than the amount demanded.[2] And a statute is also bad which imposes double liability where a jury awards more than the railroad offers to pay.[3]

[1] Kansas City Southern R. Co. *v.* Anderson, 233 U. S. 325 [1914].
[2] St. Louis, I. M. & S. R. Co. *v.* Wynne, 224 U. S. 354 [1912].
[3] Chicago, M. & St. P. R. Co. *v.* Polt, 232 U. S. 165 [1914]; Chicago, M. & St. P. R. Co. *v.* Kennedy, 232 U. S. 626 [1914].

A State statute imposing a penalty on common carriers for failure to settle claims for lost or damaged freight in shipment within the State within a reasonable specified period is not unconstitutional as depriving the carrier of its property without due process of law as to claimants presenting claims for amounts actually due.[1]

[1] Yazoo & M. V. R. Co. *v.* Jackson Vinegar Co., 226 U. S. 217 [1912]. *See also* Chicago & N. W. R. Co. *v.* Nye Schneider Fowler Co., 260 U. S. 35 [1922]; Southern R. Co. *v.* Clift, 260 U. S. 316 [1922].

Liability of Initial or Delivering Carrier.

A State statute making the initial carrier[1] or delivering carrier[2] liable for nondelivery of goods, is not unconstitutional.

[1] Chicago & N. W. Co. *v.* Nye Schneider Fowler Co., 260 U. S. 35 [1922].
[2] Atlantic Coast Line R. Co. *v.* Glenn, 239 U. S. 388 [1915].

Liability for Fire.

A statute of a State, which enacts that every railroad corporation owning or operating a railroad in the State, shall be responsible in damages to the owner of any property injured or destroyed by fire communicated, directly or indirectly, by locomotive engines in use upon its railroad; and which provides that it shall have an insurable interest in the property upon the route of its railroad, and may procure insurance thereon in its own behalf; does not violate the Constitution of the United States as depriving the railroad company of its property without due process of law.[1]

[1] St. Louis & S. F. R. Co. *v.* Mathews, 165 U. S. 1 [1897].

Presumption of Negligence.

A State statute which, upon the mere fact of a collision between a railway train and a vehicle at a highway grade crossing resulting in death, raises a presumption that the railway company and its employees were negligent in the particulars alleged in the complaint (even where the allegations are conflicting), and that every act or omission so alleged was the proximate cause of the death; which makes the

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company liable unless it shows due care in respect of every matter alleged against it, and permits the jury to consider and weigh the presumptions as evidence against the testimony of the company's witnesses tending affirmatively to prove due care, is unreasonable and arbitrary and violates the due process clause of the Fourteenth Amendment.[1]

[1] Western & A. R. Co. *v.* Henderson, 279 U. S. 639 [1929].

But a statute making derailment,[1] or failure to give warning signals at grade crossings,[2] prima facie evidence of negligence does not deprive a railroad of its property without due process of law.

[1] Mobile, J. & K. C. R. Co. *v.* Turnipseed, 219 U. S. 35 [1910].
[2] Atlantic Coast Line R. Co. *v.* Ford, 287 U. S. 502 [1933].

Removal of Weeds.

A statute requiring railroads to cut down and destroy noxious weeds on lands occupied by them and providing a penalty of $25 in case of default, to be recovered in a civil action by any person feeling himself aggrieved, is not violative of the due process clause of the Fourteenth Amendment, as applied to a case in which the lands in question are part of a railroad right-of-way, and the person feeling himself aggrieved is the owner of lands contiguous thereto who does not appear to have been guilty of similar neglect.[1]

[1] Chicago T. H. & S. E. R. Co. *v.* Anderson, 242 U. S. 283 [1916]. *See also* Missouri, K. & T. R. Co. *v.* May, 194 U. S. 267 [1904].

MOTOR CARRIERS.

In limiting the use of State highways for intrastate transportation for hire, the legislature reasonably may provide that carriers who have furnished adequate, responsible, and continuous service over a given route from a specified date in the past shall be entitled to licenses as a matter of right, but that the licensing of those whose service over the route began later than the date specified shall depend upon the public convenience and necessity.[1]

[1] Stanley *v.* Public Utilities Commission, 295 U. S. 76 [1935].

Statutes imposing registration fees on intrastate motor carriers for hire do not violate the due process clause simply because such fees are in addition to license taxes imposed by cities for the use of city streets.[1]

[1] Carley & Hamilton *v.* Snook, 281 U. S. 66 [1930].

A statute requiring private contract carriers to obtain a permit based on the efficiency of existing common carrier service and authorizing the fixing of minimum rates not less than those prescribed for common carriers, as a means of conserving highways, is valid,[1] but laws in express terms converting private carriers into common carriers,[2] or subjecting them to the burdens and regulations of common

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carriers although not in express terms declaring them to be common carriers,[3] are violative of due process.

[1] Stephenson v. Binford, 287 U. S. 251 [1932].
[2] Michigan Pub. Utilities Commission v. Duke, 266 U. S. 570 [1925].
[3] Frost v. Railroad Commission, 271 U. S. 583 [1926]; Smith v. Cahoon, 283 U. S. 553 [1931].

COMPULSORY EXPENDITURES BY UTILITIES OTHER THAN RAILROADS.

Notwithstanding a State's inability to require a gas company to make large expenditures for the extension of its mains and service into near communities when the necessary result will be to compel the company to use its property for the public convenience without just compensation, the Court will not substitute its own judgment for the determination of a commission as to what extensions are reasonable, but it will decide whether the power to regulate was so used as to exceed the exercise of reasonable judgment and amount to an infringement of the right of ownership.[1]

[1] New York ex rel. Woodhaven Gas Light Co. v. Public Serv. Commission, 269 U. S. 244 [1925]. *See also* New York ex rel. New York & O. Gas Co. v. McCall, 245 U. S. 345 [1917].

A State may require a gas company to continue to use present facilities to supply an existing need so long as it continues to do business in the State.[1]

[1] United Fuel Gas Co. v. Railroad Commission, 278 U. S. 300, 308–309 [1929].

A water company may be compelled to furnish connections at its own expense to one residing on an ungraded street in which it has voluntarily laid its lines, where it appears that such was the rule prior to granting of the company's charter.[1]

[1] Consumer's Co. v Hatch, 224 U. S. 148 [1912].

The changing of the location of gas pipes at the expense of the gas company to accommodate a system of drainage does not amount to deprivation of property without due process of law.[1] But a statute authorizing the highway commission to require a pipe-line company at its own expense to relocate pipe and telephone lines located on a private right-of-way, is beyond the police power, and is invalid.[2]

[1] New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453 [1905].
[2] Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U. S. 613 [1935].

A State may require a railroad bridge company to construct a roadway for vehicles and a pathway for pedestrians, where there is nothing to show that the addition to the existing structure will not yield a reasonable return.[1]

[1] International Bridge Co. v. New York, 254 U. S. 126 [1920].

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The requirement that a road be kept in repair as a condition to taking tolls, and the opening of the gates of such a road for failure to observe such condition, is not a denial of due process of law.[1]

[1] Norfolk & S. Turnpike Co. *v.* Virginia, 225 U. S. 264 [1912].

Eminent Domain.*

IN GENERAL.

The right of every State to exercise the power of eminent domain as to every description of property is an inherent power without which it cannot perform its functions; the power was not surrendered by the States to the United States or affected by the Federal Constitution, except that it must be exercised with due process of law and on compensation being made.[1] The power may be conferred on municipalities,[2] public utilities,[3] or even on individuals,[4] provided it be exercised for a public purpose.

[1] Cincinnati *v.* Louisville & N. R. Co., 223 U. S. 390 [1912].
[2] Sweet *v.* Rechel, 159 U. S. 380 [1895].
[3] Offield *v.* New York, N. H. & H. R. Co., 203 U. S. 372 [1906].
[4] Clark *v.* Nash, 198 U. S. 361 [1905]; Strickley *v.* Highland Boy Gold Min. Co., 200 U. S. 527 [1906].

It is no longer an open question in this country that the mode of exercising the right of eminent domain, in the absence of any provision in the organic law prescribing a contrary course, is within the discretion of the legislature; if the purpose be a public one, and just compensation be paid or tendered to the owner for the property taken.[1]

[1] Secombe *v.* Milwaukee & St. P. R. Co., 23 Wall. 108, 117–118 [1874].

The power of eminent domain extends to tangibles and intangibles, including choses in action, contracts, and charters.[1]

[1] Cincinnati *v.* Louisville & N. R. Co., 223 U. S. 390 [1912]. *See also* Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685 [1897]; Offield *v.* New York, N. H. & H. R. Co., 203 U. S. 372 [1906].

The Fourteenth Amendment knows no difference between eminent domain for maintaining an existing telegraph line and establishing a new one.[1]

[1] Louisville & N. R. Co. *v.* Western U. Teleg. Co., 250 U. S. 363 [1919].

The right of eminent domain may not be contracted away or otherwise surrendered.[1]

[1] Pennsylvania Hospital *v.* Philadelphia, 245 U. S. 20 [1917]; Galveston Wharf Co. *v.* Galveston, 260 U. S. 473 [1923].

PUBLIC USE.

"It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private prop-

* *See also* p. 347.

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erty, the question what is a public use is a judicial one. In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgment of State courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution." [1]

[1] Cincinnati *v.* Vester, 281 U. S. 439, 446 [1930], citing Fallbrook Irrig. District *v.* Bradley, 164 U. S. 112, 159 [1896]; Missouri P. R. Co. *v.* Nebraska ex rel. Board of Transportation, 164 U. S. 403, 417 [1896]; Madisonville Traction Co. *v.* St. Bernard Min. Co., 196 U. S. 239, 252 [1905]; Clark *v.* Nash, 198 U. S. 361, 369 [1905]; Strickley *v.* Highland Boy Gold Min. Co., 200 U. S. 527, 531 [1906]; Hairston *v.* Danville & W. R. Co., 208 U. S. 598, 606 [1908]; Sears *v.* Akron, 246 U. S. 242, 251 [1918]; Rindge Co. *v.* Los Angeles County, 262 U. S. 700, 705 [1923]; Old Dominion Land Co. *v.* United States, 269 U. S. 55, 66 [1925].

It is not essential that an entire community or even any considerable portion should directly enjoy or participate in any improvement in order to constitute a public use within the law of eminent domain; and not only present demands of the public, but those which may be fairly anticipated in the future, may be considered.[1]

[1] Rindge Co. *v.* Los Angeles County, 262 U. S. 700 [1923]. *See also* Strickley *v.* Highland Boy Gold Min. Co., 200 U. S. 527 [1906].

The following takings have been held to be for public and not private purposes: draining and raising the grade of land,[1] water supply system,[2] enlargement by individual of ditch of another to obtain water for irrigation of his land,[3] railroads, etc., for working of mines,[4] spur railroad track to private industry,[5] connection of two lakes within limits of recreation park,[6] water power,[7] electric power for street railway in excess of that actually necessary,[8] places of historical interest,[9] land for exchange with a railroad for a portion of its right-of-way, required in widening a highway.[10]

[1] Sweet *v.* Rechel, 159 U. S. 380 [1895].
[2] Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685 [1897].
[3] Clark *v.* Nash, 198 U. S. 361 [1905].
[4] Strickley *v.* Highland Boy Gold Min. Co., 200 U. S. 527 [1906].
[5] Hairston *v.* Danville & W. R. Co., 208 U. S. 598 [1908]; Union Lime Co. *v.* Chicago & N. W. R. Co., 233 U. S. 211 [1914].
[6] Chicago, M. & St. P. R. Co. *v.* Minneapolis, 232 U. S. 430 [1914].
[7] Mt. Vernon-Woodberry Cotton Duck Co. *v.* Alabama Interstate Power Co., 240 U. S. 30 [1916].
[8] Hendersonville Light and P. Co. *v.* Blue Ridge Interurban R. Co., 243 U. S. 563 [1917].
[9] Roe *v.* Kansas ex rel. Smith, 278 U. S. 191, 193 [1929].
[10] Dohany *v.* Rogers, 281 U. S. 362 [1930].

A statute authorizing any person to erect and maintain on his own land a water mill and mill dam upon and across any stream not

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navigable does not, as to owners of overflowed lands who are paid damages assessed in a judicial proceeding, deprive them of their property without due process of law.[1] The flooding of lands consequent upon the private erection of a dam under the authority of legislation enacted in the exercise of the police power to subserve the drainage of low lands does not amount to a taking which requires compensation to be made to the owner in order to afford the due process of law guaranteed by the Fourteenth Amendment, when such flooding can be prevented by raising the height of the dikes around the lands.[2]

[1] Head *v.* Amoskeag Mfg. Co., 113 U. S. 9 [1885]; Otis Co. *v.* Ludlow Mfg. Co., 201 U. S. 140 [1906].

[2] Manigault *v.* Springs, 199 U. S. 473 [1905].

The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and so a statute by which a board is authorized to require a railroad corporation, which has permitted the erection of two elevators by private persons on its right-of-way, to grant upon like terms and conditions a location to other private persons for the purpose of erecting a third elevator is a taking of property for a private use, and is unconstitutional.[1]

[1] Missouri P. R. Co. *v.* Nebraska ex rel. Board of Transportation, 164 U. S. 403 [1896].

It is within the power of a State to provide for condemnation of minority shares of stock in railroad and other corporations where the majority of the shares are held by another railroad if public interest demands.[1]

[1] Offield *v.* New York, N. H. & H. R. Co., 203 U. S. 372 [1906].

NECESSITY OF TAKING.

When the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate; they are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.[1] It is no longer open to question in the Supreme Court that the legislature may confer upon a municipality the authority to determine such necessity for itself.[2]

[1] Bragg *v.* Weaver, 251 U. S. 57, 58, 59 [1919], citing Mississippi & R. River Boom Co. *v.* Patterson, 98 U. S. 403, 406 [1879]; Backus (A.) Jr. & Sons *v.* Fort Street Union Depot Co., 169 U. S. 557, 568 [1898]; Adirondack R. Co. *v.* New York, 176 U. S. 335, 349 [1900]; Sears *v.* Akron, 246 U. S. 242, 251 [1918]. *See also* Joslin Mfg. Co. *v.* Providence, 262 U. S. 668, 678 [1923]; Rindge Co. *v.* Los Angeles County, 262 U. S. 700 [1923]; North Laramie Land Co. *v.* Hoffman, 268 U. S. 276 [1925].

[2] Joslin Mfg. Co. *v.* Providence, 262 U. S. 668, 678 [1923].

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WHAT CONSTITUTES A TAKING.

The mere abatement of a nuisance without more is not an appropriation of property to public use within the meaning of the constitution.[1] An obstruction in a street causing merely consequential damages to a person is not within the constitutional provision against depriving a person of property without due process of law.[2] The erection and maintenance of a viaduct above the surface of the street for the use of the public, under the authority of a statute containing no provision for damages to the owners of land abutting on the street, by which an owner's access to his land and the free and interrupted use of light and air have been impaired, does not deprive such owner of his property without due process of law. The State courts have uniformly held that the erection over a street of an elevated viaduct, intended for general public travel and not devoted to the exclusive use of a private transportation corporation, is a legitimate street improvement equivalent to a change of grade; and that, as in the case of a change of grade, an owner of land abutting on the street is not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it.[3]

[1] Sweet v. Rechel, 159 U. S. 380 [1895].
[2] Meyer v. Richmond, 172 U. S. 82 [1898].
[3] Sauer v. New York, 206 U. S. 536 [1907].

A statute providing for the taking of lands for public use by a city does not deprive the city taxpayers of property without due process of law by making the city liable to property owners for consequential damages, within the limits of equity and justice, in addition to the just compensation required by the Constitution.[1] A statute repealing a former statute which gave a right to consequential damages from change of grade, construed by the State courts as destroying rights to compensation which had accrued while the earlier act was in effect, amounts to a deprivation of property without due process of law.[2] Due process of law is not denied by construing the repeal of all laws empowering telegraph companies to condemn the right-of-way of railway companies, as applicable to a condemnation proceeding begun and pending at the date of such repeal on appeal from a judgment in favor of a telegraph company, followed by payment of the award into court.[3]

[1] Joslin Mfg. Co. v. Providence, 262 U. S. 668 [1923].
[2] Ettor v. Tacoma, 228 U. S. 148 [1913].
[3] Western U. Teleg. Co. v. Louisville & N. R. Co., 258 U. S. 13 [1922].

Requiring a street-railway company to stand the expense of lowering, or, at its option, removing, a tunnel constructed by it under the Chicago River, which, though not an obstruction to navigation when constructed, has since become such by reason of the increased size of the vessels plying that river, does not deny it due process of law where the ordinance under which the tunnel was constructed was

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adopted while a statute was in force which, as construed by the State courts, made it a condition of the construction of such tunnel that navigation should not be unnecessarily interrupted.[1]

[1] West Chicago Street R. Co. *v.* Illinois ex rel. Chicago, 201 U. S. 506 [1906].

Where one held oyster beds in the tidal waters of Hampton Roads by leases from the State of Virginia, under a guaranty of an "absolute right" to continue to use and occupy them, it was decided that the grant, construed strictly, with reference to the public necessity in that vicinity and previous pollution of the water, was subject to the right of the State to authorize the city of Newport News to discharge its sewage into the Roads, and that the consequent pollution of the plaintiff's oysters was not a taking of his property without due process.[1]

[1] Darling *v.* Newport News, 249 U. S. 540 [1919].

A statute which requires an irrigation district constructing a ditch or canal through the land of any person having no interest in such ditch or canal, to erect substantial and convenient bridges, is valid even as applied to a district which was not obliged to exercise the power of eminent domain to obtain the particular right-of-way.[1]

[1] Farmers Irrig. Dist. *v.* Nebraska ex rel. O'Shea, 244 U. S. 325 [1917].

Compelling use of railroad station property for public hackstands without compensation is a taking of property without due process of law.[1]

[1] Delaware, L. & W. R. Co. *v.* Morristown, 276 U. S. 182 [1928].

JUST COMPENSATION.*

Reasonable compensation to the owner must be made if private property is actually appropriated for public use.[1] But the owner of property so taken is entitled to be paid only for what is taken as the title stands;[2] hypothetical possibilities of change [3] or the speculative schemes of the proprietor [4] cannot be considered. Damages are measured by the loss to the owner, not by the gain to the taker.[5] Attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain.[6]

[1] Sweet *v.* Rechel, 159 U. S. 380 [1895].
[2] Boston Chamber of Commerce *v.* Boston, 217 U. S. 189 [1910].
[3] McGovern *v.* New York, 229 U. S. 363 [1913]. *Cf.* Mississippi & R. River Boom Co. *v.* Patterson, 98 U. S. 403 [1879].
[4] Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226 [1897].
[5] Roberts *v.* New York, 295 U. S. 264 [1935].
[6] Dohany *v.* Rogers, 281 U. S. 362 [1930].

When a city seeks by condemnation proceedings to open a street across the tracks of a railroad within its corporate limits, it is not

* *See also* p. 911 with reference to hearing, notice, etc.

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bound to obtain and pay for the fee in the land over which the street is opened, leaving untouched the right of the company to cross the street with its tracks, nor is it bound to pay the expenses that will be incurred by the railroad company in constructing gates, placing flagmen, etc., caused by the opening of the street across its tracks.[1]

[1] Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226 [1897].

The settled rule of the Supreme Court in cases for the determination of the amount of damages to be paid for private property condemned and taken for public use, is that it accepts the construction placed by the supreme court of the State upon its constitution and statutes.[1] And a judgment by which an owner of condemned property gets less than he ought, and in that sense is deprived of his property, is not reviewable by the Court. On the constitutional question unless there is something more than ordinary honest mistake of law in the proceedings, the final judgment of the State court should be upheld unless the rulings of law prevented the owner from obtaining substantially any compensation.[2] An award of $1 for property taken for an easement was upheld where the State court recognized the right to recover for any substantial damage, but found as a matter of fact that no damage whatever had been shown.[3] Similarly, where the State provides adequate machinery for ascertaining compensation on notice and hearing which were availed of and there was no ruling by the State court which prevented compensation for property actually taken, there is no lack of due process because of the amount awarded, even if only nominal.[4]

[1] Backus (A.) Jr. and Sons *v.* Fort Street Union Depot Co., 169 U. S. 557 [1898].
[2] McGovern *v.* New York, 229 U. S. 363 [1913].
[3] Provo Bench Canal and Irrig. Co. *v.* Tanner, 239 U. S. 323 [1915].
[4] Appleby *v.* Buffalo, 221 U. S. 524 [1911].

Summarizing, "in condemnation proceedings as in lawsuits generally the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error. West Ohio Gas Co. *v.* Public Utilities Comm'n (No. 1), 294 U. S. 63, 70. To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action. The test has been differently phrased by different judges and in different contexts. At times we find the statement that the Constitution is not infringed unless there has been 'absolute disregard' of the right of the owner to be paid for what is taken. Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226, 246; Backus *v.* Fort Street Union Depot Co., 169 U. S. 557, 565; Appleby *v.* Buffalo, 221 U. S. 524, 532. At other times we are told that due process is not lacking unless 'plain rights' have been ignored, with a reminder that much will be overlooked when there is nothing of unfairness or partiality in the course of the proceedings.

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McGovern *v.* New York City, *supra*, [229 U. S.] at page 373. From the very nature of the problem these phrases and others like them are approximate suggestions rather than scientific definitions. In last resort the line of division is dependent upon differences of degree too subtle to be catalogued. Hudson County Water Co. *v.* McCarter, 209 U. S. 349, 355; Klein *v.* Board of Supervisors, 282 U. S. 19, 23. *Cf.* Davidson *v.* New Orleans, 96 U. S. 97, 104. One cannot hope to mark its bearings in a sentence or a paragraph. Enough for present purposes that when the hearing has been full and candid, there must ordinarily be a showing of something more far-reaching than one of dubious mistake in the appraisal of the evidence. Due process is a growth too sturdy to succumb to the infection of the least ingredient of error. 'It takes more than a possible misconstruction by a court to make a case under the Fourteenth Amendment.' Seattle, R. and S. Ry. Co. *v.* Linhoff, 231 U. S. 568, 570." [1]

[1] Roberts *v.* New York, 295 U. S. 264, 277–278 [1935].

"That the Fourteenth Amendment of the Federal Constitution forbids a State to deprive any person of property without due process of law, and to take private property for public use without compensation amounts to such deprivation, is recognized and affirmed in a case wherein the subject was given much consideration."[1]

[1] Appleby *v.* Buffalo, 221 U. S. 524, 530 [1911], citing Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226 [1897]. *See also* Sweet *v.* Rechel, 159 U. S. 380 [1895]; Cincinnati *v.* Louisville & N. R. Co., 223 U. S. 390 [1912]; Consolidated Turnp. Co. *v.* Norfolk & O. V. R. Co., 228 U. S. 326 [1913].

"It has long been settled that the taking of property for public use by a State or one of its municipalities need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge."[1]

[1] Joslin Mfg. Co. *v.* Providence, 262 U. S. 668, 677 [1923]. *See also* Sweet *v.* Rechel, 159 U. S. 380, 400, 404, 407 [1895]; Backus (A.) Jr. and Sons *v.* Fort Street Union Depot Co., 169 U. S. 557, 568 [1898]; Adirondack R. Co. *v.* New York, 176 U. S. 335, 349 [1900]; Williams *v.* Parker, 188 U. S. 491, 502–503 [1903]; Bragg *v.* Weaver, 251 U. S. 57, 62 [1919]; Hays *v.* Seattle, 251 U. S. 233, 238 [1920].

There must be reasonable notice of pending proceedings.[1] Where notice of initiation of proceedings for establishing a public highway is given by publication on 3 successive weeks, in three successive issues of a paper pursuant to a statute which also requires meetings thereon to be public, and the proceedings to be published in a newspaper, sufficient notice is given, and a requirement limiting court appeals to 30 days after final action by the board is not unconstitutional.[2]

[1] Bragg *v.* Weaver, 251 U. S. 57 [1919].
[2] North Laramie Land Co. *v.* Hoffman, 268 U. S. 276 [1925].

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It is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard. Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court carrying with it a right to have the matter determined upon a full trial. And where this mode is adopted due process does not require that a hearing before the viewers be afforded, but is satisfied by the full hearing that may be obtained by exercising the right to appeal.[1]

[1] Bragg v. Weaver, 251 U. S. 57, 59 [1919].

Provision for a hearing in court of the action of county commissioners in establishing a highway and awarding damages therefor within a specified time after notice of their action is sufficient to meet the constitutional requirements of due process of law.[1]

[1] North Laramie Land Co. v. Hoffman, 268 U. S. 276 [1925].

As to the court to determine the question, or the form of procedure, all that is essential is that, in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation; and when this has been provided for there is that due process of law which is required by the Federal Constitution.[1] It is not required that the assessment of damages shall be made by a jury, the award may be made by commissioners where there is provision for a review of their proceedings in the courts.[2]

[1] Backus (A.) Jr. and Sons v. Fort Street Union Depot Co., 169 U. S. 557 [1898]. *See also* Pearson v. Yewdall, 95 U. S. 294 [1877]; Hooker v. Los Angeles, 188 U. S. 314 [1903]; Appleby v. Buffalo, 221 U. S. 524 [1911]; North Laramie Land Co. v. Hoffman, 268 U. S. 276 [1925].

[2] Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685 [1897]; Dohany v. Rogers, 281 U. S. 362 [1930].

Police Power.*

SCOPE OF THE POLICE POWER.

The Fourteenth Amendment does not limit the subjects upon which the police power of the State may be exerted.[1]

[1] Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26 [1889]; Davis v. Massachusetts, 167 U. S. 43 [1897]. *See also* Sanitary District v. United States, 266 U. S. 405, 427 [1925], citing Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 414 [1911]; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 558 [1914]; Denver & R. G. R. Co. v. Denver, 250 U. S. 241, 244 [1919].

It is thoroughly established that the inhibitions of the Constitution upon the deprivation of property without due process of law by the States are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals.[1]

[1] New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567 [1894]. *See also* Barbier v. Connolly, 113 U. S. 27 [1885]; Ex parte Kemmler, 136 U. S. 436 [1890]; Ex parte Converse, 137 U. S. 624 [1891]; Giozza v. Tiernan, 148 U. S. 657 [1893]; Howard v. Kentucky, 200 U. S. 164 [1906].

* *See also* pp. 149, 154, 174, 337, 565, 719, 969.

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The police power of a State embraces regulations designed to promote the public convenience or the general prosperity as well as those to promote public safety, health, or morals, and is not confined to the suppression of what is offensive, disorderly, or unsanitary, but extends to what is for the greatest welfare of the State.[1]

[1] Bacon *v.* Walker, 204 U. S. 311 [1907]. *See also* California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306, 318 [1905]; Chicago, B. & Q. R. Co. *v.* Illinois ex rel. Grimwood, 200 U. S. 561, 592 [1906]; Western Turf Asso. *v.* Greenburg, 204 U. S. 359, 363 [1907]; House *v.* Mayes, 219 U. S. 270, 282 [1911]; Chicago, B. & Q. R. Co. *v.* McGuire, 219 U. S. 549, 568, 569 [1911]; Eubank *v.* Richmond, 226 U. S. 137 [1912]; Schmidinger *v.* Chicago, 226 U. S. 578 [1913]; Sligh *v.* Kirkwood, 237 U. S. 52, 58–59 [1915]; Chicago & Alton R. Co. *v.* Tranbarger, 238 U. S. 67 [1915]; Nebbia *v.* New York, 291 U. S. 502 [1934]; Near *v.* Minnesota ex rel. Olson, 283 U. S. 697, 707 [1931]; Nashville, C. & St. L. R. Co. *v.* Walters, 294 U. S. 405 [1935].

Where the mutual advantage is a sufficient compensation, an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose seems to be a private use.[1]

[1] Noble State Bank *v.* Haskell, 219 U. S. 104, 110; ibid., 219 U. S. 575, 580 [1911].

The right to exercise the police power is a continuing one, and a business lawful today may, in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good.[1] A vested interest cannot because of conditions once obtaining be asserted against the proper exercise of the police power.[2] "The principle that a police regulation, valid when adopted, may become invalid because in its operation it has proved to be confiscatory, carries with it the recognition of the fact that earlier compliance with the regulation does not forfeit the right of protest when the regulation becomes intolerable."[3]

[1] Dobbins *v.* Los Angeles, 195 U. S. 223 [1904].
[2] Hadacheck *v.* Sebastian, 239 U. S. 394 [1915].
[3] Abie State Bank *v.* Bryan, 282 U. S. 765, 776 [1931].

The police power of the State extends over the Federal public domain, at least when there is no legislation by Congress on the subject.[1]

[1] Omaechevarria *v.* Idaho, 246 U. S. 343, 346 [1918].

Laws passed by the States in the exertion of their police power, not in conflict with laws of Congress upon the same subject, and indirectly and remotely affecting interstate commerce, are nevertheless valid laws.[1]

[1] New York ex rel. Silz *v.* Hesterberg, 211 U. S. 31, 41 [1908], citing Missouri K. & T. R. Co. *v.* Haber, 169 U. S. 613 [1898]; Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477 [1903]; Asbell *v.* Kansas, 209 U. S. 251 [1908].

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INALIENABILITY OF POLICE POWER.

The police power of the State cannot be abdicated nor bargained away. It is inalienable even by express grant, and all contract and property rights are held subject to its fair exercise.[1]

[1] Texas & N. O. R. Co. *v.* Miller, 221 U. S. 408, 414 [1911]; Atlantic Coast Line R. Co. *v.* Goldsboro, 232 U. S. 548 [1914]; Chicago & Alton R. Co. *v.* Tranbarger, 238 U. S. 67 [1915].

UNCOMPENSATED OBEDIENCE UNDER POLICE POWER.

"It is hardly necessary to say that cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a State to exert its reserved power or its police power."[1] It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law.[2]

[1] Erie R. Co. *v.* Williams, 233 U. S. 685, 700 [1914], citing New York & N. E. R. Co. *v.* Bristol, 151 U. S. 556 [1894]; United States *v.* Union P. R. Co., 160 U. S. 1 [1895]; St. Louis, I. M. & S. R. Co. *v.* Paul, 173 U. S. 404 [1899]; Wisconsin & M. P. R. Co. *v.* Jacobson, 179 U. S. 287 [1900].

[2] New Orleans Public Service *v.* New Orleans, 281 U. S. 682, 687 [1930], citing Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226, 251 [1897]; Chicago B. & Q. R. Co. *v.* Illinois Ex rel. Grimwood, 200 U. S. 561, 594 [1906]; Chicago & Alton R. Co. *v.* Tranbarger, 238 U. S. 67, 77 [1915]. *See also* Mugler *v.* Kansas, 123 U. S. 623 [1887]; New Orleans Gas Light Co. *v.* Drainage Commission, 197 U. S. 453 [1905].

LIMITATIONS ON THE POLICE POWER.

The police power of a State has its limits and must stop when it encounters the prohibitions of the Federal Constitution.[1] However, the police power is the least limitable of the exercises of government [2] and its limitations are hard to define,[3] are not susceptible of circumstantial precision,[4] cannot be determined by any formula [5] and must always be determined with appropriate regard to the particular subject of its exercise.[6]

[1] Eubank *v.* Richmond, 226 U. S. 137 [1912]; Southern R. Co. *v.* Virginia, 290 U. S. 190 [1933]; Panhandle Eastern Pipe Line Co. *v.* State Highway Commission, 294 U. S. 613, 622 [1935].

[2] Hadacheck *v.* Sebastian, 239 U. S. 394 [1915]; Hall *v.* Geiger-Jones Co., 242 U. S. 539 [1917].

[3] Sligh *v.* Kirkwood, 237 U. S. 52, 58–59 [1915].

[4] Eubank *v.* Richmond, 226 U. S. 137, 142 [1912]; Erie R. Co. *v.* Williams, 233 U. S. 658, 699 [1914]; Panhandle Eastern Pipe Line Co. *v.* State Highway Commission, 294 U. S. 613, 622 [1935].

[5] Hudson County Water Co. *v.* McCarter, 209 U. S. 349 [1908].

[6] Near *v.* Minnesota ex rel. Olsen, 283 U. S. 697, 707 [1931].

Though obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper execution of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment

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of that end and must not be arbitrary or oppressive.[1] The police power may be exerted, when otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment, only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.[2] The general rule is that if regulation goes too far it will be recognized as a taking for which compensation must be paid.[3]

[1] Treigle v. Acme Homestead Asso., 297 U. S. 189, 197 [1936].
[2] Liggett (Louis K.) Co. v. Baldridge, 278 U. S. 105, 111–112 [1928].
[3] Pennsylvania Coal Co. v. Mahon, 260 U. S. 393 [1922].

PRESUMPTION OF VALIDITY.

Each exertion of the police power has the support of the presumption that it is an exercise in the interest of the public, and that there are facts justifying its specific exercise.[1] The presumption attaches alike to statutes, municipal ordinances, and orders of administrative bodies.[2]

[1] Erie R. Co. v. Williams, 233 U. S. 685, 699 [1914].
[2] Pacific States Box & Basket Co. v. White, 296 U. S. 176 [1935].

While it is the duty of the Federal courts to see to it that the constitutional rights of the citizen are not infringed by the State, they should not strike down an enactment or regulation adopted by the State under its police power unless it be clear that the declaration of public policy contained in the statute is plainly in violation of the Federal Constitution.[1] The legislation, when dealing with a subject within the police power, must be upheld unless shown to be clearly unreasonable, arbitrary, or discriminatory.[2] The broad words of the Fourteenth Amendment are not to be pushed to a drily logical extreme, and the courts will be slow to strike down as unconstitutional legislation enacted under the police power.[3]

[1] Broadnax v. Missouri, 219 U. S. 285, 292 [1911].
[2] Hadacheck v. Sebastian, 239 U. S. 394 [1915]; Cusack (Thomas) Co. v. Chicago, 242 U. S. 526 [1917].
[3] Noble State Bank v. Haskell, 219 U. S. 104 [1911].

It is well established that when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective.[1] Reasonableness is the test of police power, not scientific precision.[2] A regulation will not be declared invalid because a court may regard it as ineffectual, or harsh in particular instances or in aid of an objectionable policy.[3]

[1] Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 201 [1912].
[2] Sproles v. Binford, 286 U. S. 374 [1932].
[3] Bayside Fish Flour Co. v. Gentry, 297 U. S. 422 [1936].

"We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions

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as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision." [1]

[1] Standard Oil Co. v. Marysville, 279 U. S. 582, 584 [1929], citing Zahn v. Board of Public Works, 274 U. S. 325, 328 [1927]; Hadacheck v. Sebastian, 239 U. S. 394, 408–412, 413–414 [1915]; Euclid v. Ambler Realty Co., 274 U. S. 365, 388 [1926]; Jacobson v. Massachusetts, 197 U. S. 11, 30 [1905]; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 365 [1910]; Cusack (Thomas) Co. v. Chicago, 242 U. S. 526, 530 [1917]; Price v. Illinois, 238 U. S. 446, 451 [1915]. *See also* Purety Extract & Tonic Co. v Lynch, 226 U. S. 192, 201–202 [1912]; Erie R. Co. v. Williams, 233 U. S. 685, 704 [1914].

Tradition and habits of the community count for more than logic in determining the constitutionality of laws enacted for the public welfare under the police power.[1] The fact that a practice is of ancient standing in a State is a reason for holding it unaffected by the Fourteenth Amendment.[2] The amendment does not override public rights, existing in the form of servitudes or easements which are held by the courts of a State to be valid under its constitution and laws.[3]

[1] Laurel Hill Cemetery v. San Francisco, 216 U. S. 358 [1910]. *See also* Plessy v. Ferguson, 163 U. S. 537 [1896].

[2] Jackman v. Rosenbaum Co., 260 U. S. 22 [1922].

[3] Eldridge v. Trezevant, 160 U. S. 452, 468 [1896]; Vidalia v. McNeely, 274 U. S. 676 [1927]. *See also* St. Anthony Falls Water Power Co. v. Board of Water Commissioners, 168 U. S. 349 [1897].

"A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce." [1] When a State legislature has declared that, in its opinion, the policy of the State requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment unless they can clearly see that there is no reason why the law should not be extended to classes left untouched.[2]

[1] Roschen v. Ward, 279 U. S. 337 [1929].

[2] Williams v. Arkansas, 217 U. S. 79 [1910].

CRIMINAL STATUTES.

Due process of law imposes upon a State an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required.[1]

[1] Cline v. Frink Dairy Co., 274 U. S. 445 [1927], citing Connally v. General Constr. Co., 269 U. S. 385 [1926]; Collins v. Kentucky, 234 U. S. 634 [1914]; American Seeding Machine Co. v. Kentucky, 236 U. S. 660 [1915]; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86 [1909]; Fox v. Washington, 236 U. S. 273 [1915]; Omaechevarria v. Idaho, 246 U. S. 343 [1918]; Miller v. Strahl, 239 U. S. 426 [1915]; Tedrow v. Lewis & Son Drygoods Co. 255 U. S. 98 [1921]; Weeds, Inc. v. United States, 255 U. S. 109 [1921]; Kinnane v. Detroit Creamery Co., 255 U. S. 102 [1921].

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The mere fact that a State police statute punishes an offense actually committed without regard to intent does not render the statute unconstitutional under the due process clause.[1]

[1] Shevlin-Carpenter Co. *v.* Minnesota, 218 U. S. 57 [1910].

PROHIBITING THE INNOCUOUS AS WELL AS THE NOXIOUS.

The Fourteenth Amendment does not prevent a State from regulating or prohibiting a nonuseful occupation which may become harmful to the public, and the regulation or prohibition need not be postponed until the evil is flagrant.[1] It is not enough to condemn a police statute as unconstitutional under the due process of law clause that the innocuousness of the prohibited article be debatable, for if debatable the legislature is entitled to its own judgment.[2]

[1] Murphy *v.* California, 225 U. S. 623 [1912].
[2] Price *v.* Illinois, 238 U. S. 446 [1915].

A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be toward that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.[1] When in the exercise of the police power, municipal authorities by ordinance determine that a certain class of resorts should be prohibited as harmful to the public, the courts cannot except from the operation of a statute one of the class affected on the ground that this particular place does not produce the evil aimed at by the ordinance.[2] Similarly, it is within the authority of a State to protect the community not only against deception but against practices which, though they may be free from deception in particular instances, tend nevertheless to lower the standards of a profession and demoralize it.[3]

[1] Booth *v.* Illinois, 184 U. S. 425, 429 [1902].
[2] Murphy *v.* California, 225 U. S. 623 [1912].
[3] Semler *v.* Oregon State Dental Examiners, 294 U. S. 608 [1935].

But prohibition is unconstitutional if regulation will accomplish the intended purpose; constitutional guaranties cannot be made to yield to mere convenience.[1]

[1] Weaver *v.* Palmer Bros. Co., 270 U. S. 402 [1926].

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REGULATION OF CORPORATIONS.

The reserved right of a State to amend charters cannot be exercised so as to take a corporation's property without due process of law.[1] A decree adjudging the charter of an alleged corporation to be null and void, and enjoining the officers and stockholders from acting as a corporation, on the ground that the purpose for which it was formed is illegal, does not take away the property of the individual corporators without due process of law.[2] Annulment, under a statute, of the charter of a social club violating the liquor laws (when the judgment was rendered by a court of competent jurisdiction, all the parties being before it and given full opportunity to be heard), does not deny due process of law.[3]

[1] Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491 [1915].
[2] New Orleans Debenture Redemption Co. v. Louisiana, 180 U. S. 320 [1901].
[3] Cosmopolitan Club v. Virginia, 208 U. S. 378 [1908].

A State has the right to exclude a foreign corporation and forbid it from establishing branches within its boundaries. This power extends to a corporation already within its jurisdiction. A single foreign corporation may be expelled from a State by a special act if the act does not deprive it of property without due process of law. The property of which a foreign corporation cannot be deprived without due process of law under the Fourteenth Amendment does not include the mere right to extend its business and membership in a State which otherwise may exclude it from its boundaries.[1]

[1] National Council v. State Council, 203 U. S. 151 [1906].

As to subsequent transactions, a State law invalidating conveyances of local realty to foreign corporations before they have filed articles with a local official, does not violate the due process clause.[1]

[1] Munday v. Wisconsin Trust Co., 252 U. S. 499 [1920].

A pecuniary judgment for an insured against a foreign insurance company, for recovery of assessments in excess of the maxima fixed by the contract does not involve an unconstitutional exercise of visitorial power over the corporation.[1]

[1] Hartford L. Ins. Co. v. Douds, 261 U. S. 476 [1923].

REGULATION OF BUSINESSES, PROFESSIONS, ETC.

In General.

"The right of the State to regulate certain occupations which may become unsafe or dangerous when unrestrained, in the exercise of the police power, with a view to protect the public health and welfare, has been so often and so recently before this court that it is only necessary to refer to some of the cases which sustain the proposition that the State has a right, by reasonable regulations, to protect the

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public health and safety." [1] "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited, and the right to conduct a business, or to pursue a calling, may be conditioned. Regulation of a business to prevent waste of the State's resources may be justified, and statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the State's competency." [2]

[1] New York ex rel. Lieberman *v.* Van De Carr, 199 U. S. 552, 558 [1905], citing Boston Beer Co. *v.* Massachusetts, 97 U. S. 25 [1878]; New Orleans Gas Co. *v.* Louisiana Light & Heat Production & Mfg. Co., 115 U. S. 650 [1885]; Crowley *v.* Christenson, 137 U. S. 86 [1890]; Lawton *v.* Steele, 152 U. S. 133 [1894]; Jacobson *v.* Massachusetts, 197 U. S. 11 [1905]; California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306 [1905]; Gardner *v.* Michigan, 199 U. S. 325 [1905].

[2] Nebbia *v.* New York, 291 U. S. 502, 527–528 [1934].

But a State cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or to impose unreasonable and unnecessary restrictions upon them.[1]

[1] Smith *v.* Texas, 233 U. S. 630 [1914]; Burns Baking Co. *v.* Bryan, 264 U. S. 504, 513 [1924]; Weaver *v.* Palmer Bros. Co., 270 U. S. 402 [1926]; Liggett (Louis K.) Co. *v.* Baldrige, 278 U. S. 105, 113 [1928].

There is no doubt that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the State is not violative of rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised and where it is shown to be thus exercised against the individual, under sanction of State authority, the Supreme Court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a Federal court.[1]

[1] New York ex rel. Lieberman *v.* Van De Carr, 199 U. S. 552, 562 [1905]. *See also* Gundling *v.* Chicago, 177 U. S. 183, 185 [1900].

Revocation without notice or hearing of a license to distribute gasoline, required by the Iowa law, held not a taking of property, in the absence of any penalty for doing business unlicensed, and of any threat of other injury to the licensee.[1]

[1] Monamotor Oil Co. *v.* Johnson, 292 U. S. 86 [1934].

The Supreme Court has uniformly recognized State laws relating to the observance of Sunday as enacted in the legitimate exercise of the police power and a law forbidding the keeping open of barber shops on Sunday is not unconstitutional.[1]

[1] Petit *v.* Minnesota, 177 U. S. 164 [1900].

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Prevention of Fraud, Oppression, Etc.

ANTITRUST LAWS*.—A State act prohibiting trusts, etc., is not in conflict with the Fourteenth Amendment as to a person combining with others to pool and fix prices, divide net earnings, and prevent competition in the purchase and sale of grain.[1] The Fourteenth Amendment does not preclude the State from adopting a policy against all combinations of competing corporations and enforcing it even against combinations which may have been induced by good intentions and from which benefit and not injury may have resulted.[2] A State may also require corporation officers annually to file an affidavit of their nonparticipation in any trust.[3]

[1] Smiley *v.* Kansas, 196 U. S. 447 [1905]. *See* Waters-Pierce Oil Co. *v.* Texas, 212 U. S. 86 [1909]; National Cotton Oil Co. *v.* Texas, 197 U. S. 115 [1905], also upholding antitrust laws.

[2] International Harvester Co. *v.* Missouri, 234 U. S. 199 [1914]. *See also* American Seeding Machine Co. *v.* Kentucky, 236 U. S. 660 [1915].

[3] Mallinckrodt Chemical Works *v.* Missouri, 238 U. S. 41 [1915].

An antitrust act which excepts from its operation combinations, otherwise unlawful, if their purpose is to obtain a reasonable profit not otherwise obtainable, is unconstitutional for uncertainty.[1]

[1] Cline *v.* Frink Dairy Co., 274 U. S. 445 [1927].

A statute does not abridge liberty of contract as against retail lumber dealers uniting in an agreement not to purchase any materials from wholesale dealers selling direct to consumers in certain localities.[1]

[1] Grenada Lumber Co. *v.* Mississippi, 217 U. S. 433 [1910].

A statute punishing combinations for maliciously injuring another in his reputation, trade, business, or profession is not unconstitutional as applied to such a combination made from solely malevolent motives.[1]

[1] Aikens *v.* Wisconsin, 195 U. S. 194 [1904].

DISCRIMINATION.—A statute prohibiting unfair discrimination by anyone engaged in manufacture or distribution of a commodity in general use for the purpose of intentionally destroying competition of any regular dealer in such commodity by making sales thereof at a lower rate in one section of the State than in another, after equalization for distance, is a constitutional exercise of the police power of the State and is not unconstitutional as depriving persons having more than one place of business in the State of their property without due process of law or as abridging their liberty of contract.[1]

[1] Central Lumber Co. *v.* South Dakota, 226 U. S. 157 [1912].

A statute creating a rebuttable presumption that any person paying in that State a lower price for sugar than he pays in any other State

* *See also* pp. 172, 971.

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is a party to a monopoly or conspiracy in restraint of trade, is unconstitutional.[1] Similarly, liberty of contract is infringed by a law punishing dealers in milk or cream who pay higher prices in one locality than in another; such a law is not sustainable as a means of preventing monopoly or destruction of competition.[2]

[1] McFarland *v.* American Sugar Refining Co., 241 U. S. 79 [1916].
[2] Fairmont Creamery Co. *v.* Minnesota, 274 U. S. 1 [1927].

Resale Price Contracts.—A statute sanctioning contracts requiring that commodities identified by trade mark will not be sold by the vendee or subsequent vendees except at prices stipulated by the original vendor does not violate the due process of law clause as an unlawful delegation of power to private persons to control the disposition of the property of others.[1]

[1] Old Dearborn Distributing Co. *v.* Seagram-Distillers Corp., 299 U. S. 183 [1936]; The Pep Boys *v.* Pyroil Sales Co., 299 U. S. 198 [1936].

Prevention of Fraud in Sale of Goods.—Laws and ordinances tending to prevent frauds and requiring honest weights and measures in the sale of articles of general consumption have long been considered lawful exertions of the police power.[1]

[1] Schmidinger *v.* Chicago, 226 U. S. 578, 588 [1913], citing McLean *v.* Arkansas, 211 U. S. 539, 550 [1909].

A prohibition on the issuance by other than an authorized weigher of any weight certificate for grain weighed at any warehouse or elevator where State weighers are stationed, or to charge for such weighing, is not unconstitutional.[1] A municipal ordinance requiring that commodities sold in load lots by weight be weighed by a public weighmaster within the city, is not unconstitutional as applied to one delivering coal from State-tested scales at a mine outside the city.[2]

[1] Merchants Exch. *v.* Missouri, ex rel. Barker, 248 U. S. 365 [1919].
[2] Hauge *v.* Chicago, 299 U. S. 387 [1937].

A statute requiring that lard not sold in bulk should be put up in containers holding 1, 3, or 5 pounds net weight, or some whole multiple of these numbers, does not deprive sellers of their property without due process of law.[1]

[1] Armour & Co. *v.* North Dakota, 240 U. S. 510 [1916].

A State has power to prescribe the standards for the containers in which horticultural products are marketed. An administrative order (pursuant to a statute) prescribing a specified capacity and of a form commonly used, is not arbitrary or capricious, since the form and dimensions bore reasonable relation to protection of buyers and to the preservation and shipment of the fruit.[1]

[1] Pacific States Box & Basket Co. *v.* White, 296 U. S. 176 [1935].

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An ordinance fixing standard sizes of bread loaves and prohibiting the sale of other sizes is not unconstitutional.[1] A "tolerance" of only 2 ounces in excess of the minimum weight of a loaf of bread is arbitrary and unreasonable when it is impossible to manufacture good bread without frequently exceeding the prescribed tolerance.[2] But a statute authorizing a secretary of agriculture to fix a reasonable tolerance in excess of the minimum is not unconstitutional under a regulation allowing a 3 ounce tolerance and requiring that the bread maintain the minimum weight for not less than 12 hours after cooling.[3]

[1] Schmidinger v. Chicago, 226 U. S. 578 [1913].
[2] Burns Baking Co. v. Bryan, 264 U. S. 504 [1924].
[3] Peterson Baking Co. v. Bryan, 290 U. S. 570 [1934].

The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of the police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth.[1]

[1] Heath & M. Mfg. Co. v. Worst, 207 U. S. 338 [1907]; Corn Products Ref. Co. v. Eddy, 249 U. S. 427 [1919]; National Fertilizer Asso. v. Bradley, 301 U. S. 178 [1937].

A State law punishing violations relating to labeling "kosher" meat does not violate the rights of dealers under the due process clause, merely because the application of its prohibition may be uncertain in exceptional cases; and the more particularly is this so where the act defined is made criminal only when performed with a specific intent to defraud.[1]

[1] Hygrade Provision Co. v. Sherman, 266 U. S. 497 [1925].

A State statute providing that the purchaser of harvesting or threshing machinery for his own use shall have a reasonable time after delivery for inspecting and testing it, and permitting rescission of the contract if the machinery does not prove reasonably adequate, and further declaring any agreement contrary to its provisions to be against public policy and void, and thus preventing waiver of the warranty of fitness, does not violate the due process clause.[1]

[1] Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283 [1932].

Statutes requiring merchants making sales in bulk, not in the regular course of business, to record them are within the police power.[1]

[1] Lemieux v. Young, 211 U. S. 489 [1909]; Kidd, D. & P. Co. v. Musselman Grocer Co., 217 U. S. 461 [1910].

Sale of Securities, Futures, Etc.; Board of Trade Regulations.—In the exercise of its power to prevent fraud and imposition, a State may regulate dealings in stocks and other securities within its borders, require a license, make issuance of the license dependent on a public officer's being satisfied of the good repute of

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the applicants, and permit its revocation by him, his findings being subject to judicial review.[1]

[1] Hall v. Geiger-Jones Co., 242 U. S. 539 [1917]; Caldwell v. Sioux Falls Stock Yards Co., 242 U. S. 559 [1917]; Merrick v. Halsey & Co., 242 U. S. 568 [1917].

A State may forbid the giving of options to sell or buy at a future time any grain or other commodity.[1] It may also forbid sales on margin or for future delivery,[2] or forbid the keeping of places where stocks, grain, etc., are sold but not paid for at the time, unless a record of the same be made and a stamp tax paid.[3]

[1] Booth v. Illinois, 184 U. S. 425 [1902].
[2] Otis v. Parker, 187 U. S. 606 [1903].
[3] Broadnax v. Missouri, 219 U. S. 285 [1911].

Making criminal any deduction by the purchaser from the actual weight of grain, hay, seed, or coal under a claim of right by reason of any custom or rule of a board of trade, is a valid exercise of the police power and does not deprive the purchaser of property without due process of law, nor interfere with liberty of contract.[1]

[1] House v. Mayes, 219 U. S. 270 [1911].

Trading Stamps.—A prohibitive license fee upon the use of trading stamps is not unconstitutional.[1]

[1] Rast v. Van Deman & L. Co., 240 U. S. 342 [1916]; Tanner v. Little, 240 U. S. 369 [1916]; Pitney v. Washington, 240 U. S. 387 [1916].

Banking.

The Fourteenth Amendment does not deny to States the power to forbid a business simply because it was permitted at common law; and therefore, where public interests so demand, a State may place the banking business under legislative control and prohibit it except under prescribed conditions.[1]

[1] Noble State Bank v. Haskell, 219 U. S. 104 [1911].

A statute subjecting State banks to assessments for a depositors' guaranty fund is within the police power of the States and does not deprive the bank of property without due process of law.[1] Such a statute is not void by reason of its nonapplication to national banks,[2] or because it vests title to the fund for the purpose of administration in the State banking board and thus draws around it the State's immunity from suit.[3]

[1] Noble State Bank v. Haskell, 219 U. S. 104 [1911]; Shallenberger v. First State Bank, 219 U. S. 114 [1911]; Assaria State Bank v. Dolley, 219 U. S. 121 [1911]; Abie State Bank v. Bryan, 282 U. S. 765 [1931].
[2] Abilene Nat. Bank v. Dolley, 228 U. S. 1 [1913].
[3] Lankford v. Platt Iron Works Co., 235 U. S. 461 [1915].

Placing upon a bank commissioner the duty of closing a bank found upon examination to be insolvent, without first instituting pro-

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ceedings and obtaining an award, is not unconstitutional.[1] Nor is it improper for one statute to suspend existing statutes applicable to the liquidation of State banks and authorize the governor to appoint a conservator, especially in view of a later statute authorizing liquidation by the conservator.[2] The constitutional rights of creditors of an insolvent bank in the hands of liquidating officials are not violated by a later statute permitting reopening under a plan of reorganization approved by three-fourths of the creditors, the liquidating officer, and the court.[3]

[1] Title Guaranty & S. Co. v. Idaho, use of Allen, 240 U. S. 136 [1916].
[2] Gibbes v. Zimmerman, 290 U. S. 326 [1933].
[3] Doty v. Love, 295 U. S. 64 [1935].

A statute making directors liable for deposits received with their assent while their bank was insolvent, and making insolvency prima facie evidence of knowledge and assent, is valid;[1] but a statute is unreasonable and arbitrary in declaring that every insolvency shall be deemed fraudulent and providing for punishment of the president and directors unless they repel the presumption.[2]

[1] Ferry v. Ramsey, 277 U. S. 88 [1928].
[2] Manley v. Georgia, 279 U. S. 1 [1929].

A statute requiring savings banks to turn over to the State, deposits inactive for 30 years (when the depositor cannot be found), with provision for payment over to depositor or his heirs on establishment of the right, does not deprive the banks of property without due process of law.[1]

[1] Provident Inst. for Savings v. Malone, 221 U. S. 660 [1911].

The fixing of maximum rates of interest on money loaned within the State is clearly within the police power of the State and the details are within legislative discretion if not unreasonably or arbitrarily exercised.[1]

[1] Griffith v. Connecticut, 218 U. S. 563 [1910].

The invalidation of assignments of future wages as security for debts of less than $200, unless accepted in writing by the employer, consented to by the assignor's wife, and filed in a public office, is within the police power and does not deprive the borrower or lender of his property without due process of law.[1]

[1] Mutual Loan Co. v. Martell, 222 U. S. 225 [1911].

A national bank is not denied due process of law by the issuance against it of a writ of *quo warranto* at the suit of State officials to oust it from maintenance of a branch therein.[1]

[1] First Nat. Bank v. Missouri ex rel. Barrett, 263 U. S. 640, 661 [1924].

A State law allowing State banks to pay checks in exchange when presented by a Federal Reserve bank, or through post office or express

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company, and when not made payable otherwise by maker, does not deprive the Reserve bank of business rights and liberty of contract without due process of law.[1]

[1] Farmers & M. Bank *v.* Federal Reserve Bank, 262 U. S. 649 [1923].

Insurance.

The business of insurance is one peculiarly subject to supervision and control.[1] Fire-insurance rates may be prescribed,[2] excessive commissions restricted,[3] and the relations generally of those engaged in the insurance business regulated.[4]

[1] Hartford Acci. & Indem. Co. *v.* Nelson (N. O.) Mfg. Co., 291 U. S. 352, 360 [1934]. *See also* German Alliance Ins. Co. *v.* Lewis, 233 U. S. 389 [1914]; National Union F. Ins. Co. *v.* Wanberg, 260 U. S. 71 [1922]; O'Gorman & Young *v.* Hartford F. Ins. Co., 282 U. S. 251, 257 [1931]; Hardware Dealers Mut. F. Ins. Co. *v.* Glidden Co., 284 U. S. 151, 157 [1931].

[2] German Alliance Ins. Co. *v.* Lewis, 233 U. S. 389 [1914]; Aetna Ins. Co. *v.* Hyde, 275 U. S. 440 [1928].

[3] O'Gorman & Young, *v.* Hartford F. Ins. Co., 282 U. S. 251, 257 [1931].

[4] La Tourette *v.* McMaster, 248 U. S. 465 [1919]; Stipcich *v.* Metropolitan L. Ins. Co., 277 U. S. 311, 320 [1928].

State-made fire-insurance rates do not violate the Fourteenth Amendment merely because aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business. Rates will be set aside as confiscatory only in clear cases; and the burden is on the one seeking that relief to bring forward the invalidating facts. Rates which afford just compensation to one company cannot be challenged by it as confiscatory as applied to another, nor can they be attacked by the latter on the grounds that their enforcement against the former would make the latter unable to compete if its own rates were raised.[1]

[1] Aetna Ins. Co. *v.* Hyde, 275 U. S. 440 [1928].

It is within the police power of the State to adopt such regulations as will protect the public against evils arising from combinations of those engaged in the business of fire insurance and to substitute competition for monopoly through the medium of imposing on all fire-insurance companies connected with a tariff association a liability to be received by the insured of 25 percent in excess of the amount of the policy.[1]

[1] German Alliance Ins. Co. *v.* Hale, 219 U. S. 307 [1911]. *See also* Carroll *v.* Greenwich Ins. Co., 199 U. S. 401 [1905].

The reorganization of an association insuring lives upon the cooperative plan so as to permit it to do a life-insurance business of every kind, does not deprive policy holders of property without due process of law.[1]

[1] Polk *v.* Mutual Reserve Fund Life Asso., 207 U. S. 310 [1907].

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A State has power to prescribe a summary method of ascertaining the amount of loss on a fire-insurance policy—in this case by arbitration—reserving all other issues for trial in court,[1] and a statute compelling fire-insurance companies, in case of total loss, to pay the amount for which the property was insured less depreciation between the time of issuing the policy and the time of the loss, does not deprive the insurer of property without due process of law.[2]

[1] Hardware Dealers Mut. F. Ins. Co. *v.* Glidden Co., 284 U. S. 151 [1931].

[2] Orient Ins. Co. *v.* Daggs, 172 U. S. 557 [1899].

A State statute by which a life-insurance company, if it fails to pay upon demand the amount due under a policy after death of the insured, is made liable in addition for fixed damages, reasonable in amount, and for a reasonable attorney's fee is not unconstitutional even though payment is resisted in good faith and upon reasonable grounds.[1]

[1] Life & C. Ins. Co. *v.* McCray, 291 U. S. 566 [1934].

It is proper by statute to cut off the defense by a life-insurance company based on false and fraudulent statements in the application, unless the matter misrepresented actually contributed to the death of the insured.[1] A State may also provide that suicide shall be no defense unless contemplated when the application for a policy was made.[2]

[1] Northwestern Nat. L. Ins. Co. *v.* Riggs, 203 U. S. 243 [1906].

[2] Whitfield ex rel. Hadley *v.* Aetna L. Ins. Co., 205 U. S. 489 [1907].

A State may require that an insurance policy issued to indemnify a motor vehicle owner against liability to persons injured through negligent operation, shall provide that insolvency or bankruptcy of the insured shall not release the company from liability and that the injured person may maintain an action against it.[1]

[1] Merchants' Mut. Auto Liability Ins. Co. *v.* Smart, 267 U. S. 126 [1925].

A statute which authorizes a public officer to bring an insurance company before a judicial tribunal which, after giving the company full opportunity for defense, may determine whether its continuance in business is hazardous or whether it has exceeded its corporate powers, does not deny it due process of law.[1]

[1] Chicago L. Ins. Co. *v.* Needles, 113 U. S. 574, 583 [1885].

A requirement that companies insuring against hail shall be bound, and the insurance will take effect, 24 hours from the taking of an application, and further requiring notice by telegram of rejection of an application, is not invalid.[1]

[1] National Union F. Ins. Co. *v.* Wanberg, 260 U. S. 71 [1922].

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A State statute providing that any bond executed after its enactment for the faithful performance of a building contract shall inure to the benefit of materialmen and laborers notwithstanding any provision of the bond to the contrary, is not an arbitrary restraint upon the liberty of contract enjoyed by surety companies under the Fourteenth Amendment.[1]

[1] Hartford Acci. & Indem. Co. v. Nelson (N. O.) Mfg. Co., 291 U. S. 352 [1934].

A statute which prohibits the making of a marine insurance contract outside the State with respect to property within the State, is invalid as a deprivation of liberty without due process of law.[1] But a State may impose a fine on "any person who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this Commonwealth." [2]

[1] Allgeyer v. Louisiana, 165 U. S. 578 [1897].
[2] Nutting v. Massachusetts, 183 U. S. 553 [1902]. *See also* Hooper v. California, 155 U. S. 648 [1895].

It is not within the authority of a State in which an insurance contract was originally made to extend its authority into another State and there forbid the parties, who are both citizens of other States, from making a loan agreement in one of such States simply because it modified the contract originally made and which is invalid in the State where the original was made.[1] And the right of a citizen of a State to conclude with a foreign life-insurance company at its home office a policy loan agreement whereby the policy on his life was pledged as collateral security for a cash loan to become due and payable upon default in payment of premiums, in which case the entire policy reserve might be applied to discharge the indebtedness, is within the protection of the Fourteenth Amendment guaranteeing freedom to contract and may not be destroyed by State legislation.[2]

[1] New York L. Ins. Co. v. Head, 234 U. S. 149 [1914].
[2] New York L. Ins. Co. v. Dodge, 246 U. S. 357 [1918].

It is within the power of a municipality to require bus operators to take out liability insurance with a company authorized to do business within the State.[1]

[1] Sprout v. South Bend, 277 U. S. 163 [1928].

Employment Agencies.

An act imposing license fees for operating employment agencies and prohibiting them from sending applicants to an employer who has not applied for labor, does not deny due process of law.[1] But there is nothing immoral or dangerous in the business, so a statute making it unlawful for an agency to receive fees for furnishing employment, or information leading thereto, is a denial of liberty of contract.[2] And

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the business is not one affected with a public interest, and a State cannot, under the due process clause, fix the fees which such an agent may charge for his services.[3]

[1] Brazee v. Michigan, 241 U. S. 340 [1916].
[2] Adams v. Tanner, 244 U. S. 590 [1917].
[3] Ribnik v. McBride, 277 U. S. 350 [1928].

Pharmacies.

A State statute forbidding any corporation to own a pharmacy or drug store in addition to those owned at the time of the enactment, unless all its stockholders are licensed pharmacists, violates the due process clause as applied to a foreign corporation which owned such stores under license of the State, and sought to extend its business by acquiring and operating others.[1]

[1] Liggett (Louis K.) Co. v. Baldridge, 278 U. S. 105 [1928].

Professions and Trades.

It is established that a State may regulate the practice of medicine, using this word in its most general sense,[1] including the practice of osteopathy,[2] and may exclude osteopathic physicians from hospitals maintained by it or its municipalities.[3]

[1] McNaughton v. Johnson, 242 U. S. 344, 349 [1911]. *See also* Dent v. West Virginia, 129 U. S. 114 [1889]; Hawker v. New York, 170 U. S. 189 [1898]; Reetz v. Michigan, 188 U. S. 505 [1903]; Watson v. Maryland, 218 U. S. 173 [1910].
[2] Collins v. Texas, 223 U. S. 288 [1912].
[3] Hayman v. Galveston, 273 U. S. 414 [1927].

"That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board, is not open to dispute." [1] And a regulation of dentists preventing certain advertising regardless of its truthfulness, is not invalid.[2]

[1] Semler v. Oregon State Dental Examiners, 294 U. S. 608, 611 [1935]. *See also* Douglas v. Noble, 261 U. S. 165 [1923]; Graves v. Minnesota, 272 U. S. 425, 427 [1926].
[2] Semler v. Oregon State Dental Examiners, 294 U. S. 608 [1935].

Statutes have been upheld requiring pilots to be licensed [1] and railroad engineers to pass color blindness tests,[2] but a statute making it a misdemeanor for any person to act as a railway passenger conductor without having had 2 years' experience as a freight conductor or brakeman, is unconstitutional.[3]

[1] Olsen v. Smith, 195 U. S. 332 [1904].
[2] Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96 [1888].
[3] Smith v. Texas, 233 U. S. 630 [1914].

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Miscellaneous Businesses and Occupations.

Statutes have been upheld forbidding or regulating the manufacture of oleomargarine,[1] but a statute forbidding the use of shoddy even when sterilized has been held to be so far arbitrary and unreasonable as to violate the due process clause.[2]

[1] Powell *v.* Pennsylvania, 127 U. S. 678 [1888]; Capital City Dairy Co. *v.* Ohio ex rel. Attorney General 183 U. S. 238 [1902]; Magnano (A) Co. *v.* Hamilton, 292 U. S. 40 [1934].

[2] Weaver *v.* Palmer Bros. Co., 270 U. S. 402 [1926].

Statutes have been upheld which regulated or required licenses for grain elevators,[1] detective agencies,[2] sale of cigarettes [3] or cosmetics,[4] and the resale of theater tickets,[5] or which absolutely forbade the sale of drugs, etc., by itinerant vendors,[6] the sale of spectacles by a store not in charge of a physician or optometrist,[7] the advertising of cigarettes,[8] the solicitation by a layman of business of collecting and adjusting claims,[9] the keeping of private markets within 6 squares of a public market,[10] or the keeping of billiard halls except in hotels.[11]

[1] Cargill (W. W.) Co. *v.* Minnesota ex rel. Railroad & W. Commission, 180 U. S. 452 [1901].

[2] Lehon *v.* Atlanta, 242 U. S. 53 [1916].

[3] Gundling *v.* Chicago, 177 U. S. 183, 185 [1900].

[4] Bourjois, Inc. *v.* Chapman, 301 U. S. 183 [1937].

[5] Weller *v.* New York, 268 U. S. 319 [1925].

[6] Baccus *v.* Louisiana, 232 U. S. 334 [1914].

[7] Roschen *v.* Ward, 279 U. S. 337 [1929].

[8] Packer Corp. *v.* Utah, 285 U. S. 105 [1932].

[9] McCloskey *v.* Tobin, 252 U. S. 107 [1920].

[10] Natal *v.* Louisiana, 139 U. S. 621 [1891].

[11] Murphy *v.* California, 225 U. S. 623 [1912].

Other statutes have been upheld that forbade the use of a representation of the United States flag as an advertising medium [1] or the use of a person's photograph without his consent,[2] regulated admissions to places of amusement,[3] required hotels of more than 50 rooms to keep a night watchman to guard and warn against fire,[4] and forbade purchase by junk dealers of wire, copper, etc., without ascertaining the sellers' right to sell.[5]

[1] Halter *v.* Nebraska, 205 U. S. 34 [1907].

[2] Sperry & H. Co. *v.* Rhodes, 220 U. S. 502 [1911].

[3] Western Turf Asso. *v.* Greenberg, 204 U. S. 359 [1907].

[4] Miller *v.* Strahl, 239 U. S. 426 [1915].

[5] Rosenthal *v.* New York 226 U. S. 260 [1912].

A municipal ordinance prohibiting washing and ironing in public laundries and wash houses within defined territorial limits, from 10 p. m. to 6 a. m., is purely a police regulation within the competency of a municipality possessed of ordinary powers.[1]

[1] Barbier *v.* Connolly, 113 U. S. 27 [1885]; Soon Hing *v.* Crowley, 113 U. S. 703 [1885].

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REGULATION OF NATURAL RESOURCES.

Oil and Gas.

"We assume that the prohibition of any wasteful conduct, whether primarily in behalf of other owners of gas in the common reservoir or because of the public interests involved, is consistent with the Constitution of Texas and that of the United States, and that to prevent waste production may be prorated."[1] An oil and gas conservation statute prohibiting unreasonable waste of natural gas in oil and gas fields, is not invalid on its face for uncertainty, and the provision that the blowing, release or escape of natural gas into the air shall be *prima facie* evidence of unreasonable waste is not invalid.[2] But a statute authorizing receivership for the producing properties of oil companies violating regulatory provisions of an oil conservation statute is void under the due process clause where such provisions are too vague and indefinite to afford a standard of conduct.[3] The existence of facts justifying exertion of the military power to enforce conservation regulations is subject to judicial inquiry where there is a substantial showing that such exertion has overridden private rights secured by the Federal Constitution.[4]

[1] Thompson *v.* Consolidated Gas Utilities Corp., 300 U. S. 55, 76–77 [1937], citing Ohio Oil Co. *v.* Indiana (No. 1), 177 U. S. 190 [1900]; Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61 [1911]; West *v.* Kansas Natural Gas. Co., 221 U. S. 229 [1911]; Walls *v.* Midland Carbon Co., 254 U. S. 300 [1920]; Bandini Petroleum Co. *v.* Superior Ct., 284 U. S. 8 [1931]; Champlin Ref. Co. *v.* Corporation Commission, 286 U. S. 210 [1932]; Sterling *v.* Constantin, 287 U. S. 378 [1932]. *See also* Henderson Co. *v.* Thompson, 300 U. S. 258 [1937].

[2] Bandini Petroleum Co. *v.* Superior Ct. 284 U. S. 8 [1931].

[3] Champlin Ref. Co. *v.* Corporation Commission, 286 U. S. 210 [1932].

[4] Sterling *v.* Constantin, 287 U. S. 378 [1932].

Where the evidence showed that an order purporting to limit the total daily production of a gas field and to prorate the allowed production among the several wells, had for its real purpose not the prevention of waste nor the undue drainage from the reserves of other well owners, but rather to compel pipe line owners to furnish a market to those who had no pipe line connections, the order is void as a taking of private property for private benefit.[1]

[1] Thompson *v.* Consolidated Gas Utilities Corp., 300 U. S. 55 [1937].

A statute prohibiting use of natural gas for manufacturing carbon without fully utilizing heat for other manufacturing or domestic purposes, is a legitimate exercise of the police power and not invalid because it would destroy a heavy investment in a plant for the manufacture of carbon black.[1]

[1] Walls *v.* Midland Carbon Co., 254 U. S. 300 [1920]. *See also* Henderson Co. *v.* Thompson, 300 U. S. 258 [1937].

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Fish and Game.

A State may regulate or prohibit fishing and hunting within its limits,[1] and for the proper enforcement of its laws may prohibit the possession of the special instruments of violation, regardless of the time of acquisition or the protestation of lawful intentions on the part of a particular possessor.[2] A statute may authorize any person to destroy unlawful fish nets.[3] And a regulation of the processing of sardines whether taken within or without the State is constitutional as to a manufacturer treating only sardines brought in from the high seas and disposing of its products only in interstate and foreign commerce.[4]

[1] Manchester v. Massachusetts, 139 U. S. 240 [1891]; Lawton v. Steele, 152 U. S. 133 [1894]; Geer v. Connecticut, 161 U. S. 519 [1896].
[2] Miller v. McLaughlin, 281 U. S. 261 [1930].
[3] Lawton v. Steele, 152 U. S. 133 [1894].
[4] Bayside Fish Flour Co. v. Gentry, 297 U. S. 422 [1936].

It is within the power of a State to forbid the transportation outside the State of game killed therein,[1] forbid possession of game during the closed season even though brought from outside the State,[2] and make it unlawful for an unnaturalized foreign-born resident to take game or possess a shot gun or rifle.[3]

[1] Geer v. Connecticut, 161 U. S. 519 [1896].
[2] New York ex rel. Silz v. Hesterberg, 211 U. S. 31 [1908].
[3] Patsone v. Pennsylvania, 232 U. S. 138 [1914].

Prohibiting Diversion of Water Beyond the State.

A statute making it unlawful for a riparian owner to divert water into another State does not deprive him of property without due process of law. "We are of opinion, further, that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. * * * what it has it may keep and give no one a reason for its will.[1]"

[1] Hudson County Water Co. v. McCarter, 209 U. S. 349, 356 [1908].

ZONING, BUILDING LINES, ETC.

The police power may be exerted under some conditions to declare that under particular circumstances and in particular localities specified businesses, which are not nuisances per se, are to be deemed nuisances in fact and law.[1] Thus, a State may restrict the location of dairy or cow stables,[2] or livery stables,[3] the grazing of sheep near habitations,[4] the erection of billboards in residential districts,[5] storage of gasoline, etc., within 300 feet of any dwelling.[6]

[1] Hadacheck v. Sebastian, 239 U. S. 394 [1915].
[2] Fischer v. St. Louis, 194 U. S. 361 [1904].
[3] Reinman v. Little Rock, 237 U. S. 171 [1915].
[4] Bacon v. Walker, 204 U. S. 311 [1907].
[5] Cusack (Thomas) Co. v. Chicago, 242 U. S. 526 [1917]; St. Louis Poster Advertising Co. v. St. Louis, 249 U. S. 269 [1919].
[6] Pierce Oil Corp. v. Hope, 248 U. S. 498 [1919].

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A city ordinance requiring that all tanks with a capacity of more than 10 gallons, used within city limits for the storage of gasoline and kerosene, be buried at least 3 feet under ground, is a legitimate exercise of the police power.[1]

[1] Standard Oil Co. v. Marysville, 279 U. S. 582 [1929].

A State may declare the emission of dense smoke in cities or populous neighborhoods a nuisance and restrain it; and regulations to that effect, if not arbitrary, are not unconstitutional under the due process clause even though they affect the use of property or subject the owner to expense of complying with their terms.[1]

[1] Northwestern Laundry Co. v. Des Moines, 239 U. S. 486 [1916].

A municipal ordinance, which narrows the limits within which gasworks may be erected and maintained so as to exclude from the privileged territory property purchased for that purpose and on which such works were then being erected, constitutes an arbitrary and unjustifiable interference with property rights where such change is not demanded by the public welfare.[1]

[1] Dobbins v. Los Angeles, 195 U. S. 223 [1904].

The Fourteenth Amendment does not prevent a city from demolishing and removing wooden buildings, built within defined fire limits in face of prohibitory regulations in force at the time.[1]

[1] Maguire v. Reardon, 255 U. S. 271 [1921].

A State statute under which the height of buildings is regulated constitutes a reasonable exercise of the police power.[1]

[1] Welch v. Swasey, 214 U. S. 91 [1909].

A zoning ordinance creating a residential district in a village, and excluding therefrom apartment houses, retail stores, etc., is a valid exercise of the police power. Before holding such an ordinance unconstitutional, it must be shown to be clearly arbitrary and unreasonable and having no substantial relation to the public health, safety, morals, or general welfare.[1] A requirement in a zoning ordinance that the consent of owners of two-thirds of the property within 400 feet of the site of a proposed philanthropic home be obtained is repugnant to the due process clause.[2]

[1] Euclid v. Ambler Realty Co., 272 U. S. 365 [1926]; Zahn v. Board of Public Works, 274 U. S. 325 [1927]; Nectaw v. Cambridge, 277 U. S. 183 [1928].

[2] Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U. S. 116 [1928].

An ordinance requiring municipal authorities to establish building lines in any block on request of the owners of two-thirds of the property is unconstitutional as an attempt to deprive nonassenting

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owners of their property without due process of law.[1] But ordinances requiring lot owners, when constructing new buildings, to set them back a certain distance from the street lines is not unconstitutional unless clearly arbitrary or unreasonable.[2]

[1] Eubank *v.* Richmond, 226 U. S. 137 [1912].
[2] Gorieb *v.* Fox, 274 U. S. 603 [1927].

A city ordinance which forbids colored persons to occupy houses in blocks where the greater number of houses are occupied by white persons, and vice versa, is beyond the police power and in practical effect prevents the sale of lots in such blocks to colored persons (or white persons as the case may be) and is unconstitutional.[1]

[1] Buchanan *v.* Warley, 245 U. S. 60 [1917].

HEALTH.*

In General.

"Although this court has refrained from any attempt to define the limits of that [police] power, yet it has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description'; indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. Gibbons *v.* Ogden, 9 Wheat. 1, 203; Railroad Company *v.* Husen, 95 U. S., 465, 470; Boston Beer Company *v.* Massachusetts, 97 U. S. 25; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 661; Lawton *v.* Steele, 152 U. S. 133. It is equally true that the State may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the State, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a State, nor any regulation adopted by a local governmental agency acting under the sanction of State legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures. Gibbons *v.* Ogden, 9 Wheat. 1, 210; Sinnot *v.* Davenport, 22 How. 227, 243; Missouri, Kansas and Texas Ry. Co. *v.* Haber, 169 U. S. 613, 626." [1]

[1] Jacobson *v.* Massachusetts, 197 U. S. 11, 25 [1905].

* *See also* discussion under Personal liberty, p. 779.

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A State may, consistently with the Federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative.[1] And it is settled that the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law.[2]

[1] Jacobson v. Massachusetts, 197 U. S. 11 [1905]; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358 [1910]; Zucht v. King, 260 U. S. 174, 176 [1922].

[2] New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552 [1905]; Zucht v. King, 260 U. S. 174, 176 [1922].

A statute forbidding entry of persons into a quarantined area is a valid exercise of the police power as applied to the owner of a vessel bringing passengers from a foreign country.[1]

[1] Compagnie Francaise de Navigation A Vapeur v. Louisiana State Board of Health, 186 U. S. 380 [1902].

Food.

"The power of the State to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence is well established. Such articles, it has been declared by this Court, are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution." [1] A State may order the destruction of unsafe and unwholesome food even though it may have value for purposes other than as food,[2] forbid the sale and confiscate impure milk,[3] and may make it a criminal offense to deliver immature citrus fruits for shipment in interstate commerce.[4]

[1] Sligh v. Kirkwood, 237 U. S. 52, 59–60 [1915].
[2] North American Cold Storage Co. v. Chicago, 211 U. S. 306 [1908].
[3] Adams v. Milwaukee, 228 U. S. 572 [1913].
[4] Sligh v. Kirkwood, 237 U. S. 52 [1915].

Laws forbidding the sale as ice cream of any article not containing a reasonable proportion of butterfat fall fairly within the State police power.[1] Similarly, a requirement that condensed milk be made from whole milk is valid and one making such condensed milk from skimmed milk violated the law notwithstanding the wholesomeness of the forbidden product and its labeling showing contents.[2] A prohibition against the sale of food preservatives containing boric acid is not unreasonable and arbitrary.[3]

[1] Hutchinson Ice Cream Co. v. Iowa, 242 U. S. 153 [1916].
[2] Hebe Co. v. Shaw, 248 U. S. 297 [1919].
[3] Price v. Illinois, 238 U. S. 446 [1915].

Protection of Water Supply.

A State may require the removal of timber refuse from the vicinity of a watershed for a municipal water supply to prevent danger by fire.[1]

[1] Perley v. North Carolina, 249 U. S. 510 [1919].

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Garbage.

An ordinance for cremation of garbage and refuse at a designated place as a means for the protection of the public health is not a taking of private property for public use without just compensation even though such garbage and refuse may have some elements of value for certain purposes.[1]

[1] California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306 [1905].

Sewers.

One of the commonest exercises of the police power is to provide for a system of sewers and to compel property owners to connect therewith, and this duty may be enforced by criminal penalties without violating the due process clause.[1]

[1] Hutchinson *v.* Valdosta, 227 U. S. 303 [1913].

MORALS.

Intoxicating Liquor.*

"It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment." [1] And there is no doubt of the State's power to declare that places where liquor is manufactured or kept shall be deemed common nuisances.[2] An innocent owner of property may be subjected to penalty and forfeiture of property for the acts of a wrongdoer.[3]

[1] Crane *v.* Campbell, 245 U. S. 304, 307 [1917]. *See also* Bartemeyer *v.* Iowa, 18 Wall. 129 [1874]; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 33 [1878]; Foster *v.* Kansas ex rel. Johnston, 112 U. S. 201, 206 [1884]; Mugler *v.* Kansas, 123 U. S. 623 [1887]; Kidd *v.* Pearson, 128 U. S. 1 [1888]; Crowley *v.* Christensen, 137 U. S. 86, 91 [1890]; Rippey *v.* Texas, 193 U. S. 504 [1904]; Pabst Brewing Co. *v.* Crenshaw, 198 U. S. 17 [1905]; Purety Extract & Tonic Co. *v.* Lynch, 226 U. S. 192 [1912]; Eberle *v.* Michigan, 232 U. S. 700 [1914]; Clark (James) Distilling Co. *v.* Western Maryland R. Co., 242 U. S. 311 [1917]; Seaboard Air Line R. Co. *v.* North Carolina, 245 U. S. 298 [1917]; Samuels v. McCurdy, 267 U. S. 188 [1925]; Barbour *v.* Georgia, 249 U. S. 454 [1919].

[2] Mugler *v.* Kansas, 123 U. S. 623, 671 [1887].

[3] Hawes *v.* Georgia, 258 U. S. 1 [1922]; Van Oster *v.* Kansas, 272 U. S. 465 [1926].

A license to sell beer in a State may be revoked.[1]

[1] Premier-Pabst Sales Co. *v.* Grosscup, 298 U. S. 226 [1936].

A statute providing that spirituous liquors could not be used in the preparation of prescriptions by a licensed pharmacist without his

* *See also* pp. 168, 203, 976.

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first procuring a druggist's license does not trespass upon any constitutional rights.[1]

[1] Gray v. Connecticut, 159 U. S. 77 [1895].

Drugs.

"There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription, and use of dangerous and habit-forming drugs, such as are named in the statute. The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question."[1]

[1] Minnesota ex rel. Whipple v. Martinson, 256 U. S. 41, 45 [1921].

Censorship of Motion Pictures.

State statutes imposing censorship on moving pictures are valid exercises of the police power.[1]

[1] Mutual Film Corp. v. Industrial Commission, 236 U. S. 230 [1915]; Mutual Film Corp. v. Hodges, 236 U. S. 248 [1915].

Gambling.

The suppression of gambling is concededly within the police powers of the State, and legislation prohibiting gambling will not be interfered with by the court unless such legislation be a clear, unmistakable infringement of rights secured by the fundamental law.[1] And the State may make a judgment against those winning money a lien upon the property in which the gambling is conducted with the owner's knowledge and consent.[2]

[1] Ah Sin v. Wittman, 198 U. S. 500 [1905].
[2] Marvin v. Trout, 199 U. S. 212 [1905].

Lotteries.

Lotteries may be forbidden even though operating under a legislative grant, and irrespective of any particular equities.[1]

[1] Stone v. Mississippi ex rel. Harris, 101 U. S. 814 [1880]; Douglas v. Kentucky, 168 U. S. 488 [1897].

Red Light Districts.

Persons owning or occupying property in or adjacent to limits fixed by a city ordinance outside of which no woman of lewd character was allowed to dwell, are not deprived of their property without due process of law.[1]

[1] L'Hote v. New Orleans, 177 U. S. 587 [1900].

REGULATION OF MOTOR VEHICLES.*

The power of a State to regulate and tax for the use of highways is clearly constitutional,[1] and it is within a State's discretion to limit

**See also* pp. 187, 211, 790, 818, 979, 994.

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vehicle loads to 7,000 pounds.[2] The highways of a State are public property, the primary and preferred use of which is for private purposes; their use for purposes of gain may generally be prohibited by the legislature or conditioned as it sees fit.[3]

[1] Continental Baking Co. v. Woodring, 286 U. S. 553 [1932].
[2] Sproles v. Binford, 286 U. S. 374 [1932].
[3] Stephenson v. Binford, 287 U. S. 251 [1932].

A State statute making the owner of an automobile liable for personal injuries resulting from its negligent operation by another person to whom he has entrusted it, is consistent with due process as applied to a nonresident owner who was not in that State when the accident occurred and who had merely lent his machine to one not his agent or engaged in business for him, with express or implied permission to take it from the State of the owners' residence, where bailment occurred and whose laws do not impose such liability.[1]

[1] Young v. Masci, 289 U. S. 253 [1933].

Compulsory automobile insurance is so plainly valid as to present no Federal question.[1]

[1] Ex parte Poresky, 290 U. S. 30 [1933]. *See also* Packard v. Banton, 264 U. S. 140 [1924]; Hodge Drive-It-Yourself Co. v. Cincinnati, 284 U. S 335 [1932]; Continental Baking Co. v. Woodring, 286 U. S. 553 [1932].

OTHER LEGISLATION AFFECTING PROPERTY RIGHTS.

Mortgage Moratorium.

A mortgage moratorium statute limited to the period of an existing financial emergency permitting courts to extend the time for redemption from mortgage foreclosure, is a valid exercise of the police power.[1]

[1] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398 [1934].

Emergency Rent Legislation.

Emergency legislation suspending a landlord's right of action to recover possession from his tenant, except under specified conditions, and providing that in an action for rent under an agreement for premises occupied for dwelling purposes it shall be a defense that the rent is unjust and unreasonable and the agreement oppressive, but permitting the landlord to plead, prove, and recover a fair and reasonable rent, is constitutional.[1]

[1] Browne (Marcus) Holding Co. v. Feldman, 256 U. S. 170 [1921]; Levy (Edgar A.) Leasing Co. v. Siegel, 258 U. S. 242 [1922].

Torrens Act.

Where under a Torrens Act, a bona fide purchaser may obtain a valid certificate as against a defrauded owner is not a deprivation of property without due process of law.[1]

[1] Eliason v. Wilborn, 281 U. S. 457 [1930].

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Prevention of Cedar Rust.

A statute providing for destruction of cedar trees infected with cedar rust within 2 miles of any apple orchard is a reasonable exercise of the police power.[1]

[1] Miller *v.* Schoene, 276 U. S. 272 [1928].

Drilling of Oil and Gas Wells.

A city ordinance conditioning the right to drill for oil or gas within the city limits upon the filing of a bond in the sum of $200,000 for each well, to secure payment of damages from injuries to any persons or property resulting from the drilling, operation or maintenance of any well or structures appurtenant thereto, is consistent with due process of law, and is not voided by the requirement that the bond be executed by a bonding company authorized to do business in the State.[1]

[1] Gant *v.* Oklahoma City, 289 U. S. 98 [1933].

Mining Under Another's Property.

Where landowner deeded surface, reserving right to remove coal, subsequent State law forbidding mining so as to cause subsidence of surface, held to exceed police power and contrary to the due process clause.[1]

[1] Pennsylvania Coal Co. *v.* Mahon, 260 U. S. 393 [1922].

Lease of State Canal Waters.

Grant of the right to use surplus water from a State canal is subject to the State's right to abandon the canal and devote it to other purposes, and is not a deprivation of property without due process of law.[1]

[1] Fox *v.* Cincinnati, 104 U. S. 783 [1882]; Kirk *v.* Maumee Valley Electric Co., 279 U. S. 797 [1929]; Kirk *v.* Providence Mill Co., 279 U. S. 807 [1929].

Public-School Teachers' Retirement System.

A statute reducing "annuities" of public-school teachers theretofore retired does not deprive them of property without due process of law.[1]

[1] Dodge *v.* Board of Education of Chicago, 302 U. S. 74 [1937].

Dogs.

A statute providing that no dog shall be entitled to the protection of the law unless placed upon the assessment rolls, and that in a civil action for killing a dog the owner cannot recover beyond the value fixed by himself in the last assessment preceding the killing, is within the police power of the State.[1]

[1] Sentell *v.* New Orleans & C. R. Co., 166 U. S. 698 [1897].

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Taxation.*

IN GENERAL.

The power of taxation is fundamental to the very existence of government in the several States.[1] The Fourteenth Amendment did not subvert their tax systems [2] and it was not contemplated on its adoption that it would restrain or cripple their taxing power.[3] Rather, the purpose of the amendment was to extend to the citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty, and property as was afforded against Congress by the Fifth Amendment.[2]

[1] State Tax Comrs. *v.* Jackson, 283 U. S. 527 [1931].

[2] Tonawanda *v.* Lyon, 181 U. S. 389 [1901]; Cass Farm Co. *v.* Detroit, 181 U. S. 396 [1901].

[3] Southwestern Oil Co. *v.* Texas, 217 U. S. 114 [1910].

A State tax law, where conflict with Federal power is not involved, will be held to conflict with the Fourteenth Amendment only when it proposes or clearly results in such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation—to spoliation under the guise of exerting the power of taxing.[1] The Court will not condemn a tax solely on the ground that it is excessive.[2] When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers.[3]

[1] Henderson Bridge Co. *v.* Henderson, 173 U. S. 614 [1899]; Dane *v.* Jackson, 256 U. S. 589 [1921]; Lawrence *v.* State Tax Commission, 286 U. S. 276 [1932].

[2] Stewart Dry Goods Co. *v.* Lewis, 294 U. S. 550 [1935]. *See also* Chapman *v.* Zobelein, 237 U. S. 135 [1915]; Kelly *v.* Pittsburgh, 104 U. S. 78 [1881].

[3] Fox *v.* Standard Oil Co., 294 U. S. 87, 99 [1935].

PUBLIC PURPOSE.

It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the States.[1] The nature of a use, whether public or private, is ultimately a judicial question. However, the determination of this question is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgment of State courts upon what should be deemed public uses in any State.[2]

[1] Citizens' Sav. & L. Asso. *v.* Topeka, 20 Wall. 655 [1875]; Jones *v.* Portland, 245 U. S. 217 [1917]; Green *v.* Frazier, 253 U. S. 233 [1920]; Carmichael *v.* Southern Coal & Coke Co., 300 U. S. 644 [1937].

[2] Milheim *v.* Moffat Tunnel Improv. Dist., 262 U. S. 710 [1923].

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*See also pp. 204, 342, 361, 366, 531, 981.

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The court has held taxes levied for each of the following purposes to have been for a public use: City coal and fuel yard;[1] State bank, warehouse, elevator, flour-mill system, and home-building projects;[2] society for preventing cruelty to animals (dog license tax);[3] railroad tunnel;[4] books for school children including children in private as well as public schools;[5] roads;[6] and relief of unemployment.[7]

[1] Jones *v.* Portland, 245 U. S. 217 [1917].
[2] Green *v.* Frazier, 253 U. S. 233 [1920].
[3] Nicchia *v.* New York, 254 U. S. 228 [1920].
[4] Milheim *v.* Moffat Tunnel Improv. Dist., 262 U. S. 710 [1923].
[5] Cochran *v.* Louisiana State Bd. of Edu., 281 U. S. 370 [1930].
[6] Memphis & C. R. Co. *v.* Pace, 282 U. S. 241 [1931].
[7] Carmichael *v.* Southern Coal & Coke Co., 300 U. S. 644 [1937].

However, the taxing power does not depend upon the taxpayers' enjoyment of any special benefit from use of the funds raised by taxation.[1]

[1] Nashville, C. & St. L. R. Co. *v.* Wallace, 288 U. S. 249 [1933]; Carmichael *v.* Southern Coal & Coke Co., 300 U. S. 644 [1937].

DOUBLE TAXATION.

Exemption from double taxation by one and the same State is not guaranteed by the Fourteenth Amendment;[1] much less is taxation by two States upon identical or closely related property interests falling within the jurisdiction of both, forbidden.[2]

[1] St. Louis S. W. R. Co. *v.* Arkansas, 235 U. S. 350, 367–368 [1914]; Ft. Smith Lumber Co. *v.* Arkansas ex rel. Arbuckle, 251 U. S. 532 [1920]; Shaffer *v.* Carter, 252 U. S. 58 [1920]; Swiss Oil Corp. *v.* Shanks, 273 U. S. 407 [1927]. *See also* Davidson *v.* New Orleans, 96 U. S. 97, 106 [1878]; Tennessee *v.* Whitworth, 117 U. S. 129, 136, 137 [1886].
[2] Citizens Nat. Bank *v.* Durr, 257 U. S. 99, 109 [1921]; Cream of Wheat Co. *v.* Grand Forks County, 253 U. S. 325 [1920]. *See also* Kidd *v.* Alabama, 188 U. S. 730, 732 [1903]; Hawley *v.* Malden, 232 U. S. 1, 13 [1914]; Fidelity & C. Trust Co. *v.* Louisville, 245 U. S. 54, 58 [1917].

The decisions cited in support of the foregoing have been the basis for concurring and dissenting opinions in a later case holding that intangibles, such as stocks and bonds, in the hands of the holder of the legal title, with definite taxable situs at the legal owner's residence, and not subject to be changed by the equitable owner, may not be taxed at the latter's domicile in another State.[1] The Supreme Court has denied certiorari in a State case which held that a tax on the capitalized value of a life annuity of a resident receiving income from intangibles held in trust in another State where personal property taxes were paid, was bad because it involved taxation of a share in the principal and hence unconstitutional as double taxation.[2]

[1] Safe Deposit & T. Co. *v.* Virginia, 280 U. S. 83 [1929].
[2] Baltimore *v.* Gibbs, 166 Md. 364 [1934], certiorari denied, 293 U. S. 559 [1934].

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In a recent inheritance tax case, the court said "* * * existing conditions * * * imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here had been in that direction. * * * We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles." [1]

[1] Farmers Loan & T. Co. *v.* Minnesota, 280 U. S. 204, 212 [1930], overruling Blackstone *v.* Miller, 188 U. S. 189 [1903]. *Cf.* Worcester County Trust Co. *v.* Riley, 302 U. S. 292 [1937].

TAX ON MORTGAGED PROPERTY.

Notwithstanding due process clause, land subject to mortgage may be taxed for its full value without deduction of the mortgage debt from the valuation either of the land or of the owner's personal property.[1]

[1] Paddell *v.* New York, 211 U. S. 446 [1908].

RETROACTIVE TAXATION.

Laws of a retroactive nature, imposing taxes or providing remedies for their assessment and collection and not impairing vested rights, are not lacking in due process.[1] Neither is it violative of due process to provide a new remedy for a tax liability imposed by a prior law.[2] It is no denial of due process for a State statute to subject to taxation property which has escaped in prior years, an opportunity to question the validity or the amount being given.[3] The Court has also upheld a law which, in order to reach property which has escaped taxation, taxes the estates of decedents for a period anterior to date of death, but allows proportionate deductions where a personal representative shows that taxes were paid, or property was not owned, by his decedent within the period.[4]

[1] League *v.* Texas, 184 U. S. 156 [1902]; Kentucky Union Co. *v.* Kentucky, 219 U. S. 140 [1911].
[2] Citizens' Nat. Bank *v.* Kentucky use of Boyle County, 217 U. S. 443 [1910].
[3] Winona & St. P. Land Co. *v.* Minnesota, 159 U. S. 537 [1895].
[4] Bankers' Trust Co. *v.* Blodgett, 260 U. S. 647 [1923].

CERTAINTY OF TAX.

A statute levying a license tax on the production of electricity involving complicated measurements and computations, does not deprive the taxpayer of due process because absolute precision is not obtainable, fair and reasonable approximations being sufficient.[1]

[1] Utah Power & Light Co. *v.* Pfost, 286 U. S. 165 [1932].

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COMBINATION OF REGULATION AND REVENUE.

It is not a valid objection to an ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate, where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordnance which authorized it fulfills the two functions, one a regulating and the other a revenue function. So long as the State law authorizes both regulation and taxation, it is enough, and the enforcement of the ordinance violates no provision of the Federal Constitution.[1]

[1] Gundling *v.* Chicago, 177 U. S. 183 [1900].

REQUIRING PAYMENT ON DEPOSIT AS CONDITION TO CONTEST VALIDITY OF TAX.

A denial by a State court of a recovery of taxes exacted by a State officer in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment and cannot be justified by a State statute limiting suits to recover illegally assessed taxes to taxes paid at the time and in the manner provided by it.[1]

[1] Carpenter *v.* Shaw, 280 U. S. 363 [1930].

TYPES OF TAXES.

Succession and Inheritance Taxes.

In General.—The power of testamentary disposition and the privilege of inheritance are subject to State taxation and State regulation, and regulatory taxing provisions, even though they produce inequalities in taxation, do not effect an unconstitutional taking of property, unless there results such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—to spoliation under the guise of exerting the power of taxing. The subject matter of an inheritance taxing statute may be either the transmission, or the exercise of the legal power of transmission, of property by will or descent, or it may be the legal privilege of taking property by devise or descent.[1]

[1] Stebbins *v.* Riley, 268 U. S. 137, 140, 141 [1925].

Neither the United States nor any State in determining the amounts of its transfer tax is under any constitutional obligation to make any deduction on account of the tax of the other.[1]

[1] Frick *v.* Pennsylvania, 268 U. S. 473, 500 [1923].

Taxable Transfers.—A State may exercise its power to impose an inheritance tax at any time during which it holds the property from the legatee. A State inheritance tax is not void as a deprivation

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of property without due process of law as to legatees dying prior to its enactment but whose estates are still undistributed.[1] It is also permitted to a State to tax a transfer intended to take effect in possession or enjoyment at or after the death of the grantor.[2] Thus, a succession tax on an irrevocable transfer to a trustee to pay the income to the settlor for life, the principal after his death to go to others, is not unconstitutional.[3] But a conclusive statutory presumption that all gifts of a material part of the decedent's estate made within 6 years of his death were made in contemplation of death—whereby they became subjected without regard to the actual intent of the maker to graduated inheritance taxes—creates an arbitrary classification and conflicts with the Fourteenth Amendment.[4]

[1] Cahen *v.* Brewster, 203 U. S. 543 [1906].
[2] Keeney *v.* New York, 222 U. S. 525 [1912].
[3] Guaranty Trust Co. *v.* Blodgett, 287 U. S. 509 [1933].
[4] Schlesinger *v.* Wisconsin, 270 U. S. 230 [1926].

A statute imposing an estate tax on all property of a decedent upon which no town or city property tax has been assessed or State tax paid during the year preceding the decedent's death, does not violate the due process clause by depriving the distributees and creditors of their estate.[1]

[1] Bankers' Trust Co. *v.* Blodgett, 260 U. S. 647 [1923].

Remainders, Trusts, Powers, Etc.—A succession tax imposed on the transfer of remainders which vested at the time of the creation of a trust and prior to enactment of the taxing statute is unconstitutional,[1] but where the interests of remaindermen were contingent and did not vest until the donor's death subsequent to enactment of the statute, the tax is not invalid.[2]

[1] Coolidge *v.* Long, 282 U. S. 582 [1931].
[2] Binney *v.* Long, 299 U. S. 280 [1936].

Where the donor of a trust reserves the right to the income for life and retained the power of appointment, etc., it is proper for a State to tax the transfer on his death.[1] The State may also tax a transfer under a statute enacted subsequent to the creation of a trust wherein the settlor gave the income after his death to his children (with gifts over) and died thereafter without exercising the power reserved by him (with consent of one trustee) to alter or terminate the trust, the court holding that the tax was imposed on the children and that the gift taxed did not pass to them until the donor's death subsequent to enactment of the statute.

[1] Bullen *v.* Wisconsin, 240 U. S. 625 [1916].

Where remainder interests vested after a transfer tax law was approved but before the time when it became effective, but which nevertheless were subjected to the tax by the State court upon the

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theory that the vesting actually occurred after it became effective, they are not to be regarded as taxed thereby in violation of the Fourteenth Amendment, since the law might have been made applicable before the interests vested.[1] A State law has also been upheld which imposed a graduated tax on the transfer of contingent remainders measured by their value at the testator's death, undiminished by the value of the intervening life estate, but payment being postponed until after the death of the life tenant, the court finding that the due process clause places no restriction on a State as to the time at which an inheritance tax shall be levied or the property valued for purposes of such a tax.[2]

[1] Nickel *v.* Cole, 256 U. S. 221 [1921].
[2] Salomon *v.* State Tax Commission, 278 U. S. 484 [1929].

Where a power of appointment has been granted by a deed, a transfer tax on the property upon the exercise of the power by will, is not a taking of property without due process of law, and this is true even though the instrument creating the power was executed prior to enactment of the taxing statute.[1] But a State may not tax the exercise of a power through a will made within its limits by a resident, when the property is a trust fund in another State created by the will of a resident of such other State, in view of the latter's law treating the property in such cases as passing from the original donor to the appointee.[2]

[1] Orr *v.* Gilman, 183 U. S. 278 [1902]; Chandler *v.* Kelsey, 205 U. S. 466 [1907].
[2] Wachovia Bank & T. Co. *v.* Doughton, 272 U. S. 567 [1926].

Sealing of Safe Deposit Boxes.—An inheritance tax statute which requires the sealing of safe deposit boxes for at least 10 days after death of the renter, and requires the owner to retain assets found therein sufficient to pay the tax that may be due to the State, does not deprive the owner of any property rights without due process of law.[1]

[1] National Safe Deposit Co. *v.* Stead, 232 U. S. 58 [1914].

Income Taxes.

Any attempt by a State to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. Thus, a State income tax statute which authorizes an assessment of a tax against a husband computed on the combined total of his and his wife's incomes and augmented by surtaxes resulting from the combination, although under the laws of the State the husband has no interest in or control over the property or income of his wife, violates the due process clause.[1]

[1] Hoeper *v.* Tax Commission, 284 U. S. 206 [1931].

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One cannot object to the imposition of an income tax upon the ground that, in operation, it returns to the plaintiff's town less income tax than he and its other inhabitants pay, and distributes the overplus to other subdivisions which may elect to use it for their local purposes not beneficial to those who paid it.[1] It is likewise no valid objection that the tax is on a special class of persons and property for a public purpose (reimbursing cities and towns for increase of educational salaries) by which they are not benefited.[2]

[1] Dane *v.* Jackson, 256 U. S. 589 [1921].
[2] Knights *v.* Jackson, 260 U. S. 12 [1922].

Franchise and Privilege Taxes.

A special franchise tax imposed some years after a franchise was granted upon the consideration of a lump sum paid therefor, does not deprive a corporation of its property without due process of law.[1] The contention of a street railway that a valuation placed on its franchise was mere guesswork, was overruled where it was shown that the statute required that valuation be determined by the State board of tax commissioners upon reports made by the railway, and which gave a right of hearing upon objection to the valuation and a review of the assessment by writ of certiorari.[2] The franchise of a railroad company is not necessarily to be regarded as valueless because its present earnings are not sufficient to pay more than high grade investments or operating expenses.[3] The Federal Constitution does not preclude a State from requiring a corporation actually controlling and exercising a franchise to pay the tax legally assessed thereon, although not the actual owner of the franchise.[4] A municipal charter authorizing the imposition upon a local telegraph company of a tax upon the lines of the company within its limits at the rate at which other property is taxed upon an arbitrary valuation per mile does not deprive the company of its property without due process of law, since the tax is a mere franchise or privilege tax.[5]

[1] New York ex rel. Metropolitan Street R. Co. *v.* State Bd. of Tax Comrs., 199 U. S. 1, 46 [1905].
[2] New York ex rel. Brooklyn City R. Co. *v.* State Bd. of Tax Comrs., 199 U. S. 48 [1905].
[3] Ohio River & W. R. Co. *v.* Dittey (Ohio Tax Cases), 232 U. S. 576 [1914].
[4] Illinois C. R. Co. *v.* Kentucky, 218 U. S. 551 [1910].
[5] New York, P. & N. Teleg. Co. *v.* Dolan, 265 U. S. 96 [1924].

A city ordinance imposing annual license taxes on light and power companies is not violative of the due process clause merely because the city has entered the power business in competition with such companies.[1]

[1] Puget Sound Power & Light Co. *v.* Seattle, 291 U. S. 619 [1934]; Seattle Gas Co. *v.* Seattle, 291 U. S. 638 [1934].

A State statute imposing a license tax (for the privilege of engaging in the business of selling advertising) on newspapers and magazines

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having a weekly circulation of more than 20,000 copies, is unconstitutional under the due process clause of the Fourteenth Amendment because it abridges the freedom of the press.[1]

[1] Grosjean v. American Press Co., 297 U. S. 233 [1936].

Gasoline Taxes.

An excise tax upon the sale and use of gasoline does not, as applied to domestic sales and use, infringe rights of dealers in such product under the due process of law clause.[1]

[1] Bowman v. Continental Oil Co., 256 U. S. 642 [1921].

Nor is it unconstitutional for a State law to require retailers of gasoline to collect from purchasers a tax on such gasoline sold by them as they have reason to believe the purchasers will use in motors on the highways of the State, and requiring the retailers to register, and to report and pay over each month the taxes accruing on sales made under penalty of a fine.[1]

[1] Pierce Oil Corp. v. Hopkins, 264 U. S. 137 [1924].

Severance Taxes.

A State excise on the production of oil which extends to the royalty interest of the lessor in the oil produced under an oil lease as well as to the interest of the lessee engaged in the active work of production, the tax being apportioned between these parties according to their respective interest in the common venture, is not arbitrary as regards the lessor, but consistent with due process.[1]

[1] Barwise v. Sheppard, 299 U. S. 33 [1936].

SITUS AND JURISDICTION TO TAX.

In General.

It is firmly established that consistently with the due process clause of the Constitution, a State cannot tax property located or existing permanently beyond its limits.[1] It is essential to the validity of an ad valorem property tax, under the due process clause, that the property shall be within the territorial jurisdiction of the taxing State. This rule receives its most familiar illustration in the case of land.[2] The Court has said: "Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by any court."[3] But a State is not to be prevented from taxing lands within its jurisdiction because waters over it are within the jurisdiction of another State.[4]

[1] Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385 [1903]; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 [1905]; Safe Deposit & T. Co. v. Virginia, 280 U. S. 83 [1929].

[2] Wheeling Steel Corp. v. Fox, 298 U. S. 193, 208 [1936].

[3] Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 204 [1905].

[4] Central R. Co. v. Jersey City, 209 U. S. 473 [1908].

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"In the case of tangible property, the ancient maxim [*mobilia sequuntur personam*], which had its origin when personal property consisted in the main of articles appertaining to the person of the owner, yielded in modern times to the 'law of the place where the property is kept and used.'"[1] And "in view of the enormous increase of such property since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a situs of its own for the purpose of taxation, and correlatively to exempt at the domicil of its owner."[2] But in the case of tangible personalty making only occasional excursions into other States, the State of origin remains the permanent situs.[3]

[1] Wheeling Steel Corp. *v.* Fox, 298 U. S. 193, 209 [1936].

[2] Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 207 [1905]; Western U. Teleg. Co. *v.* Kansas ex rel. Coleman, 216 U. S. 1 [1910]; Johnson Oil Ref. Co. *v.* Oklahoma ex rel. Mitchel, 290 U. S. 158 [1933].

[3] New York ex rel. New York C. & H. R. R. Co. *v.* Miller, 202 U. S. 584 [1906]; Southern Pacific Co. *v.* Kentucky ex rel. Alexander, 222 U. S. 63 [1911].

A State, as an exertion of its taxing power, without denial of due process of law, may tax tangible property having a situs within its borders, irrespective of the residence of the owner, and can if necessary impose the obligation to pay such tax upon the custodian or possessor of such property, giving a lien thereon to secure reimbursement.[1]

[1] Carstairs *v.* Cochran, 193 U. S. 10 [1904]; Thompson *v.* Kentucky, 209 U. S. 340 [1908]; Hannis Distilling Co. *v.* Baltimore, 216 U. S. 285 [1910].

"Ordinarily this Court recognizes that the fiction of *mobilia sequuntur personam* may be applied in order to determine the situs of intangible personal property."[1] The Court also recognizes the principle that intangible personal property may acquire a taxable (business) situs where permanently located, employed, and protected,[2] and it is not necessary that the taxpayer own real estate or other property within the State.[3]

[1] Safe Deposit & T. Co. *v.* Virginia, 280 U. S. 83 [1929].

[2] Ibid., p. 93. Farmers' Loan & T. Co. *v.* Minnesota, 280 U. S. 204, 213 [1930]; Virginia *v.* Imperial Coal Sales Co., 293 U. S. 15 [1934]; Wheeling Steel Corp. *v.* Fox, 298 U. S. 193, 210 [1936].

[3] Virginia *v.* Imperial Coal Sales Co., 293 U. S. 15 [1934].

One cannot be required to pay a property tax on property outside the State, over which he has no control but from which he receives the income.[1]

[1] Brooke *v.* Norfolk, 277 U. S. 27 [1928].

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Intangibles.

In setting forth the principles declared above in the matter of taxing intangibles, the Court has held that a State may tax—

(1) A debt held by a resident against a nonresident, evidenced by a bond of the debtor and secured by a mortgage on real estate in the State of the debtor's residence.[1]

(2) A mortgage owned and kept outside the State by a nonresident but on land within the State.[2]

(3) Credits due to a nonresident by residents for money loaned and invested by the resident agent of the creditor.[3]

(4) Stock held by a resident in a foreign corporation that does no business and has no property within the State.[4]

(5) Membership held by a nonresident in a local exchange (called a chamber of commerce).[5]

(6) Deposits of a resident in a bank in another State where he carries on a business from which the profits are derived, but belonging absolutely to him and not used in the business.[6]

(7) Membership held by a resident in a stock exchange located in another State.[7]

(8) Stock held by resident in a domestic corporation only part of whose property is within the State.[8]

(9) Bank deposits and accounts receivable of a foreign corporation which has acquired a commercial domicile within the State, even though the deposits are outside the State and the accounts receivable arise from manufacturing activities in another State, general control resting at the office in the taxing State.[9]

(10) Stock in a foreign corporation owned by another foreign corporation transacting its business within the State.[10]

[1] Kirtland *v.* Hotchkiss, 100 U. S. 498 [1879].
[2] Savings & L. Soc. *v.* Multnomah County, 169 U. S. 421 [1898].
[3] Bristol *v.* Washington County, 177 U. S. 141 [1900].
[4] Hawley *v.* Malden, 232 U. S. 1 [1914].
[5] Rogers *v.* Hennepin County, 240 U. S. 184 [1916].
[6] Fidelity & C. Trust Co. *v.* Louisville, 245 U. S. 54 [1917].
[7] Citizens Nat. Bank *v.* Durr, 257 U. S. 99 [1921].
[8] Klein *v.* Board of Tax Supervisors, 282 U. S. 19 [1930].
[9] Wheeling Steel Corp. *v.* Fox, 298 U. S. 193 [1936].
[10] First Bank Stock Corp. *v.* Minnesota, 301, U. S. 234 [1937].

The Court has held that a State may not tax—

(1) Mortgage notes in safe keeping within the State but made and payable and secured by property in a second State and owned by a resident of a third State.[1]

(2) Equitable interest of resident in intangibles (stocks and bonds) in hands of nonresident holder of legal title, the equitable owner having no power to change the situs of the intangibles.[2]

(3) Land trust certificates representing interests in various parcels of land (some inside the State and some outside), the holder

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of the certificates, although without voice in the management of the property, being entitled to a share in the net income and, upon a sale of the property, to the proceeds of sale.[3]

[1] Buck *v.* Beach, 206 U. S. 392 [1907].
[2] Safe Deposit & T. Co. *v.* Virginia, 280 U. S. 83 [1929].
[3] Senior *v.* Braden, 295 U. S. 422 [1935].

Income Tax on Individuals and Corporations (Except Carriers).

A State may, consistently with due process of law, impose an annual tax upon net income derived by nonresidents from property owned by them within the State, and from any business, trade, or profession carried on by them within its borders.[1] It may also tax profits realized by a nonresident upon sale of a right appurtenant to membership in a stock exchange within its borders, although the nonresident does no business within the State.[2] So far as residents are concerned, a State may tax income earned outside the State,[3] income from rents of land located outside the State and from interest on bonds physically without the State and secured by mortgage upon lands similarly situated,[4] and income received by a beneficiary from securities held by a trustee in a trust created and administered by the law of another State, and not directly taxable to the trustee.[5]

[1] Shaffer *v.* Carter, 252 U. S. 37 [1920]; Travis *v.* Yale & T. Mfg. Co., 252 U. S. 60 [1920].
[2] Whitney *v.* Graves, 299 U. S. 366 [1937].
[3] Lawrence *v.* State Tax Commission, 286 U. S. 276 [1932].
[4] New York ex rel. Cohn *v.* Graves, 300 U. S. 308 [1937].
[5] Maguire *v.* Trefry, 253 U. S. 12 [1920].

A privilege tax on a domestic corporation is not violative of due process as applied to a corporation doing intrastate, interstate, and foreign business, where the tax is based on such portion of the entire net income as is derived from business done within the State, as against the contention that only income from intrastate business is taxable.[1] A tax based on the income of a foreign corporation may be determined by allocating to the State a proportion of the total income which the tangible property in the State bears to the total.[2] However, such a basis may work an unconstitutional result if the income thus attributed to the State is out of all appropriate proportion to the business there transacted by the corporation; evidence may always be received which tends to show that a State has applied a method which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction.[3] But the burden is on the taxpayer to prove the unconstitutional operation.[4]

[1] Matson Nav. Co. *v.* Bd. of Equalization, 297 U. S. 441 [1936].
[2] Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113 [1920]; Bass, Ratcliff & Gretton *v.* State Tax Commission, 266 U. S. 271 [1924].
[3] Rees' (Hans) Sons *v.* North Carolina ex rel. Maxwell, 283 U. S. 123 [1931].
[4] Norfolk & W. R. Co. *v.* North Carolina, 297 U. S. 682 [1936].

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Succession and Inheritance Taxes.

No State may tax the transfer of property wholly beyond its power, jurisdiction, or control,[1] or impose death duties reckoned upon the value of tangibles permanently located outside its limits and having an actual situs in another State.[2] Tangibles with a permanent situs in a State, and their testamentary transfer, may be taxed only by the State where they are found.[3] But a State does not in effect tax property beyond its territorial jurisdiction merely because it applies to the local property the rate which would be applicable to the entire estate were it all within its borders.[4] Coins and bank notes kept by a decedent in a safe-deposit box in another State, are tangible property and not subject to the transfer tax by the State of domicile.[5]

[1] Frick *v.* Pennsylvania, 268 U. S. 473 [1925]; Rhode Island Hospital Trust Co. *v.* Doughton, 270 U. S. 69 [1926]; Wachovia Bank & T. Co. *v.* Doughton, 272 U. S. 567 [1926].

[2] Frick *v.* Pennsylvania, 268 U. S. 473 [1925]; City Bank Farmers Trust Co. *v.* Schnader, 293 U. S. 112 [1934].

[3] Farmers Loan & T. Co. *v.* Minnesota, 280 U. S. 204, 211 [1930].

[4] Maxwell *v.* Bugbee, 250 U. S. 525 [1919].

[5] Blodgett *v.* Silberman, 277 U. S. 1 [1928].

"* * * in general, intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles." [1] With respect to specific types of intangibles the Court has determined that—

(1) A State has no power to tax the succession of shares of stock owned by a nonresident in a foreign corporation merely because the corporation owns property in the State.[2]

(2) The State of domicile may tax the transfer of bonds and certificates of indebtedness payable to bearer, deposited in a safe-deposit box in another State, and also an interest in a limited partnership organized under the laws of such other State.[3]

(3) Negotiable bonds and certificates of indebtedness issued by a State or its municipalities, owned by a nonresident and not used in business in the issuing State, may not be taxed by it on their transfer.[4]

(4) Credits for bank deposits, coupon bonds of the United States, and promissory notes, all physically within the State and some secured by lands within the State, may not be made the basis for an inheritance tax when the owner is domiciled in another State.[5]

(5) A debt (open account) owed by a resident to a nonresident may not be made the basis of an inheritance or succession tax upon the death of the nonresident creditor.[6]

(6) When a stockholder in a corporation dies domiciled in a State other than that in which the corporation was created and has

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its property, the State of domicile may tax the succession to the shares by will or inheritance, but the State of the corporation can not do so.[7]

[1] Farmers Loan & T. Co. *v.* Minnesota, 280 U. S. 204, 212 [1930], overruling Blackstone *v.* Miller, 188 U. S. 189 [1903].
[2] Rhode Island Hospital Trust Co. *v.* Doughton, 270 U. S. 69 [1926].
[3] Blodgett *v.* Silberman, 277 U. S. 1 [1928].
[4] Farmers Loan & T. Co. *v.* Minnesota, 280 U. S. 204 [1930], overruling Blackstone *v.* Miller, 188 U. S. 189 [1903].
[5] Baldwin *v.* Missouri, 281 U. S. 586 [1930]. In the dissent of Justice Holmes in this case, he said that he supposes that Wheeler *v.* Sohmer, 233 U. S. 434 [1914] (upholding a transfer tax on notes on deposit within the State due by a nonresident) now joins Blackstone *v.* Miller on the "Index Expurgatorius."
[6] Beidler *v.* South Carolina Tax Commission, 282 U. S. 1 [1930].
[7] First Nat. Bank *v.* Maine, 284 U. S. 312 [1932].

Tax on Property of Carriers.

A State in assessing that part of a railroad within its limits, need not treat it as an independent line, disconnected from the part without, and place upon the property within the State only a value which could be given to it if operated separately from the balance of the road. The State may ascertain the value of the whole line as a single property and then determine the value of the part within on a mileage basis unless there be special circumstances which distinguish between conditions in the several States.[1] But no property of such a carrier can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State.[2]

[1] Pittsburgh, C. C. & St. L. R. Co. *v.* Backus, 154 U. S. 431 [1894]; Cleveland, C. C. & St. L. R. Co. *v.* Backus, 154 U. S. 443 [1894].
[2] Wallace *v.* Hines, 253 U. S. 66 [1920]; Southern R. Co. *v.* Kentucky, 274 U. S. 76 [1927]. *See also* Fargo *v.* Hart, 193 U. S. 490 [1904].

It is also permitted to regard the property of an interstate express company as a unit-profit-producing plant and to consider the value of the capital stock as an essential factor in determining the value of the entire property.[1]

[1] Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194 [1897].

Due process of law is denied a domestic corporation by a tax on its rolling stock permanently located in other States and employed there in prosecution of its business.[1] But the taxable situs of a vessel which has no permanent location within another jurisdiction is the domicile of the owner.[2] And although a State may not tax property belonging to a foreign corporation which has never come within its borders, it may tax movables which are regularly and habitually used and employed therein. While the valuation must be just (absolute accuracy being generally impossible) it need not be limited to mere worth of the articles considered separately but may include the

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intangible value due to the organic relation of the property to the whole system. But if the plan is arbitrary and the consequent valuation grossly excessive, it will be condemned as in conflict with the Fourteenth Amendment.[3] The fact that cars are loaded and reloaded at a refinery in a State outside the owner's domicile, does not fix the situs of the entire fleet in the State in which the refinery is located. Such State may, however, tax the number of cars which on the average are found to be physically present within the State.[4]

[1] Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 [1905].
[2] Southern P. Co. v. Kentucky ex rel. Alexander, 222 U. S. 63 [1911].
[3] Union Tank Line v. Wright, 249 U. S. 275 [1919].
[4] Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell, 290 U. S. 158 [1933].

Other Taxes on Corporations.

The total capital stock, even though it represents capital not subject to the taxing power of a State, has been upheld as the basis for a privilege tax (not a property tax) on a domestic corporation.[1] However, as applied to a foreign corporation, such a basis is bad,[2] even though there be a maximum fee,[3] unless apportioned according to some method such as property owned and used in business transacted in the State.[4] It is bad even though apportioned when based on the entire authorized stock, all not having been issued.[5] The stock of subsidiary foreign corporations doing business in the State may be included in apportioning the stock of the foreign holding company.[6] The tax has also been held bad as to domestic corporations when construed as a property tax.[7] And a State may not include the value of a franchise owned by a domestic corporation and granted by another State in taxing the franchise granted to it by the taxing State.[8]

[1] Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 227 [1916]; Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111 [1916].
[2] Western U. Teleg. Co. v. Kansas ex rel. Coleman, 216 U. S. 1 [1910]; Pullman Co. v. Kansas ex rel. Coleman, 216 U. S. 56 [1910]; Ludwig v. Western U. Teleg. Co., 216 U. S. 146 [1910]; Looney v. Crane Co., 245 U. S. 178 [1917]; International Paper Co. v. Massachusetts, 246 U. S. 135 [1918]; Locomobile Co. v. Massachusetts, 246 U. S. 178 [1918].
[3] Cudahy Packing Co. v. Hinkle, 278 U. S. 460 [1928].
[4] St. Louis S. W. R. Co. v. Arkansas ex rel. Norwood, 235 U. S. 350 [1914].
[5] Air-way Electric Appliance Corp. v. Day, 266 U. S. 71 [1924].
[6] National Leather Co. v. Massachusetts, 277 U. S. 413 [1929].
[7] Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341 [1905].
[8] Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385 [1903].

A State may impose an entrance fee for a foreign corporation measured solely by the amount of its authorized capital stock (amounting to $5,000 for corporations with a capitalization of $90,000,000).[1]

[1] Atlantic Refining Co. v. Virginia, 302 U. S. 22 [1937].

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A nonexcessive tax on domestic corporations assessed upon a proportion of the franchise value measured by local business, does not deny due process to a corporation engaged in interstate commerce.[1]

[1] Schwab *v.* Richardson, 263 U. S. 88 [1923].

A State may tax the corporate excess (value of outstanding capital stock in excess of value of real and personal property and certain indebtedness) of a domestic corporation, although the corporation's property and business are entirely in another State, and it makes no difference whether the tax be considered as one on property or on the franchise.[1] Where a foreign corporation transacts only interstate commerce within the borders of a State, a tax (excise) on such excess is bad, the amount of the tax being unimportant.[2]

[1] Cream of Wheat Co. *v.* Grand Forks County, 253 U. S. 325 [1920].
[2] Alpha Portland Cement Co. *v.* Massachusetts, 268 U. S. 203 [1925].

A State may impose a tax on a foreign corporation measured by the amount of sales of the goods manufactured in a local factory even though destined for interstate commerce.[1] A State tax on the annual gross earnings of a domestic railway corporation, construed as a property tax and apportioned according to mileage, is not unconstitutional in absence of proof that it exceeds what would be legitimate as an ordinary tax on the property valued as part of a going concern or that it is relatively higher than taxes on other kinds of property.[2]

[1] American Mfg. Co. *v.* St. Louis, 250 U. S. 459 [1919].
[2] Great Northern R. Co. *v.* Minnesota, 278 U. S. 503 [1929].

A privilege tax upon gross receipts may not be applied to the gross receipts of a foreign corporation for work outside the State in fabricating equipment later installed therein.[1]

[1] James *v.* Dravo Contracting Co., 302 U. S. 134 [1937].

A tax on the production of electricity does not violate the due process of law clause because it may be necessary to ascertain, as an element in its computation, the amounts delivered in another jurisdiction.[1]

[1] Utah Power & Light Co. *v.* Pfost, 286 U. S. 165 [1932].

Premiums and Loans of Insurance Companies.

A privilege tax on the gross premiums received by a foreign life-insurance company at its home office for business written in the State, does not deprive the company of property without due process,[1] but a tax is bad when the company has withdrawn all its agents from the State and has ceased to do business, merely continuing to be bound to policy holders resident therein and receiving at its home office the renewal premiums.[2]

[1] Equitable L. Assur. Soc. *v.* Pennsylvania, 238 U. S. 143 [1915].
[2] Provident Sav. Life Assur. Soc. *v.* Kentucky, 239 U. S. 103 [1915].

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A State may tax an insurance company located in another State, which contracts with a sales corporation resident therein to insure its customers against loss of the articles purchased from it, so far as the articles go into possession of purchasers within the taxing State.[1]

[1] Palmetto F. Ins. Co. *v.* Conn, 272 U. S. 295 [1926].

A State law exacting of persons insuring their property situated in the State a so-called tax of 5 percent of the amounts paid by them as premiums to insurers not authorized to do business in the State, is void as applied to insurance contracted and paid for outside the State by a foreign corporation doing a local business.[1]

[1] St. Louis Cotton Compress Co. *v.* Arkansas, 260 U. S. 346 [1922].

Loans made by a foreign insurance company on its own policies are taxable by the State of the policy holder even though the notes may be temporarily sent to the home office,[1] but the State may not impose a tax where a policy-holder simply withdraws a portion of the reserve on his policy for which the company is bound, even though he gives a note on which interest is necessarily charged to adjust the account.[2] Premiums due by residents and which have been extended by foreign companies are credits that may be taxed at the debtor's domicile whether the extension be by the company [3] or by the local agent and for which he (the agent) becomes liable.[4]

[1] Metropolitan L. Ins. Co. *v.* New Orleans, 205 U. S. 395 [1907].
[2] Board of Assessors *v.* New York L. Ins. Co., 216 U. S. 517 [1910].
[3] Liverpool & L. & G. Ins. Co. *v.* Board of Assessors, 221 U. S. 346 [1911].
[4] Orient Ins. Co. *v.* Board of Assessors, 221 U. S. 358 [1911].

Chain Store Taxes.

A tax on chain stores at a rate per store determined by the number of stores both within and without the State, is not unconstitutional as a tax in part upon things beyond the jurisdiction of the State.[1]

[1] Great A. & P. Tea Co. *v.* Grosjean, 301 U. S. 412 [1937].

Stamp and Transfer Taxes.

A stamp (excise) tax on promissory notes made within the State by a domestic corporation and sent to payee banks in other States and placed to the maker's credit was held good,[1] as was a tax on transfers within the State of stock certificates issued by a foreign corporation and owned by a nonresident.[2]

[1] Graniteville Mfg. Co. *v.* Query, 283 U. S. 376 [1931].
[2] New York ex rel Hatch *v.* Reardon, 204 U. S. 152 [1917].

COLLECTION OF PROPERTY TAXES.

Penalties and Interest for Nonpayment.

As the State may, in the first instance, enact that taxes shall bear interest from the time they become due, so, without conflicting

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with any provision of the Federal Constitution it may in like manner provide that taxes which have become delinquent shall bear interest from the time the delinquency commenced.[1]

[1] League v. Texas, 184 U. S. 156 [1902].

Collection by Distress and Seizure of Person.

Collection of the tax by distress and seizure of the person does not deprive any one of liberty and property without due process of law when the law of the State gives opportunity for objection before the tax commissioner, and if dissatisfied with the final action of the commissioner the party may have that action reviewed by certiorari.[1] Due process of law is not denied a foreign insurance company by distraining its personal property to satisfy personal taxes lawfully levied.[2]

[1] Palmer v. McMahon, 133 U. S. 660, 669 [1890].
[2] Scottish Union & Nat. Ins. Co. v. Bowland, 196 U. S. 611 [1905].

Forfeiture of Land for Nonpayment.

A statute providing for the forfeiture of land titles for failure to list and pay taxes thereon for certain specified years, does not deny due process of law, an opportunity to be heard being given. And it is no valid objection that the lands may have been listed and taxes paid by another claimant under a separate title.[1]

[1] King v. Mullins, 171 U. S. 404 [1898]; King v. West Virginia, 216 U. S. 92 [1910] Fay v. Crozer, 217 U. S. 455 [1910]; Kentucky Union Co. v. Kentucky, 219 U. S. 140 [1911]; Chapman v. Zobelein, 237 U. S. 135 [1915].

Foreclosure of Tax Lien by Proceedings in Rem.

A statute providing for foreclosure of tax liens by proceedings in rem to which the land alone is made a party, and for cutting out all preexisting rights or liens by sale under decree therein, does not deprive a person of property without due process of law.[1]

[1] Leigh v. Green, 193 U. S. 79 [1904].

New Remedies Applicable to Delinquent Taxes.

A State may adopt new remedies for the collection of taxes and apply those remedies to taxes already delinquent.[1] A change in the method of tax sale has been held not to deprive bondholders of a drainage district of due process.[2]

[1] League v. Texas, 184 U. S. 158 [1902]. *See also* Straus v. Foxworth, 231 U. S. 162 [1914].
[2] Ingraham v. Hanson, 297 U. S. 378 [1936].

PROCEDURE.*

In General.

Exactly what due process of law requires in the assessment and collection of general taxes has never been decided by the Supreme

**See also* p. 910.

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Court, and while it has been held that notice must be given to the owner at some stage of proceedings for imposition of special taxes, it has also been held that laws for assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary; the Fourteenth Amendment is satisfied by showing that the usual course prescribed by the State laws requires notice to the taxpayers and is in conformity with natural justice.[1]

[1] Turpin *v.* Lemon, 187 U. S. 51 [1902]; Glidden *v.* Harrington, 189 U. S. 255 [1903].

Due process of law as applied to taxation does not mean judicial process; the taxpayer is not entitled to be present when the tax is assessed against him, nor is he entitled to have the tax collected by suit.[1] The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain.[2] If the taxpayer is given an opportunity to test the validity of the tax at any time before it is final, whether the proceedings for review take place before a board having a quasi-judicial character, or before a tribunal provided by the State for the purpose of determining such questions, due process of law is not denied.[3]

[1] McMillen *v.* Anderson, 95 U. S. 37 [1877].
[2] Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 239 [1890].
[3] Hodge *v.* Muscatine County, 196 U. S. 276 [1905].

Notice and Hearing.

NECESSITY OF NOTICE AND HEARING.

Whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or for some limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.[1]

[1] Davidson *v.* New Orleans, 96 U. S. 97, 104 [1878]. *See also* Gallup *v.* Schmidt, 183 U. S. 300, 307 [1902].

"Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice

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to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable." [1]

[1] Hagar *v.* Reclamation District No. 108, 111 U. S. 701, 708 [1884].

"Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by the law and go into business. There is no need in such case for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.

"But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law." [1]

[1] Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701, 709–710 [1884]. *See also* Cincinnati, N. O. & T. P. R. Co. *v.* Kentucky (Kentucky Railroad Tax Cases), 115 U. S. 321, 331 [1885]; Palmer *v.* McMahon, 133 U. S. 660, 669 [1890]; Turpin *v.* Lemon, 187 U. S. 51 [1902]; Hodge *v.* Muscatine County, 196 U. S. 276 [1905]; Central of Georgia R. Co. *v.* Wright, 207 U. S. 127 [1907]; Londoner *v.* Denver, 210 U. S. 373 [1908].

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A taxpayer who, after assessment of his property is given the right to appear and be heard by a board of arbitration on the question of valuation whose decision shall be final, is not deprived of his property without due process of law.[1] But when the arbitrators fail to reach an agreement as to the specific value, although all agreed the valuation was too high, the taxpayer is deprived of his property without due process of law.[2]

[1] McGregor *v.* Hogan, 263 U. S. 234 [1923].
[2] Turner *v.* Wade, 254 U. S. 64 [1920].

Due process was not satisfied where a taxpayer was denied the right to test the validity of a tax or the amount of the assessment, and limiting the right to attach an assessment to cases of fraud or corruption is insufficient.[1] But where a car company failed to report its gross receipts as required by statute, and the State comptroller estimated such receipts and added 10 percent thereto as a penalty as permitted in the statute, the company had no further right to be heard.[2]

[1] Central of Georgia R. Co. *v.* Wright, 207 U. S. 127 [1907].
[2] Pullman Co. *v.* Knott, 235 U. S. 23 [1914].

The judgment of a State court denying a remedy in equity to enjoin a discriminatory tax, when that was the only remedy available, is invalid.[1]

[1] Brinkerhoff-Faris Trust & Sav. Co. *v.* Hill, 281 U. S. 673 [1930].

TIME OF NOTICE AND HEARING.

There is no constitutional command that notice of the assessment of a tax, and opportunity to contest it, must be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the State to pay becomes final.[1]

[1] Nickey *v.* Mississippi, 292 U. S. 393, 396 [1934]. *See also* Winona & St. P. Land Co. *v.* Minnesota, 159 U. S. 526, 537 [1895]; Wells Fargo & Co. *v.* Nevada, 248 U. S. 165 [1918].

A State tax of a specified percent on deposits in national banks paid by the bank under agreement with the State pursuant to statute and which is otherwise valid, does not amount to denial of due process of law because the depositor had no notice in advance of the assessment, where the tax was recoverable by suit in which the depositor would have full opportunity to resist any illegal demand.[1]

[1] Clement Nat. Bank *v.* Vermont, 231 U. S. 120 [1914].

It is not necessary that there be notice and hearing after the determination by the assessing board as well as before. A hearing before judgment, with full opportunity to present all the evidence and the arguments, which the party deems important, is all that can be adjudged vital. Rehearings and new trials are not essential to

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due process of law.[1] Thus, where a taxpayer had no notice of a hearing but did have notice of the decision, from which he had a right of appeal and there to be heard and to offer evidence before the valuation of his property for taxation was finally fixed, he was afforded all the notice to which he was entitled.[2] One hearing is sufficient to constitute due process.[3]

[1] Pittsburgh, C. C. & St. L. R. Co. *v.* Backus, 154 U. S. 421 [1894].
[2] Pittsburgh, C. C. & St. L. R. Co. *v.* Board of Public Works, 172 U. S. 32, 45 [1898].
[3] Michigan C. R. Co. *v.* Powers, 201 U. S. 245, 302 [1906].

It may be that the authority of the legislature to prescribe the length of notice is not absolute and beyond review, but it is certain that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of time.[1]

[1] Bellingham Bay & B. C. R. Co. *v.* New Whatcom, 172 U. S. 314, 318 [1899].

MANNER OF GIVING NOTICE.

IN GENERAL.—Where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon what it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice either personal, by publication, or by law fixing the time and place of hearing.[1]

[1] Londoner *v.* Denver, 210 U. S. 373 [1908].

NOTICE BY STATUTE.—A naming of the time and place for the meetings of an assessing board by statute is sufficient notice in tax proceedings.[1]

[1] Cincinnati, N. O. & T. P. R. Co. *v.* Kentucky (Kentucky Railroad Tax Cases), 115 U. S. 321, 331 [1885]; Palmer *v.* McMahon, 133 U. S. 660 [1890]; Pittsburgh, C. C. & St. L. R. Co. *v.* Backus, 154 U. S. 421 [1894]; Hodge *v.* Muscatine County, 196 U. S. 276 [1905].

PERSONAL NOTICE AND NOTICE BY PUBLICATION.—That the notice of a tax is not personal, but by publication, is not sufficient to vitiate it.[1] Personal notice has never been considered an essential to due process in respect to taxation.[2] Suitable notice posted in public places is sufficient.[3]

[1] Winona & St. P. Land Co. *v.* Minnesota, 159 U. S. 526, 537 [1895].
[2] Merchants' & Mfgrs. Nat. Bank *v.* Pennsylvania, 167 U. S. 461, 466 [1897].
[3] Glidden *v.* Harrington, 189 U. S. 255 [1903].

A State statute does not deprive a nonresident stockholder of property without due process of law, because of the omission to require

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directly the giving of notice of assessments for taxation on his stock, and opportunity for contest by him as to the correctness of the valuation, but constitutes the corporation his agent to receive notice and to represent him in proceedings for correcting assessments.[1]

[1] Corry *v.* Baltimore, 196 U. S. 478 [1905].

NOTICE GIVEN THOUGH NOT REQUIRED BY STATUTE.

When, on the collection of back taxes, a State court has afforded to the taxpayer full opportunity to be heard on the question of the validity and amount of the tax, the taxpayer has been accorded due process though the statute does not require notice to be given of the assessment.[1]

[1] Security Trust & S. V. Co. *v.* Lexington, 203 U. S. 323 [1906].

REASSESSMENTS.

When the governor of a State, upon complaint, can order a reassessment, it is not necessary that there be a hearing before he can act on the complaint, an opportunity to be heard being given during the proceedings for reassessment or on defense of an action for collection of the tax.[1] Nor does a taxpayer have a right to a hearing before the State equalization board preliminary to issuance by it of an order increasing the valuation of all property in a particular city by 40 percent.[2]

[1] Weyerhauser *v.* Minnesota, 176 U. S. 550, 554 [1900].

[2] Bi-Metallic Invest. Co. *v.* State Bd. of Equalization, 239 U. S. 441 [1915].

A taxpayer was denied due process of law when a review board, required by law to reach an agreement within 10 days, failed to reach such an agreement as to the specific value although all members found the revaluation fixed was too high.[1]

[1] Turner *v.* Wade, 254 U. S. 64 [1920].

NOTICE OF TAX SALE.

Where the State seeks directly or by authorization to others to sell land for taxes, upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are "so minded" to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the Fourteenth Amendment to the Constitution.[1]

[1] Leigh *v.* Green, 193 U. S. 79, 92 [1904].

Although a description may not be technically correct, if it identifies the land it will sustain an assessment for taxes, and notice of sale therefor when delinquent; and, if the owner knows that the property so described is his, he is not, by reason of the insufficient

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description, deprived of his property without due process of law. Where tax proceedings are in rem, owners are bound to take notice thereof and to pay taxes on their property, even if assessed to unknown or other persons; and if an owner stands by and sees his property sold for delinquent taxes, he is not thereby deprived of his property without due process of law.[1]

[1] Ontario Land Co. *v.* Yordy, 212 U. S. 152 [1909]. *See also* Ontario Land Co. *v.* Wilfong, 223 U. S. 543 [1912].

An owner of property must be held to knowledge that failure to pay duly assessed taxes will be followed by sale; and if the statute gives him full opportunity to be heard as to the assessment on definite days, and definitely fixes the time for payment and the time for sale in case of default, so that he cannot fail, if duly diligent, to learn of the pendency of the sale, he is not denied due process of law because the notice of sale is by publication and not by personal service.[1]

[1] Longyear *v.* Toolan, 209 U. S. 414 [1908].

Assessment for Public Improvement.

IN GENERAL.

A State may defray the entire expense of creating, developing, and improving a political subdivision either from funds raised by general taxation, by apportioning the burden among the municipalities in which the improvements are made, by creating tax districts to meet authorized outlays, or by authorizing the creation of such districts.[1]

[1] Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701 [1884]; Houck *v.* Little River Drainage Dist., 239 U. S. 254 [1915].

"In view of our decisions, we certainly cannot say that, as a matter of law, a State statute which makes the cost of paving a street in a city assessable upon the abutting properties and a lien thereon, is unconstitutional."[1]

[1] Chadwick *v.* Kelley, 187 U. S. 540, 543 [1903], citing Willard *v.* Presbury, 14 Wall. 676 [1870]; Mattingly *v.* District of Columbia, 97 U. S. 687 [1878]; Spencer *v.* Merchant, 125 U. S. 345 [1888]; Bauman *v.* Ross, 167 U. S. 548 [1897]; Parsons *v.* District of Columbia, 170 U. S. 45 [1898]; Wight *v.* Davidson, 181 U. S. 371 [1901]; French *v.* Barber Asphalt Paving Co., 181 U. S. 324 [1901]. *See also* Walston *v.* Nevin, 128 U. S. 581 [1888]; Wagner *v.* Leser, 239 U. S. 207 [1915].

The formation of drainage districts and the assessment of lands benefited is not an appropriation of property for a private use.[1]

[1] O'Neill *v.* Leamer, 239 U. S. 244 [1915]; Houck *v.* Little River Drainage Dist., 239 U. S. 254 [1915].

Where a State statute authorizes municipal authorities to define the district to be benefited by a street improvement and to assess the

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cost of the improvement upon the property within the district in proportion to benefits, their action in establishing the district and in fixing the assessments on included property, after due hearing of the owners as required by the statute, when not arbitrary or fraudulent, cannot be reviewed under the Fourteenth Amendment upon the ground that other property benefited by the improvement was not included and taxed.[1]

[1] Butters *v.* Oakland, 263 U. S. 162 [1923].

A law establishing a taxing district under which there is no reasonable presumption that substantial justice will be done, but under which parties probably will be disproportionately taxed, cannot stand as constitutional against one actually so taxed.[1] However, the law will be deemed constitutional in absence of showing that it produced results palpably arbitrary or grossly unequal.[2] It can be successfully called in question only when it is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power.[3] Unless the exaction is a flagrant abuse, and by reason of its arbitrary character is a mere confiscation of particular property, it cannot be maintained that the State has exceeded its taxing power.[4]

[1] Gast Realty & Invest. Co. *v.* Schneider Granite Co., 240 U. S. 55 [1916]; Kansas City Southern R. Co. *v.* Road Improv. Dist. No. 6, 256 U. S. 658 [1921].

[2] Withnell *v.* Ruecking Constr. Co., 249 U. S. 63 [1919]; Kansas City Southern R. Co. *v.* Road Improv. Dist. No. 3, 266 U. S. 379 [1924].

[3] Embree *v.* Kansas City & L. Boulevard Road Dist., 240 U. S. 242 [1916].

[4] Houck *v.* Little River Drainage Dist., 239 U. S. 254 [1915].

RELATION OF ASSESSMENTS TO BENEFITS.

To justify an assessment of benefits, it is not essential that the benefits be direct or immediate,[1] but it is essential that they have a better basis than mere conjecture,[2] or prophecy.[3] A legislative determination that lands will be benefited by a public improvement for which a special tax is authorized is conclusive, unless it is arbitrary, wholly unwarranted, and a mere confiscation of the particular property.[4]

[1] Houck *v.* Little River Drainage Dist., 239 U. S. 254 [1915]; Miller & Lux *v.* Sacramento & San Joaquin Drainage Dist., 256 U. S. 129 [1921]; Valley Farms Co. *v.* Westchester County, 261 U. S. 155 [1923]; Thomas *v.* Kansas City Southern R. Co., 261 U. S. 481 [1923].

[2] Kansas City Southern R. Co. *v.* Road Improv. Dist. No. 6, 256 U. S. 658 [1921].

[3] Thomas *v.* Kansas City Southern R. Co., 261 U. S. 481 [1923].

[4] Spencer *v.* Merchant, 125 U. S. 345 [1888]; Branson *v.* Bush, 251 U. S. 182 [1919]; Milheim *v.* Moffat Tunnel Improv. Dist., 262 U. S. 710 [1923].

Until the time of Norwood *v.* Baker,[1] it appeared that, so long as the assessments were apportioned according to benefits, they were not necessarily limited in absolute amount by the benefits.[2] In that case,

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the language of the court seemed to imply that the assessment could not be levied until it had been determined after hearing, that it would not impose upon any particular piece of property a tax in substantial excess of the benefit conferred by the improvement upon that property. However, in French *v.* Barber Asphalt Paving Co.,[3] the Court said that such was not the necessary legal import of the decision but rather that its legal effect was only to prevent the enforcement of the particular assessment in question. It has recently been stated that the principle applied in Norwood *v.* Baker has no application to an assessment to pay the general indebtedness of an irrigation district, though in excess of the benefits received.[4]

[1] 172 U. S. 269 [1898].

[2] Spencer *v.* Merchant, 125 U. S. 345 [1888]; Paulsen *v.* Portland, 149 U. S. 30 [1893].

[3] 181 U. S. 324 [1901]. *See also* Tonawanda *v.* Lyon, 181 U. S. 389 [1901].

[4] Roberts *v.* Richland Irrig. Co., 289 U. S. 71 [1933].

A statute has been upheld which provided that original roads should be constructed at the exclusive cost of the adjoining owners according to area, notwithstanding that a complaining railroad received no benefit.[1] It has also been held that a State may assess paving costs against street railroads occupying the streets without regard to benefits, even though others are assessed only on the basis of benefits.[2]

[1] Louisville & N. R. Co. *v.* Barber Asphalt Pav. Co., 197 U. S. 430 [1905].

[2] Georgia R. & Electric Co. *v.* Decatur, 295 U. S. 165 [1935].

When gains may result from increased traffic reasonably expected from an improvement, this is sufficient to sustain an assessment against a railroad,[1] but when any benefit resulting by reason of the construction of a road would be greatly reduced by the loss of local freight and passenger traffic, an assessment has been held bad.[2]

[1] Kansas City Southern R. Co. *v.* Road Improv. Dist. No. 3, 266 U. S. 379 [1924].

[2] Road Improv. Dist. No. 1 *v.* Missouri P. R. Co., 274 U. S. 188 [1927].

Where a high and dry island is included within the boundaries of a drainage district from which it could not be benefited directly or indirectly, a tax on such island is a deprivation of property without due process of law.[1]

[1] Myles Salt Co. *v.* Iberia & St. M. Drainage Dist., 239 U. S. 478 [1916].

BASIS OF APPORTIONING LEVY.

The power to levy taxes for local improvements according to value, acreage, front foot, or benefits is definitely recognized.[1] The action of a district in proportioning the burden of taxation cannot be assailed under the Fourteenth Amendment unless palpably arbitrary

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and a plain abuse.[2] The method to be used is a matter of legislative discretion.[3]

[1] Houck *v.* Little River Drainage Dist., 239 U. S. 254 [1915]; Roberts *v.* Richland Irrig. Co., 289 U. S. 71 [1933]. *See also* Webster *v.* Fargo, 181 U. S. 394 [1901].

[2] Roberts *v.* Richland Irrig. Co., 289 U. S. 71 [1933]. *See also* Kansas City Southern R. Co. *v.* Road Improv. Dist. No. 6, 256 U. S. 658 [1921].

[3] Hancock *v.* Muskogee, 250 U. S. 454 [1919].

ASSESSMENT FOR PRELIMINARY EXPENSES.

An assessment may be made upon lands within a district, after the district is formed, to defray the preliminary expenses of its organization.[1] It is also proper to impose a tax to defray the expense of an inquiry when the improvement is abandoned, and the fact that the tax exceeded the amounts of anticipated benefits had the improvement been made did not render the assessment obnoxious to the Fourteenth Amendment, there being no suggestion of a flagrant abuse or purely arbitrary exercise of the taxing power.[2]

[1] Houck *v.* Little River Drainage Dist., 239 U. S. 254 [1915].

[2] Missouri P. R. Co. *v.* Western Crawford Road Improv. Dist., 266 U. S. 187 [1924].

REASSESSMENT AND ASSESSMENT FOR IMPROVEMENTS ALREADY MADE.

A State may, without violating the Fourteenth Amendment, assess property for special benefits resulting from an improvement already made [1] or change the method of assessment after completion of the work.[2] Where an assessment has been held void for want of authority, it may be validated by the legislature [3] or a new legal assessment made.[4]

[1] Wagner *v.* Leser, 239 U. S. 207 [1915].

[2] Seattle *v.* Kelleher, 195 U. S. 351 [1904].

[3] Charlotte Harbor & N. R. Co. *v.* Welles, 260 U. S. 8 [1922].

[4] Lombard *v.* West Chicago Park, 181 U. S. 33, 42 [1901].

A statute may provide that if a foreclosure on land in a district does not produce enough to pay the assessment on that land, the deficit may be reassessed on the remaining lands in the district.[1]

[1] Kadow *v.* Paul, 274 U. S. 175 [1927].

ESTOPPEL FROM CONTESTING CONSTITUTIONALITY.

When a public improvement is completed, and the assessment made at the instance and on the petition of property owners pursuant to a legislative act, they are estopped from setting up the unconstitutionality of an assessment made in conformity therewith.[1] An owner of property within a sewer district who connected his premises with the sewer was estopped from maintaining a suit in which he alleged

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that the manner of constituting the district and apportioning the costs infringed his rights under the Fourteenth Amendment.[2]

[1] Shepard *v.* Barron, 194 U. S. 553 [1904].

[2] St. Louis Malleable Casting Co. *v.* Prendergast Constr. Co., 260 U. S. 469 [1923].

PERSONAL JUDGMENT AGAINST OWNER.

A personal judgment for the amount of a tax against the owner of property, in addition to a charge on the land, does not amount to a taking of property without due process of law.[1] But where the owner of the land is a nonresident of the State, a personal liability to pay such an assessment violates the amendment.[2]

[1] Davidson *v.* New Orleans, 96 U. S. 97 [1878].

[2] Dewey *v.* Des Moines, 173 U. S. 193 [1899].

NOTICE AND HEARING.

In General.

"* * * in proceedings * * * for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential" to due process.[1]

[1] Turpin *v.* Lemon, 187 U. S. 55, 58 [1902], citing Spencer *v.* Merchant, 125 U. S. 345 [1888]; Huling *v.* Kaw Valley R. & Improv. Co., 130 U. S. 559 [1889]; Hagar *v.* Reclamation Dist., 111 U. S. 701 [1884]; Paulsen *v.* Portland, 149 U. S. 30 [1893].

Where assessments are made by a political subdivision, a taxing board, or court, according to special benefits, the property owner is entitled to be heard as to the amount of his assessments and upon all questions properly entering into that determination. If the legislature, as has frequently been stated, provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.[1] When it is found that the land of an owner has been duly included within a benefit district, the right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e., the amount of the tax which he is to pay.[2]

[1] St. Louis & K. C. Land Co. *v.* Kansas City, 241 U. S. 419, 430 [1916], citing Spencer *v.* Merchant, 125 U. S. 345, 355, 356 [1888]; Paulsen *v.* Portland, 149 U. S. 30, 41 [1893]; Bauman *v.* Ross, 167 U. S. 548, 590 [1897]; Goodrich *v.* Detroit, 184 U. S. 432 [1902].

[2] St. Louis & K. C. Land Co. *v.* Kansas City, 241 U. S. 419, 430 [1916], citing Fallbrook Irrig. Dist. *v.* Bradley, 164 U. S. 112, 175 [1896]; French *v.* Barber Asphalt Paving Co., 181 U. S. 324, 341 [1901]. *See also* Soliah *v.* Heskin, 222 U. S. 522 [1912].

"Where a local improvement territory is selected, and the burden is spread by the legislature or by a municipality to which the State

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has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits." [1] When the legislature itself prescribes that the cost of an improvement shall be apportioned against lots in a district in proportion to area, there is no occasion for a hearing with respect to the mode in which the assessment shall be apportioned.[2] But it is essential that owners of property be given notice and opportunity to be heard where the district was not created by the legislature, and there has been no legislative determination that their property will be benefited by the improvement.[3]

[1] Browning *v.* Hooper, 269 U. S. 396, 405 [1926]. *See also* Williams *v.* Eggleston, 170 U. S. 304 [1898]; Londoner *v.* Denver, 210 U. S. 373 [1908]; Wagner *v.* Leser, 239 U. S. 207 [1915]; Valley Farms Co. *v.* Westchester County, 261 U. S. 155 [1923]; Withnell *v.* Ruecking Constr. Co., 249 U. S. 63 [1919]; St. Louis & S. W. R. Co. *v.* Nattin, 277 U. S. 157 [1928].

[2] Hancock *v.* Muskogee, 250 U. S. 454 [1919].

[3] Browning *v.* Hooper, 269 U. S. 396, 405 [1926]. *See also* Embree *v.* Kansas City & L. Boulevard Road Dist., 240 U. S. 242 [1916]; Hancock *v.* Muskogee, 250 U. S. 454 [1918].

There is no constitutional privilege to be heard in opposition at the launching of a project which may end in an assessment. It is enough that a hearing is permitted before the imposition of the assessment as a charge upon the lands,[1] or in proceedings for collection afterward.[2] But when a municipal charter gives a hearing on the question of benefits before formation of a district to be improved, and the council takes into consideration whether the property would be benefited by improvements in an amount greater than the cost of an improvement as assessed, every requirement of due process of law is satisfied.[3]

[1] Utley *v.* St. Petersburg, 292 U. S. 106, 109 [1934]. *See also* Goodrich *v.* Detroit, 184 U. S. 432 [1902]; Mount St. Mary's Cemetery Asso. *v.* Mullins, 248 U. S. 501 [1919]; Chicago, M., St. P. & P. R. Co. *v.* Risty, 276 U. S. 567 [1928].

[2] Utley *v.* St. Petersburg, 292 U. S. 106, 109 [1934]. *See also* Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701 [1884]; Hetrick *v.* Lindsey, 265 U. S. 384 [1924].

[3] King *v.* Portland, 184 U. S. 61 [1902].

A State law under which a drainage has been established, the ditches constructed and the cost assessed does not violate the landowners' rights to due process in empowering a supervising board, without further notice, to determine the necessity and extent of cleaning and repairs, and to assess the cost upon the lands in proportion to the original assessments.[1]

[1] Breiholz *v.* Pocahontas County, 257 U. S. 118 [1921].

Sufficiency of Notice.

No particular form of notice is necessary to satisfy constitutional requirements. If it be such as fairly apprises the landowner of what is

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proposed and affords reasonable opportunity to be heard, it suffices.[1] A property owner is not entitled to notice of every step in the proceedings.[2] On the sale of lands for levee taxes under a drainage law, a nonresident owner has not been deprived of property without due process of law when the law provides for service upon such owner by publication for four weeks.[3]

[1] Chicago, M. St. P. & P. R. Co. v. Risty, 276 U. S. 567 [1928].
[2] Voigt v. Detroit, 184 U. S. 115 [1902].
[3] Ballard v. Hunter, 204 U. S. 241 [1907].

Sufficiency of Hearing.

"In some States, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the tax-payer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law. In Davidson v. New Orleans [96 U. S. 97] this court decided this precise point."[1] A judicial inquiry into the value of lands and benefits which actually accrue by a proposed improvement is not necessary.[2] An opportunity to submit objections in writing, without the right of personal appearance, is not sufficient.[3]

[1] Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 710 [1884].
[2] Tonawanda v. Lyon, 181 U. S. 389, 391 [1901].
[3] Londoner v. Denver, 210 U. S. 373 [1908].

In the apportionment of assessments for improvements, due process of law is afforded if the taxpayer is given an opportunity to be heard before the body making the assessment; and, so far as the Federal Constitution is concerned, the State legislature may provide that such hearing shall be conclusive.[1] When a statute delegating authority to establish a district, provides for a hearing on the question of benefits, the decision of the designated tribunal is sufficient and due process is not denied unless made fraudulently or in bad faith.[2] An owner of property has no right to be heard as to the assessments on all other property owners.[3]

[1] Hibben v. Smith, 191 U. S. 310 [1903].
[2] Embree v. Kansas City & L. Boulevard Road Dist., 240 U. S. 242 [1916].
[3] St. Louis & K. C. Land Co. v. Kansas City, 241 U. S. 419, 430 [1916].

The owners of back-lying property are not denied due process of law if they have such notice and opportunity to be heard as is accorded to the owners of abutting property.[1] Persons failing to avail themselves of an opportunity to object and be heard, cannot complain of assessments as arbitrary and unconstitutional.[2]

[1] Cleveland, C. C. & S. L. R. Co. v. Porter, 210 U. S. 177 [1908].
[2] Farncomb v. Denver, 252 U. S. 7 [1920]; Milheim v. Moffat Tunnel Improv. Dist., 262 U. S. 710 [1923].

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Where by State statute the basis for assessing a street railway for the cost of paving part of the street was the benefit resulting to it, and evidence tending to prove no benefit resulted was excluded, the street railway was thereby denied a hearing and the due process of law clause was violated.[1]

[1] Georgia R. & Electric Co. v. Decatur, 295 U. S. 165 [1935].

Procedural Due Process of Law.

IN GENERAL.

Procedural Due Process "Defined."

GENERALLY.—By due process is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. There must be an observance of those general rules established in our system of jurisprudence for the security of private rights.[1] Any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.[2]

[1] Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 708 [1884]; Turpin v. Lemon, 187 U. S. 51, 58 [1902].
[2] Hurtado v. California, 110 U. S. 516, 537 [1884].

PARTICULAR PROCEEDINGS.—It is familiar that what is due process of law depends, of course, on circumstances. It varies with the subject matter and the necessities of the situation. Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so also where title or possession of property is involved.[1] "Due process of law", when applied to judicial proceedings, means 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 private rights.[2]

[1] Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 708 [1884].
[2] Endicott-Johnson Corp. v. Encyclopedia Press, 266 U. S. 285, 288 [1924]; Pennoyer v. Neff, 95 U. S. 714, 733 [1878].

But where the taking is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to the property owner is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable.[1] "Due process of law",

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as applied to taxation, does not imply or require the right to such notice and hearings as are considered to be essential to the validity of proceedings and judgments of judicial tribunals. Summary proceedings suffice for taxes, notice by statute is generally the only notice given, and that has been held sufficient.[2]

[1] Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701, 708 [1884].
[2] Cincinnati, N. O. & T. P. R. Co. *v.* Kentucky (Kentucky Railroad Tax Cases), 115 U. S. 321, 331 [1885].

In judging what is due process of law in tax and eminent domain proceedings respect must be had to the cause and object of the taking of property, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not due process of law. Whenever by the laws of a State or by State authority a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.[1]

[1] Davidson *v.* New Orleans, 96 U. S. 97, 104, 107 [1878].

Criteria of Procedural Due Process.

ANCIENT USAGE.—What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings, existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. A process of law which is not otherwise forbidden must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country.[1]

[1] Twining *v.* New Jersey, 211 U. S. 78, 100 [1908].

The Fourteenth Amendment was intended to preserve and protect fundamental rights long recognized under the common law system,[1] and no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of Government.[2]

[1] Butler *v.* Perry, 240 U. S. 328, 333 [1916].
[2] Twining *v.* New Jersey, 211 U. S. 78, 101 [1908].

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It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment.[1] To hold that procedure sanctioned by usage is essential to due process of law would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.[2] The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. A State may avail itself of the wisdom gathered by the experience of the century to make such charges as may be necessary.[3]

[1] Twining *v.* New Jersey, 211 U. S. 78, 101 [1908].
[2] Hurtado *v.* California, 110 U. S. 516, 529 [1884].
[3] Brown *v.* New Jersey, 175 U. S. 172, 175 [1899].

UNIFORMITY.—Due process is secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. Law in its regular course of administration through courts of justice is due process, and when secured by the law of the State, the constitutional requirement is satisfied.[1] Where a plaintiff has the benefit of a full and fair trail in the State courts, and his rights were measured not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition, he is not deprived of property without due process of law, even if he can be regarded as deprived of his property by an adverse result.[2]

[1] Leeper *v.* Texas, 139 U. S. 462, 468 [1891]; Dent *v.* West Virginia, 129 U. S. 114, 124 [1889]; Caldwell *v.* Texas, 137 U. S. 692, 697 [1891]; Maxwell *v.* Dow, 176 U. S. 581, 603 [1900].
[2] Marchant *v.* Pennsylvania R. Co., 153 U. S. 380, 386 [1894].

SUBSTANCE.—The due process of law guaranteed by the Fourteenth Amendment has regard to substance of right, and not to matters of form.[1] In determining whether the essential elements of due process of law (i. e., notice and an opportunity to defend) were denied, the Supreme Court is governed by the substance of things, not by mere form.[2]

[1] Frank *v.* Mangum, 237 U. S. 309, 331 [1915]; Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226, 235 [1897]; Western Life Indemnity Co. *v.* Rupp 235 U. S. 261, 273 [1914].
[2] Simon *v.* Craft, 182 U. S. 427, 436 [1901].

Due Process and Judicial Process.

GENERALLY.—Due process is not necessarily judicial process.[1] Medical examiners, school boards, tax assessors, and even purely

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ministerial officers may act judicially in the determination of facts in the performance of their official duties.[2] Due process of law does not always mean a proceeding in court.[3] Administrative or executive process may constitute due process. Proceedings to raise revenue by levying and collecting taxes are not necessarily judicial.[4] "The Nation from whom we inherit the phrase 'due process of law' has never relied upon courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation." [5]

[1] Palmer *v.* McMahon, 133 U. S. 660, 668 [1890].
[2] Reetz *v.* Michigan, 188 U. S. 505, 507 [1903].
[3] Ballard *v.* Hunter, 204 U. S. 241, 255 [1907].
[4] Cincinnati, N. O. & T. P. R. Co. *v.* Kentucky (Kentucky Railroad Tax Cases), 115 U. S. 321, 331 [1885].
[5] McMillen *v.* Anderson, 95 U. S. 37, 41 [1877].

Facts need not be ascertained by a jury in a court of justice. There is no denial of due process in making the findings of fact by the triers of fact, whether commissioners or a jury, in condemnation proceedings final as to such facts, and leaving open to the courts simply the inquiry as to whether there was any erroneous basis adopted in their appraisal or other errors in their proceedings.[1] A State law committing preliminary proceedings to determine water rights to a State board, and the final hearing and adjudication to the courts, does not violate due process.[2] Similarly, a State law providing for summary proceedings without a jury to determine title to a judicial office does not deprive an incumbent of property without due process of law.[3]

[1] Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 695 [1897]
[2] Pacific Live Stock Co. *v.* Lewis, 241 U. S. 440 [1916].
[3] Kennard *v.* Louisiana ex rel. Morgan, 92 U. S. 480 [1876].

Courts may be deprived of certain common law functions without violating the due process clause. No provision of the Federal Constitution prohibits a State from conferring upon nonjudicial bodies certain functions that may be called judicial.[1] For example, a State statute vesting in a nonjudicial body (viz, a State parole board) certain judicial functions does not contravene the Fourteenth Amendment. Whether legislative, executive, and judicial powers of a State shall be kept altogether distinct and separate, or whether they should in some particulars be merged is for the determination of the State.[2]

[1] Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541, 552 [1908].
[2] Dreyer *v.* Illinois, 187 U. S. 71, 83–84 [1902]; Carfer *v.* Caldwell, 200 U. S. 293, 297 [1906].

The contention that a State statute delegating to a probate court authority to establish park districts and to appoint boards of park commissioners involves an unconstitutional delegation of legislative

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power and is void under the due process clause of the Fourteenth Amendment presents no substantial Federal question.[1]

[1] Ohio ex rel. Bryant *v.* Akron Metropolitan Park Dist., 281 U. S. 74, 79 [1930].

A governor, finding that a state of insurrection exists, may call out troops, make arrests in good faith by way of precaution in the honest belief that they are needed in order to prevent an insurrection without subjecting himself to an action after he is out of office. Public danger warrants the substitution of executive process for judicial process. Just as the governor might order a company to fire upon a mob in insurrection, so he may order the temporary arrest of insurrectionists.[1]

[1] Moyer *v.* Peabody, 212 U. S. 78, 84 [1909].

JUDICIAL PROCESS SOMETIMES ESSENTIAL TO DUE PROCESS.—In some proceedings, however, the right to seek a review in a court of justice cannot be abridged without depriving a person of due process of law. For example, a State law making transportation rates published by a commission final and conclusive as to what are reasonable charges, and forbidding the court to interfere with such rates is unconstitutional because it deprives the railroad of a right to a judicial investigation by due process of law.[1] The question whether transportation rates are so unreasonably low as to be confiscatory cannot be so conclusively determined by the legislature of a State or by regulations adopted under its authority that the matter may not become a subject of judicial inquiry.[2]

[1] Chicago, M. & St. P. R. Co. *v.* Minnesota ex rel. Railroad & W. Commission 134 U. S. 418, 456 [1890].
[2] Smyth *v.* Ames, 169 U. S. 466, 526 [1898].

An order of a commission fixing the maximum future rates chargeable by a water company violates due process of law if no fair opportunity is provided by the State law for submitting the question whether the rates are confiscatory to the determination of a judicial tribunal upon its own independent judgment as to both law and fact.[1] A public utility, challenging as confiscatory rates imposed by a State commission, is entitled under the due process clause of the Fourteenth Amendment, to the independent judgment of the court as to both law and facts.[2]

[1] Ohio Valley Water Co. *v.* Ben Avon, 253 U. S. 287, 289 [1920].
[2] Bluefield Waterworks & Improv. Co. *v.* Public Service Commission, 262 U. S. 679, 689 [1923].

Furthermore, the right to a judicial determination of the question of unconstitutional deprivation of property exists whether the deprivation is by a rate statute passed without a hearing or by administrative orders of a commission made after a hearing.[1] But a

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statute establishing a railroad commission and giving it authority to fix reasonable rates is not in violation of due process because the statute itself failed to provide for an appeal from orders of the commission, if a carrier by a bill in equity could enjoin the enforcement of an order fixing rates so low as to be confiscatory.[2] And where the order of a public utilities commission requiring a railroad company to eliminate a grade crossing at its own expense is reviewable in fact and in law by the State supreme court, even though it be only by certiorari, the company is not deprived of property without due process of law.[3] Requiring obedience by mandamus to an order of a State railway commission pending the determination of a suit in equity does not deprive the railroad of property without due process of law where the writ was conditioned upon the giving of a suitable indemnity bond.[4]

[1] Wadley Southern R. Co. *v.* Georgia, 235 U. S. 651 [1915].
[2] Louisville & N. R. Co. *v.* Garrett, 231 U. S. 298, 310 [1914].
[3] Lehigh Valley R. Co. *v.* Public Utility Comrs., 278 U. S. 24, 36 [1928].
[4] Detroit & M. R. Co. *v.* Michigan R. Commission, 240 U. S. 564 [1916].

If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, such law may contravene the Fourteenth Amendment. While a State may impose some conditions on the right of review, a law which in effect makes the decision of a legislature or of a commission conclusive as to the sufficiency of rates by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it may be obtained is unconstitutional.[1] For instance, when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate a company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as a prohibition against a company's seeking judicial construction thereof.[2] Or where there is no opportunity of reviewing judicially a legislative rate fixed pursuant to a State law except by way of defense to proceedings for contempt which might be instituted for violating the rate order, and when the possible penalties for such violation are so heavy as to prohibit resort to that remedy, such a law is violative of the Fourteenth Amendment. Judicial review of a legislative order beset by such deterrents does not satisfy the constitutional requirements.[3] If the price of error is so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court, the Constitution intervenes and keeps the court room open.[4]

[1] Missouri P. R. Co. *v.* Tucker, 230 U. S. 340, 349 [1913]; Ex parte Young, 209 U. S. 123, 145 [1908]. *Cf.* St. Louis I. M. & S. R. Co. *v.* Williams, 251 U. S. 63 [1919].
[2] Missouri P. R. Co. *v.* Tucker, 230 U. S. 340, 349 [1913]. *See also* Natural Gas Pipeline Co. *v.* Slattery, 302 U. S. 300 [1937].
[3] Oklahoma Operating Co. *v.* Love, 252 U. S. 331, 333, 336 [1920].
[4] Life & C. Ins. Co. *v.* McCray, 291 U. S. 566, 574 [1934].

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When as ancillary to the review and correction of administrative actions, the State statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. But when the plain provisions of the statute or State decisions preclude a supersedeas or stay until legislative process is completed by the final action of the reviewing court, due process is not afforded.[1]

[1] Porter *v.* Investors Syndicate, 286 U. S. 461, 470 [1932].

However, the right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.[1] The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.[2]

[1] Roller *v.* Holly, 176 U. S. 398, 409 [1900].
[2] Louisville & N. R. Co. *v.* Central Stock Yards Co., 212 U. S. 132, 144 [1909].

ESSENTIALS OF PROCEDURAL DUE PROCESS.

Jurisdiction.

GENERALLY.

Due process of law requires that the court or commission which assumes to determine the rights of parties shall have jurisdiction.[1] A legally competent tribunal having jurisdiction of the case constitutes a basic element of the constitutional requirement of due process of law.[2] No judgment of a court is due process of law, if rendered without jurisdiction in the court.[3] To give proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit.[4] For example, probate proceedings on the estate of a person supposed to be dead, but who is in fact alive, are invalid, because a probate court in the absence of special statutes has no jurisdiction to administer an estate of a living person. A sale thereunder of land owned by such person would deprive him of property without due process of law.[5]

[1] Twining *v.* New Jersey, 211 U. S. 78, 110 [1908].
[2] Powell *v.* Alabama, 287 U. S. 45, 68 [1932].
[3] Scott *v.* McNeal, 154 U. S. 34, 46 [1894].
[4] Pennoyer *v.* Neff, 95 U. S. 714, 733 [1878], quoted with approval in Scott *v.* McNeal, 154 U. S. 34, 46 [1894].

SERVICE OF PROCESS.

In General.—The Court, tribunal, or commission must not only have general jurisdiction over the subject matter in dispute, but also special jurisdiction over the parties involved. The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun.[1] Jurisdiction over the parties may be obtained in various ways, dependent

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on the nature of the proceedings. Statutory notice may suffice in tax matters, and notice by publications in proceedings *in rem*. Personal service or voluntary appearance may be essential in certain cases involving the determination of personal liability.[2] Without such process, notice, or appearance, the court lacks special jurisdiction to make a finding or render a judgment. A person whose life, liberty, or property is taken without proper service is deprived of due process of law.[3]

[1] McDonald *v.* Mabee, 243 U. S. 90, 91 [1917].
[2] Pennoyer *v.* Neff, 95 U. S 714, 733 [1878]; Scott *v.* McNeal, 154 U. S. 34, 46 [1894].
[3] Pennoyer *v.* Neff, 95 U. S. 714 [1878].

A judgment obtained in a suit of which the defendant had no notice is a nullity under the due process clause of the Fourteenth Amendment. In the absence of service of process, a person named as defendant can no more be regarded as a party than any other member of the community.[1] The fundamental requisite of due process of law is the opportunity to be heard. And it is to this end, of course, that summons or equivalent notice is employed.[2] In determining what is sufficient process, a distinction is to be observed between actions *in personam* and actions *in rem* or *quasi in rem*.[3]

[1] Simon *v.* Southern R. Co., 236 U. S. 115, 122 [1915].
[2] Grannis *v.* Ordean, 234 U. S. 385, 394 [1914].
[3] Grannis *v.* Ordean, 234 U. S. 385, 392 [1914].

Actions in Personam.—*Generally*.—In proceedings *in personam* to determine personal liability of a defendant, no property being brought by the proceedings within the control of the court, the court must have jurisdiction over the defendant. A personal judgment without service of process upon the defendant and without his appearance in person or by an authorized attorney is wanting in due process of law.[1] It is fundamental that no person can be deprived of his property rights by any decree in a case wherein he is not a party.[2] Hence, to subject the individual property of the citizens of a municipality, by a summary proceeding in equity, to the payment of an unsatisfied judgment against the municipality would be a denial of due process of law.[3]

[1] National Exchange Bank *v.* Wiley, 195 U. S. 257, 270 [1904].
[2] Iron Cliffs Co. *v.* Negaunee Iron Co., 197 U. S. 463, 471 [1905].
[3] Rees *v.* Watertown, 19 Wall. 107 [1874].

While courts are required by the Constitution to give full faith and credit to acts, records, and judicial proceedings of sister States, it would be in violation of the Fourteenth Amendment to give such effect to a foreign judgment rendered without jurisdiction over the defendant.[1] Hence, a judgment giving full faith and credit to a judgment *in personam* rendered in another State without actual service of process on or appearance by the defendant in an action on a

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contract not made in that State, denies to the defendant due process of law.[1] It is well settled that the full faith and credit clause does not entitle a judgment *in personam* to extraterritorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound. This rule became established long before the adoption of the Fourteenth Amendment, as the result of applying fundamental principles of justice and the rules of international law as they existed among the States at the inception of the Government.[2]

[1] Old Wayne Mut. L. Asso. *v.* McDonough, 204 U. S. 8, 23 [1907].
[2] Baker *v.* Baker, E. & Co., 242 U. S. 394, 401 [1917].

Where, after judgment rendered against a defendant, he left the State and took up his residence in another State, and subsequently a *scire facias* was issued to revive the judgment but no personal service of the writ was made on the defendant, it operated merely to keep in force the local lien; it cannot be availed of in another jurisdiction to remove the statutory bar of the *lex fori* against the original judgment.[1]

[1] Owens *v.* McClosky, 161 U. S. 642, 646 [1896].

Service on Nonresidents.—The process of a court of one State cannot run into another and summon a party there domiciled to respond to proceedings against him. Notice sent outside the State to a nonresident is unavailing to give jurisdiction in an action against him personally for money recovery. There must be actual service within the State of notice upon him or upon some one authorized to accept service for him. A personal judgment rendered against a nonresident who has neither been served with process nor appeared in the suit is without validity.[1]

[1] Hess *v.* Pawloski, 274 U. S. 352, 355 [1927].

The courts of one State cannot without a violation of the due process clause extend their authority beyond their jurisdiction so as to condemn the resident of another State when neither his person nor his property is within the jurisdiction of the court rendering the judgment.[1] A judgment rendered against a nonresident who was neither served with process nor appeared in the suit is devoid of validity within as well as without the territory of the State whose court has rendered it.[2] The assertion of its invalidity, since the adoption of the Fourteenth Amendment, is a matter of Federal right.[3]

[1] Riverside & Dan River Cotton Mills *v.* Menefee, 237 U. S. 189, 193 [1915].
[2] Harkness *v.* Hyde, 98 U. S. 476 [1879]; Wilson *v.* Seligman, 144 U. S. 41 [1892]; Riverside & Dan River Cotton Mills *v.* Menefee, 237 U. S. 189 [1915].
[3] Baker *v.* Baker, E. & Co., 242 U. S. 394 [1917].

Service on Foreign Corporations.—A State may not without violating the due process clause of the Fourteenth Amendment render

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a judgment against a corporation organized under the laws of another State when such corporation has not come into such State for the purpose of doing business therein, or has done no business therein, or has no property therein, or has no qualified agent therein upon whom process may be served.[1]

[1] Riverside & Dan River Cotton Mills *v.* Menefee, 237 U. S. 189, 194 [1915].

The fact that an agent, officer, or stockholder of a foreign corporation is within the territorial limits of a State will not necessarily enable a State to obtain jurisdiction over the foreign corporation by service of process on such person. For example, service of process on the president of a foreign corporation in a State where he was temporarily and casually present and where the corporation did no business and had no property is insufficient.[1] Service on a New York director of a Virginia corporation is not sufficient to bring the corporation into the New York courts when, at the time of service, the corporation was not doing business in New York, and the director was not there officially representing the corporation in its business.[2]

[1] Goldey *v.* Morning News, 156 U. S. 518 [1895].
[2] Conley *v.* Mathieson Alkali Works, 190 U. S. 406 [1903].

The mere fact that an officer of a corporation may temporarily be in a State or even permanently reside therein, if not there for the purpose of transacting business for the corporation, or vested with authority by the corporation to transact business in such State, affords no bases for acquiring jurisdiction or escaping the denial of due process which would result from decreeing against the corporation upon a service had upon such an officer under such circumstances.[1]

[1] Riverside & Dan River Cotton Mills *v.* Menefee, 237 U. S. 189, 195 [1915].

A nonresident firm doing business in the State at the time a transaction, the subject of the suit, took place is not brought into court by service of process on a person who was a local agent at the time of the transaction but not at the time of service; a law authorizing such service would be in violation of due process.[1] But a foreign insurance corporation which had ceased to sell insurance in Tennessee but which had sent a special agent to adjust a loss under a policy previously issued in that State is not deprived of property without due process of law, when process was served on said special agent.[2]

[1] Flexner *v.* Farson, 248 U. S. 289 [1919].
[2] Connecticut Mut. L. Ins. Co. *v.* Spratley, 172 U. S. 602 [1899].

In a suit against a partnership in which the resident partner was duly served with process and a nonresident partner was served with notice, a judgment thus obtained is binding upon the firm. The

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nonresident partner is not deprived of property without due process of law so long as there is no execution against his individual property.[1]

[1] Sugg *v.* Thornton, 132 U. S. 524 [1889].

A State may impose as a condition upon which a foreign corporation shall be permitted to do business within her limits that it will accept as sufficient the service of process on its agents or persons specially designated in litigation arising out of transactions within that State. Such conditions must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation.[1]

[1] St. Clair *v.* Cox, 106 U. S. 350, 356 [1882].

Every State has the undoubted right to provide for service of process upon foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service in proper cases may be made upon an officer designated by law.[1]

[1] Simon *v.* Southern R. Co., 236 U. S. 115, 130 [1915].

A statute requiring a foreign corporation to file with the superintendent of the insurance department a power of attorney consenting that service of process upon the superintendent shall be deemed personal service upon the company so long as it shall have liabilities in that State may be applied to a transitory cause of action arising in another State, without depriving a company that has complied therewith of property without due process of law.[1]

[1] Pennsylvania F. Ins. Co. *v.* Gold Issue Min. & Mill. Co., 243 U. S. 93, 95 [1917].

But, in cases where the State designates an officer to receive service on a corporation which fails to name an agent, the cause of action must have arisen in that State and not elsewhere to warrant such substituted service. Service of process, in a suit against a foreign corporation upon the secretary of state in conformity with State law in a case where the corporation failed to designate an agent to receive service will not give the court jurisdiction of a suit based on a cause of action arising in another State. Judgment entered thereon by default is absolutely void.[1]

[1] Simon *v.* Southern R. Co., 236 U. S. 115 [1915].

Furthermore, when the State designates an officer to receive service on a corporation which has failed to name an agent, it must appear that the corporation is actually doing business in that State

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to validate the service. Hence, service of process on the Secretary of State is insufficient to validate a judgment obtained against an insurance company not doing business in the State. The enforcement of such a judgment in the State of domicile of the insurance company deprives it of property without due process of law.[1]

[1] Minnesota Commercial Men's Asso. v. Benn, 261 U. S. 140 [1923].

Substituted service on a State officer in an action against a corporation which has since ceased to do business in that State is, however, valid. For example, a Washington statute authorizing substituted service on the secretary of state where the foreign corporation, after withdrawal from the State and removal of resident agent therefrom, has since been dissolved does not deprive said corporation of due process, even though statute did not require secretary to notify the corporation.[1] Likewise, service of a summons upon a State insurance commission in an action against a foreign insurance company doing business in that State is sufficient to bring the company into court even in a case where the license of the company had been revoked but which after such cancellation continued to collect premiums, etc., in that State.[2]

[1] Washington ex rel. Bond & Goodwin & Tucker v. Superior Ct., 289 U. S. 361 [1933].

[2] Mutual Reserve F. L. Asso. v. Phelps, 190 U. S. 147, 156 [1903].

Substituted Service.—A State may not only require foreign corporations to designate agents to receive service as a condition precedent to doing business within its territory, but a State may also require natural persons to appoint agents to receive service as a condition to conducting certain business therein, to using its highways, etc. Such laws have been held not to violate the privileges and immunities or due process clauses of the Constitution. A statute providing for the service of process on nonresident motorists by delivery of a copy to the State registrar, and providing for the mailing of a copy by registered mail to the nonresident, is valid, since the State, having power to exclude nonresidents until the appointment of an agent upon whom process may be served, may declare the use of its highways as equivalent to the appointment of the registrar as agent for that purpose.[1]

[1] Hess v. Pawloski, 274 U. S. 352 [1927].

But a State statute which provides that, in actions by residents against nonresident motorists for personal injuries resulting from the operation by the latter of motor vehicles on the State highways, service of summons may be made on the secretary of state, as their agent, and which contains no further provision making it reasonably probable that notice of such service will be communicated to the

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defendants, is lacking in due process of law, even though in the instant case the nonresident defendant was served personally in his own State.[1]

[1] Wuchter v. Pizzutti, 276 U. S. 13 [1928].

ACTIONS IN REM.—*Proceedings Against Land.*—The Fourteenth Amendment does not abridge the jurisdiction which a State possesses over property within its borders, regardless of the residence or presence of the owner. A State may, therefore, authorize its courts to take jurisdiction of controversies with regard to rights in, or claims against such property, though personal jurisdiction of the defendant is not obtained.[1] While a State cannot bring the person of a nonresident within its limits—its process goes not out beyond its borders—it may determine the extent of a nonresident's title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice.[2]

[1] Pennington v. Fourth Nat. Bank, 243 U. S. 269, 271 [1917].
[2] Arndt v. Griggs, 134 U. S. 316, 321 [1890].

Personal service upon nonresident owners of land is not always within the State's power. Its process is limited by its boundaries. Constructive service is at times a necessary resource. The land stands accountable to the demands of the State, and the owners are charged with the laws affecting it and the manner by which those demands may be enforced.[1] There may be, and necessarily must be, some form of constructive service in such cases.[2]

[1] Ballard v. Hunter, 204 U. S. 241, 254 [1907].
[2] Jacob v. Roberts, 223 U. S. 261, 265 [1912].

The inherent authority of a State over titles to lands within its borders enables a State, through its courts, to proceed to judgment respecting the ownership of such lands upon constructive notice to persons who reside beyond the reach of process.[1] Hence a State may provide by statutes that the title to real estate within its limits shall be settled and determined by a suit in which nonresident defendants are brought into court by publication.[2] Some substituted form of notice has always been held to be a sufficient warning to a nonresident owner of land, of the proceedings which are being taken under the authority of the State to subject his property to the burdens of taxation.[3] Similarly personal service upon a nonresident owner is not essential in condemnation proceedings; publication of notice is sufficient.[4] But a judgment without personal service against a nonresident is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a nonresident further than respects

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the property so taken.[5] Service by publication does not warrant a personal judgment against a nonresident.[6]

[1] Grannis *v.* Ordean, 234 U. S. 385 [1914].
[2] Arndt *v.* Griggs, 134 U. S. 316 [1890].
[3] Huling *v.* Kaw Valley R. & Improv. Co., 130 U. S. 559, 563 [1889]; Bragg *v.* Weaver, 251 U. S. 57, 59, 61 [1919].
[4] Georgia *v.* Chattanooga, 264 U. S. 472, 483 [1924].
[5] Dewey *v.* Des Moines, 173 U. S. 193, 203 [1899].
[6] Pennoyer *v.* Neff, 95 U. S. 714 [1878].

A personal judgment rendered on service by publication against one who had left the State with intent to establish a home elsewhere and who did not appear in the suit is void and is as ineffective in the State of rendition as elsewhere.[1]

[1] McDonald *v.* Mabee, 243 U. S. 90, 92 [1917].

Administration of Estates.—Since probate proceedings by which jurisdiction of a probate court is asserted over the estate of a decedent for purposes of administering the same, is in the nature of a proceeding in rem, it is therefore one as to which all the world is charged with notice.[1] Actual notice by service of summons to all known claimants and constructive notice by publication to all possible claimants who are unknown is due process in proceedings to determine the succession of real estate, whether by ordinary administrative proceedings or by proceedings in escheat.[2] Furthermore, a petition for the removal of an executor and for an accounting for the unadministered residue of the estate is so far a part of the original probate proceedings that the executor is not denied due process of law by a personal judgment rendered against him on service by publication on account of his absence from the State for the unadministered assets.[3]

[1] Goodrich *v.* Ferris, 214 U. S. 71, 80 [1909].
[2] Hamilton *v.* Brown, 161 U. S. 256, 275 [1896].
[3] Michigan Trust Co. *v.* Ferry, 228 U. S. 346 [1913].

A Pennsylvania statute prescribing a special proceeding for the administration of the estates of absentees distinct from the general law of that State providing for the settlement of the estates of deceased persons is not repugnant to the Fourteenth Amendment, where the statute provides for notice by publication after a 7 years' absence and sets up other safeguards to protect the rights of the absentee.[1]

[1] Cunnis *v.* Reading School District, 198 U. S. 458 [1905].

The exercise of jurisdiction by a probate court to declare an escheat, and to distribute the real property to the county when it is found that the intestate has left no kindred, after appropriate statutory notice, is not a deprivation of property without due process of law.[1] Similarly, a statute directing State banks to turn over to the State dormant bank deposits unclaimed for a period of 20 years

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does not violate due process when it provides for personal notice to the bank and published notice to unknown depositors.[2]

[1] Christianson v. King County, 239 U. S. 356, 372 [1915].
[2] Security Sav. Bank v. California, 263 U. S. 282 [1923].

Garnishment Proceedings.—Garnishment or foreign attachment being a proceeding in rem, personal service is not a prerequisite. Indebtedness due from a resident to a nonresident—of which bank deposits are an example—is property within the State, which may be applied in satisfaction of the obligations of absent debtors. Hence, where a husband has left the State, his wife may have his local bank deposits attached in payment of alimony without personal service on the husband.[1]

[1] Pennington v. Fourth Nat. Bank, 243 U. S. 269, 271 [1917].

Establishment of Lost Records.—After such a disaster as the San Francisco earthquake of 1906 which destroyed nearly all public records in that community, a State may permit titles to be reestablished by parties in possession, where summons was to be posted on the property, served on known claimants and published in newspapers weekly for 2 months against unknown claimants. If the statute gives all persons interested in the property an opportunity to establish their rights, unknown claimants are not by such a statute deprived of property without due process of law.[1]

[1] American Land Co. v. Zeiss, 219 U. S. 47 [1911].

*Divorce Proceedings.**—A State may authorize proceedings to determine the status of its citizens toward nonresidents which would be binding within the State, although made without service of process or personal notice to the nonresident.[1]

[1] Pennoyer v. Neff, 95 U. S. 714, 734 [1878].

Irregularities in Service.—*Misnomer of Defendant.*—The due process of law clause does not impose an unattainable standard of accuracy. If a defendant within the jurisdiction is served personally with process in which his name is misspelled, he cannot safely ignore it on account of the misnomer. Such matter must be pleaded in abatement or the judgment binds him. In a published notice intended to reach absent or nonresident defendants, where the name is a principal means of identifying the person concerned, somewhat different considerations obtain. The general rule, in case of constructive service of process by publication, tends to strictness. But it has been held that published notice to "Albert Guilfuss, Assignee", did not deprive "Albert B. Geilfuss, Assignee", of land in a partition suit without due process of law.[1]

[1] Grannis v. Ordean, 234 U. S. 385 [1914].

* The jurisdictional requirements for rendering a valid decree in divorce proceedings are considered under the "full faith and credit clause", *supra*, p. 526.

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False Return.—Foreclosure of a mortgage made upon process duly issued but which the sheriff falsely returned as having been duly served, and of which the owner had no notice, does not deprive the owner of property without due process of law. A purchaser of the land at the sheriff's sale has a right to rely on such return; otherwise judicial proceedings could never be relied upon. The mortgagee must seek his remedy against the sheriff upon his bond.[1]

[1] Miedreich *v.* Lauenstein, 232 U. S. 236 [1914].

VOLUNTARY APPEARANCE.

The court may obtain jurisdiction over the person of the defendant in other ways than by service of process. A nonresident may waive service and voluntarily appear. Where a party voluntarily appears in the cause and actively conducts his defense, he cannot claim that he has been denied due process merely because he was not served with process when the original action was commenced.[1] Submission to the jurisdiction by appearance may take the place of service upon the person.[2]

[1] Louisville & N. R. Co. *v.* Schmidt, 177 U. S. 230 [1900].
[2] McDonald *v.* Mabee, 243 U. S. 90, 91 [1917].

COMPETENT AND IMPARTIAL TRIBUNAL.

Due process implies a tribunal both impartial and mentally competent to afford a hearing.[1] Hence, it violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law, to subject his liberty or his property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case. A system by which an inferior judge is paid for his services only when he convicts the defendant has not become so embedded by custom in the general practice either at common law or in this country that it can be regarded as due process of law.[2] But a conviction before a mayor's court is not unlawful merely because a portion of fines went to a general salary fund—where the mayor received no fees, but only a salary not determined by number of convictions.[3]

[1] Jordan *v.* Massachusetts, 225 U. S. 167, 176 [1912].
[2] Tumey *v.* Ohio, 273 U. S. 510, 523, 531 [1927].
[3] Dugan *v.* Ohio, 277 U. S. 61 [1928].

A judge and jury dominated by a mob do not constitute an impartial tribunal. If the jury is intimidated and the trial judge yields, so that there is an actual interference with the course of justice, there is in that court, a departure from due process of law. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law.[1]

[1] Frank *v.* Mangum, 237 U. S. 309, 335 [1915]; Moore *v.* Dempsey, 261 U. S. 86 [1923].

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If the whole proceeding is a mask—if the counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion—and if the State courts failed to correct the wrong, neither perfection in the machinery for correction or the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent the Supreme Court from securing to a petitioner his constitutional rights.[1]

[1] Moore *v.* Dempsey, 261 U. S. 86, 91 [1923].

However, a person is not deprived of liberty without due process of law by being tried and sentenced to imprisonment by a judge who, although appointed by the governor without authority, is a judge *de facto* of a *de jure* court.[1] Furthermore, the mere fact that one juror was allegedly insane does not void a conviction, where the trial judge refused to set the verdict aside after an inquiry into the juror's sanity was made in accordance to the established procedure of the State (sanity being shown by a preponderance of evidence only).[2]

[1] Manning *v.* Weeks, 139 U. S. 504 [1891].
[2] Jordan *v.* Massachusetts, 225 U. S. 167 [1912].

Notice.

GENERALLY.

The necessity of due notice and an opportunity of being heard are among the immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.[1] Judgment without notice and opportunity to be heard wants all the attributes of a judicial determination; it is judicial usurpation and oppression and never can be upheld where justice is justly administered.[2] Notice and hearing are preliminary essentials to the passing of an enforceable judgment; they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law.[3]

[1] Powell *v.* Alabama, 287 U. S. 45, 68 [1932].
[2] Galpin *v.* Page, 18 Wall. 350, 368, 369 [1874].
[3] Powell *v.* Alabama, 287 U. S. 45, 68 [1932]; Frank *v.* Mangum, 237 U. S. 309, 340 [1915].

Even before the Fourteenth Amendment was adopted, the Supreme Court had insisted that common justice required that no man should be condemned in his person or property without notice and an opportunity to make his defense.[1] In Twining *v.* New Jersey the Court observed that these two fundamental conditions seem to be universally prescribed in all systems of law established by civilized countries.[2]

[1] Baldwin *v.* Hale, 1 Wall. 223, 233 [1864].
[2] Twining *v.* New Jersey, 211 U. S. 78, 110 [1908]

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The due process clause does not guarantee to the citizen of a State any particular form or method of State procedure. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it.[1] The Fourteenth Amendment does not control the power of a State to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard.[2] Subject to those fundamental conditions, the Supreme Court has sustained State laws, statutory or judicially declared, regulating procedure, evidence and methods of trial.[3]

[1] Dohany *v.* Rogers, 281 U. S. 362, 369 [1930]; Rogers *v.* Peck, 199 U. S. 425, 435 [1905]; Missouri ex rel. Hurwitz *v.* North, 271 U. S. 40, 42 [1926]; Louisville & N. R. Co. *v.* Schmidt, 177 U. S. 230, 236 [1900]; Garland *v.* Washington, 232 U. S. 642, 645 [1914].

[2] Twining *v.* New Jersey, 211 U. S. 78, 110 [1908].

[3] Hooker *v.* Los Angeles, 188 U. S. 314, 318 [1903].

NOT ESSENTIAL IN CERTAIN PROCEEDINGS.

ENACTMENT OF LEGISLATION.—State legislatures may enact laws in secret session without public hearings. No advance notice of legislation fixing rates, creating assessment districts, etc., is essential to due process of law. State legislatures and local governmental agencies need not notify property owners in advance of proposed assessments or legislation affecting property rights. The question of distributing or apportioning the burden of the cost among particular owners is, of course, another matter, and may require notice.[1] For example, ordinances regulating telephone rates are not invalid because of the absence of a provision for notice. Rate regulation is purely a legislative function and, even where exercised by a subordinate body upon which it is conferred, the notice and hearing essential in judicial proceedings and, for peculiar reasons, in some forms of taxation, would not generally seem to be indispensable.[2] While notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property, it is not essential to the validity of a charter granting to the city power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice.[3]

[1] Hancock *v.* Muskogee, 250 U. S. 454, 457 [1919].

[2] Home Teleph. & Teleg. Co. *v.* Los Angeles, 211 U. S. 265, 278 [1908].

[3] Paulsen *v.* Portland, 149 U. S. 30, 38 [1893].

Similarly where the legislature fixes by law the area of a sewer district, no advance notice to the property owners included therein of such legislative action is necessary.[1] A statutory provision that the cost of repairs of a drainage system shall be assessed upon the lands

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in the drainage district in the same proportion that the original cost was assessed is a legislative declaration that the lands will be benefited. Notice and hearing before such a legislative determination is not necessary.[3] An apportionment by ordinance of repairs to a railroad viaduct between railroad companies, without notice to them, is not invalid, since the reasonableness of the apportionment may be questioned in a court of justice.[3]

[1] Hancock *v.* Muskogee, 250 U. S. 454, 457 [1919].
[2] Breihols *v.* Pocahontas County, 257 U. S. 118, 123 [1921].
[3] Chicago, B. & Q. R. Co. *v.* Nebraska ex rel. Omaha, 170 U. S. 57, 77 [1898].

However, if a road improvement district is created by a petition of taxpayers rather than by the legislature, there being no legislative determination that property included therein would be benefited by the improvement, notice to property owners and an opportunity to be heard are essential to due process in the taxing of the assessment.[1]

[1] Browning *v.* Hooper, 269 U. S. 396 [1926].

It has been uniformly held that statutes providing for condemnation of land may adopt a procedure summary in character; notice of such proceedings may be indirect.[1] The levy of a general tax for the payment of improvement bonds is not in violation of due process because the bonds were issued without notice to the taxpayers.[2]

[1] North Laramie Land Co. *v.* Hoffman, 268 U. S. 276, 284 [1925].
[2] Utley *v.* St. Petersburg, 292 U. S. 106, 111 [1934].

Garnishment Proceedings.—Due process of law does not require that a judgment debtor, who had his day in court before the judgment was rendered, shall be given additional notice and opportunity to be heard before issuance of a garnishment to satisfy the judgment. After rendition of the judgment the debtor must take notice of what will follow, no further notice being necessary to advance justice.[1]

[1] Endicott-Johnson Corp. *v.* Encyclopedia Press, 266 U. S. 285, 288 [1924].

Guardianship Proceedings.—An order accepting the resignation of the guardian of one alleged to be incompetent and appointing another in his place, made without notice, does not affect a substantial right of the party. Due process does not require notice and opportunity to be heard in such a proceeding. It was a mere substitution of one officer of the court for another.[1] Notice of an application of a mother to be appointed guardian of the estate of her child, an infant under 12 in the mother's custody, is not required by the Fourteenth Amendment.[2]

[1] Chaloner *v.* Sherman, 242 U. S. 455, 461 [1917].
[2] Jones *v.* Prairie Oil & Gas Co., 273 U. S. 195, 198 [1927].

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PROCEEDINGS AGAINST ABSCONDING HUSBANDS.—Inasmuch as the procedure is an ancient one, a statute authorizing the impounding of property of an absconding husband or father for the maintenance of the dependent wife or children cannot be said to deny due process of law because it fails to provide for notice, either actual or constructive, to the absconder.[1]

[1] Corn Exch. Bank v. Coler, 280 U. S. 218, 222 [1930].

ADMINISTRATION OF ESTATES.—The legislature has the power to declare that in a proceeding against an estate involving a question of an adverse claim of title or interest in land, the heir may be represented by the administrator, and is therefore not entitled to notice. A decision adverse to the estate does not deprive the heir at law (in whom title vested on death of intestate) of property without due process.[1] The failure to give notice of probate of an alleged nuncupative will, and the admission of such will to probate, does not deprive the heirs at law of property without due process of law, when the statute gives to persons interested full right within a certain time to assail the existence of the will and its probate.[2]

[1] McCaughey v. Lyall, 224 U. S. 558 [1912].
[2] O'Callaghan v. O'Brien, 199 U. S. 89 [1905].

A statute which authorizes a special administrator having charge of the estate of a testator, pending a contest as to the validity of the will, to have a final settlement of his accounts, without giving notice to the distributors, and which settlement, in the absence of fraud, is deemed conclusive as against such distributees, does not deprive such distributees of property without due process of law. The special administrator must account for the property in his hands to the executor or administrator c. t. a., who then acts for all persons interested in the distribution of the estate.[1]

[1] RoBards v. Lamb, 127 U. S. 58, 61 [1888].

CONFESSION OF JUDGMENT.—Entry of judgment without notice, if previously authorized by a debtor or surety on the happening of certain conditions, is not invalid. And the fact that a surety on a supersedeas bond against whom judgment was entered without notice lost his opportunity for a hearing thereafter by inadvertently pursuing the wrong procedure in a State court does not afford a basis for a claim of denial of due process.[1]

[1] American Surety Co. v. Baldwin, 287 U. S. 156, 168 [1932].

PRAYER FOR JUDGMENT.—In civil suits the pleadings should no doubt contain a prayer for judgment so as to show the judicial power of the court is invoked. Rules of practice may well require a plaintiff to indicate what remedy he seeks. But the prayer does not constitute

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a part of the notice guaranteed by the Constitution. In a quo warranto proceeding against a corporation for misuse of its license to do business in the State, in which a judgment of ouster was rendered, the corporation is not deprived of property without due process of law by an adjudication that it pay a $50,000 fine, even though such relief was not asked for, inasmuch as it was put upon notice by statute that the court might impose such a fine.[1]

[1] Standard Oil Co. v. Missouri ex rel. Hadley, 224 U. S. 270, 285 [1912].

Miscellaneous Proceedings.—Where a deed has been executed conveying the legal title to land as security for the payment of a debt, and the holder of the debt, upon default in payment, has reduced it to judgment and recorded a quitclaim conveyance to the debtor, and then has the land sold in satisfaction of the judgment, a third party who had in the meantime purchased said property of the debtor subject to the security deed is not deprived of property without due process of law by the failure to receive notice of such proceedings.[1]

[1] Scott v. Paisley, 271 U. S. 632 [1926].

The revocation, without notice and hearing, of a motor vehicle fuel distributor's license for making a false tax return does not deprive said distributor of property without due process of law when no penalties are imposed for conducting said business without a license and where the State has not attempted to prevent distributor from continuing his business.[1]

[1] Monamotor Oil Co. v. Johnson, 292 U. S. 86 [1934].

Due process of law requires only those whose property is to be taken for public improvement to have prior notice. Persons whose property may be assessed to pay for the property condemned are not entitled to be heard as to the amount of the awards.[1]

[1] St. Louis & K. C. Land Co. v. Kansas City, 241 U. S. 419, 427 [1916]

STATUTORY NOTICE.

In many proceedings statutory notice is sufficient. This is particularly true in tax matters. The statute creates a board of equalization to hear taxpayers who feel that their property has been unfairly or arbitrarily appraised. The statute provides that the board shall hold regular sessions on specified days. The statute is sufficient notice. Taxpayers who wish to challenge the findings of the local tax assessor must appear on those days. Due process is not denied because the taxpayer was not individually notified of the meetings of the board to pass on controverted taxes. "When a statute fixes the time and place of meeting of any board or tribunal, no special notice to parties interested is required. The statute is itself sufficient notice." [1]

[1] Reetz v. Michigan, 188 U. S. 505, 509 [1903].

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NOTICE AS A MATTER OF GRACE.

Extra-official or casual notice or a hearing granted as a matter of favor or discretion cannot be deemed a substantial substitute for the due process of law that the Constitution requires.[1] If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is, whether any notice is provided for by the statute.[2]

[1] Coe *v.* Armour Fertilizer Works, 237, U. S. 413, 424 [1915].
[2] Security Trust & S. V. Co. *v.* Lexington, 203 U. S. 323, 333 [1906].

Notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace.[1] "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard."[2]

[1] Coe *v.* Armour Fertilizer Works, 237 U. S. 413, 424 [1915].
[2] Stuart *v.* Palmer, 74 N. Y. 183 [1878], quoted with approval in Coe *v.* Armour Fertilizer Works, 237 U. S. 413, 424 [1915]; Wuchter *v.* Pizzutti, 276 U. S. 13 [1928].

The mere fact that the statute in question makes no provision for notice does not warrant its invalidation under the due process clause. Some general statutory provision respecting notice or some principle of the common law may supply the necessary notice. Hence, a Georgia statute requiring directors of a bank, on receiving notice from the superintendent of banks, to call a special stockholders' meeting to make an assessment upon stockholders is not invalid, merely because the banking statute did not specifically provide that the directors notify stockholders of the proposed meeting. "Even where there is no provision, in statute or bylaws, for notice, it has been held that common law principles require corporate meetings to be called by reasonable notice to stockholders." Such notice is impliedly required by the banking statute, in the absence of a controlling decision of the State court.[1]

[1] Toombs *v.* Citizens Bank, 281 U. S. 643, 646 [1930].

SUFFICIENCY OF NOTICE.

A man is entitled to some notice before he can be deprived of his liberty or property, and such notice must be reasonable and adequate for the purpose. A Texas statute providing for service of process by giving 5 days' notice is not a reasonable notice to a resident of Virginia who would (at that time) have required 4 days' traveling to reach the place where the court was held. The insufficiency of notice on a nonresident is not cured by the fact that by the local practice there would be several additional days before the case would be called

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for trial, or that the court would probably set aside a default judgment and permit a defense when the nonresident arrived.[1]

[1] Roller v. Holly, 176 U. S. 398, 407, 409 [1900].

On the other hand a statute giving 10 days' notice of the time appointed for the settlement of the final account of a personal representative in probate proceedings is not wanting in due process of law as to a nonresident.[1] Likewise a notice of 10 days from the last of 3 successive daily publications of a reassessment for taxation for public improvements is sufficient. While the authority of the legislature to prescribe the length of notice is not absolute and beyond review, it is certain that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of time.[2] Similarly 18 days between service by publication and the return day is sufficient time under the due process clause, as applied to a nonresident defendant in a suit to condemn land.[3] Twenty days' written notice of a proceeding to revoke a physician's license is also adequate.[4] Four weeks' notice by publication to property owners of a suit to validate a special improvement ordinance and proposed assessments of costs on land within the benefit district described in the ordinance is sufficient.[5]

[1] Goodrich v. Ferris, 214 U. S. 71, 80 [1909].
[2] Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 314, 318 [1899].
[3] Wick v. Chelan Electric Co., 280 U. S. 108 [1929].
[4] Missouri ex rel Hurwits v. North, 271 U. S. 40 [1926].
[5] Fidelity Nat. Bank & T. Co. v. Swope, 274 U. S. 123, 130 [1927].

Hearing.

GENERALLY.

The law of the land, in the words of Daniel Webster, is a law which hears before it condemns.[1] The essential element of due process of law is an opportunity to be heard, and a necessary condition of such opportunity is notice.[2] That to condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment needs nothing but statement.[3] Even before the Fourteenth Amendment was adopted the Supreme Court had stated that it was a "great fundamental rule in the administration of justice * * * that every one shall have an opportunity of defending his rights before judgment is pronounced against him." [4]

[1] Powell v. Alabama, 287 U. S. 45, 68 [1932].
[2] Jacob v. Roberts, 223 U. S. 261, 265 [1912].
[3] Riverside & Dan River Cotton Mills v. Menefee, 237 U. S. 189, 193 [1915].
[4] Smith v. McCann, 24 How. 398, 407 [1861].

Of course, a person may waive his right to a hearing. A judgment rendered against a surety on a forthcoming bond in an attachment proceeding, without a hearing, does not deprive him of property

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without due process of law, inasmuch as the surety had, by virtue of a statute, consented that judgment might go against him on the bond if plaintiff should be entitled to a judgment against his principal.[1]

[1] Johnson *v.* Chicago & P. Elevator Co., 119 U. S. 388, 400 [1886].

The due process clause does not guarantee to a citizen of a State any particular form or method of State procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it.[1] Where a party had notice of a motion to appoint a commission of lunacy and was given an opportunity to be heard, the essential elements of due process were met although he was then under commitment.[2]

[1] Missouri ex rel. Hurwitz *v.* North, 271 U. S. 40, 42 [1926]; Ballard *v.* Hunter, 204 U. S. 241, 255 [1907].
[2] Chaloner *v.* Sherman, 242 U. S. 455, 461 [1917].

The order of a public utility commission fixing the depreciation rate on property of a telephone company is not void on ground that the company was not afforded due process; even assuming that due process required the order be upon notice with opportunity to be heard, the appearance of the company before the commission and its participation in the hearings for 2 days (its schedules and other evidence being received by the commission) suffices.[1]

[1] Northwestern Bell Teleph. Co. *v.* Nebraska State R. Commission, 297 U. S. 471 [1936].

Creditors who appear generally and are fully heard upon the merits (on a plan to reopen a closed bank) cannot claim that the proceeding is void for insufficient notice to depositors and others.[1]

[1] Doty *v.* Love, 295 U. S. 64 [1935].

IN JUDICIAL PROCEEDINGS.

The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. A State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or opportunity to be heard.[1] Fundamental rights of a defendant shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases.[2] The notice and hearing must correspond, and the relief granted must be appropriate to that which has been heard and determined on such notice.[3]

[1] Postal Teleg. Cable Co. *v.* Newport, 247 U. S. 464, 476 [1918]; Baker *v.* Baker, E. & Co., 242 U. S. 394, 403 [1917]; Louisville & N. R. Co. *v.* Schmidt, 177 U. S. 230, 236 [1900].
[2] Frank *v.* Mangum, 237 U. S. 309, 334 [1915]; Garland *v.* Washington, 232 U. S. 642, 645 [1914]; Rogers *v.* Peck, 199 U. S. 425, 435 [1905].
[3] Standard Oil Co. *v.* Missouri ex rel. Hadley, 224 U. S. 270, 281 [1912].

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A hearing includes the right to the aid of counsel, when desired and provided by the party asserting the right; it comprehends generally the right to be heard by counsel; it entitled him to the guiding hand of counsel at every step in the proceedings. An arbitrary refusal to hear a party by counsel would be a denial of a hearing, and, therefore, a denial of due process of law in the constitutional sense.[1]

[1] Powell v. Alabama, 287 U. S. 45, 68–69 [1932]; Cooke v. United States, 267 U. S. 517, 537 [1925]; Felts v. Murphy, 201 U. S. 123, 129 [1906]; Frank v. Mangum, 237 U. S. 309, 344 [1915]; Kelley v. Oregon, 278 U. S. 589, 591 [1927].

A State cannot, without disregarding the requirements of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.[1] The relief granted must be against a party to the suit. Hence, a statute authorizing a judgment creditor of a corporation to levy on the property of a stockholder in order to satisfy said judgment is repugnant to the due process clause unless it affords the third party a day in court and a hearing upon defenses personal to himself (whether he is in fact a stockholder, whether the judgment is void for fraud, etc.).[2]

[1] Postal Teleg. Cable Co. v. Newport, 247 U. S. 464, 476 [1918].
[2] Coe v. Armour Fertilizer Works, 237 U. S. 413, 423 [1915].

The time of the hearing may be determined by State practice. Due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered.[1] So long as an opportunity to be heard is given to a party objecting to a notice to produce books and papers, before the proceeding to enforce such production is closed, due process of law is afforded.[2] While due process required that there be an opportunity to present every available defense, it need not be before the entry of judgment. State practice which provides for a hearing by an appeal may suffice.[3] But the opportunity to present such evidence before final judgment is essential. Hence, where a State supreme court reversed a trial court, entering final judgment for the defendant, a plaintiff who was refused permission to introduce certain evidence which the trial court deemed immaterial but which on appeal was considered material is deprived of property without due process of law, when the appellate court entered a final judgment for defendant, thereby depriving plaintiff of an opportunity to introduce rebuttal evidence.[4]

[1] Wilson v. Standefer, 184 U. S. 399, 415 [1902].
[2] Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 551 [1908].
[3] American Surety Co. v. Baldwin, 287 U. S. 156, 168 [1932].
[4] Saunders v. Shaw, 244 U. S. 317 [1917].

IN LEGISLATIVE PROCEEDINGS.

State legislatures may enact laws affecting property without holding public hearings. The law is not invalid because persons who are affected by its provisions were not heard on the wisdom or justice

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of the legislation. If the resulting law is confiscatory, arbitrary, or unreasonable, it may for those reasons be invalid, but it is not invalid because persons affected by it were not heard when the law was enacted. For example, a State legislature may, consistently with due process, determine the amount to be assessed for a given public improvement, and designate the lands and property benefited thereby upon which the assessment is to be made, without first giving an opportunity to the owners of the property to be assessed to be heard upon the amount of the assessment or the extent of the benefit conferred.[1] Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. An order of the board of tax assessors to increase the valuation of all taxable property in the city by 40 percent is not invalid because all taxpayers were not heard. The Constitution does not require all public acts to be done in town meeting.[2]

[1] Wagner *v.* Leser, 239 U. S. 207 [1915].

[2] Bi-metallic Invest. Co. *v.* State Bd. of Equalization, 239 U. S. 441, 445 [1915].

A statute authorizing a municipality to expropriate property for a water system is not invalid because it affords no opportunity to the owner of the property to be heard as to the necessity and extent of the taking.[1] The necessity for appropriating private property for a public use is a legislative question which may be determined by a municipality to which the legislature has delegated the power; the Fourteenth Amendment does not entitle the owner to a hearing before the determination is made.[2] The question whether the purpose of a taking is a public one is judicial, but the question of the necessity and the proper extent of a taking is a legislative one.[3] Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate. They are legislative questions, and a hearing thereon is not essential to due process.[4] Likewise, there is no right to be heard before the passage of an ordinance for the taking by a city of land for a street.[5]

[1] Sears *v.* Akron, 246 U. S. 242, 251 [1918].

[2] Rindge Co. *v.* Los Angeles County, 262 U. S. 700, 708 [1923].

[3] Sears *v.* Akron, 246 U. S. 242, 251 [1918].

[4] Bragg *v.* Weaver, 251 U. S. 57, 58 [1919].

[5] Georgia *v.* Chattanooga, 264 U. S. 472, 483 [1924].

IN ADMINISTRATIVE PROCEEDINGS.

GENERALLY.—The processes employed by administrative tribunals differ from those in the courts, and in many cases are more summary. But administrative proceedings, just as proceedings in a court of justice, must conform to the essentials of due process of law. Notice and an opportunity to be heard are generally just as essential in one proceeding as in the other. Hence, a State law establishing a

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commission for licensing real-estate brokers, where it authorizes the commission to require and procure proof of honesty of each applicant, would be unconstitutional if interpreted to mean that the commission might procure such proof secretly, without giving the applicant notice or opportunity to learn its nature and source and to meet it.[1]

[1] Bratton v. Chandler, 260 U. S. 110 [1922].

Any course of procedure which has for its object the taking of property to satisfy an alleged legal obligation and which yet accords no hearing to a respectful protest invoking on reasonable grounds a prohibition found in the supreme law of the land can hardly be termed "due process of law." [1] The hearing which must precede the taking of property is not a mere form: the owner must have the right to secure and present evidence; he must be given the opportunity by proof and argument to controvert the claim asserted against him before a tribunal bound not only to listen but to give legal effect to what has been established.[2]

[1] Coe v. Armour Fertilizer Works, 237 U. S. 413, 419 [1915].

[2] Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510 [1912].

Statutes establishing administrative boards to determine the rights of persons, where notice and hearings are afforded, do not violate the Fourteenth Amendment. For example, a State statute authorizing a board of health to revoke the license of a physician for producing a criminal abortion, when the physician is given reasonable notice, an opportunity to be heard, with right of review to the State courts, does not violate the due process clause, even though the testimony of witnesses may be had only by deposition and not by subpoena.[1]

[1] Missouri ex rel. Hurwitz v. North, 271 U. S. 40 [1926].

In courts of law, notice and hearing precede the adjudication. In many administrative proceedings a similar principle is operative. But in the latter type of proceedings, because of the urgency of public need or because of practical considerations of administrative efficiency or effectiveness, prior notice and hearing is not always feasible. In such cases due process is afforded if the person whose property is affected is thereafter given an opportunity to test the validity or propriety of the administrative action.

Situations calling for the exercise of a State's police power to abate nuisances furnish a typical illustration of administrative action prior to a hearing. The classic case upholding the summary destruction of private property, without notice to the owner or judicial proceedings had, is Lawton v. Steele. In that case fishing nets had been seized and summarily destroyed under authority of a New York statute declaring that nets set in violation of the act should be deemed a public nuisance. The Supreme Court in sustaining the New York

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law laid down the following rule: "Where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the paths of conflagrations; destruction of decayed fruit or fish or unwholesome meats, or infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and, if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed." Summary destruction of the nets was deemed essential to the effective administration of the act.[1]

[1] 152 U. S. 133, 140 [1894].

Similarly, due process is not denied the owner or custodian of food in cold storage by a city ordinance under which such food, when unfit for human consumption, may summarily be seized, condemned, and destroyed without a preliminary hearing: The owner still has a right of action if his property was wrongfully destroyed.[1] Failure to accord a hearing to the owner before the seizure and destruction of liquor, the possession of which has been made unlawful, does not violate due process, if he can secure a hearing by instituting injunction proceedings to prevent the destruction.[2]

[1] North American Cold Storage Co. v. Chicago, 211 U. S. 306, 315 [1908].

[2] Samuels v. McCurdy, 267 U. S. 188 [1925].

Taxes and Assessments.*—It has never been considered necessary to the validity of a tax that the party charged shall have been present, or had an opportunity to be present, in some tribunal when he was assessed.[1] Where a tax board has its time of sitting fixed by law and where its sessions are not secret, no obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and in the business of assessing taxes, this is all that can be reasonably asked.[2]

[1] McMillen v. Anderson, 95 U. S. 37, 42 [1877].

[2] Taylor v. Secor (State Railroad Tax Cases), 92 U. S. 575, 610 [1876].

Whether a taxpayer can demand a hearing relative to tax assessments is dependent on particular circumstances surrounding the assessment. When an assessment for a local improvement is made in accordance with a fixed rule prescribed by legislative act, the property owner is not entitled to be heard in advance on the question of benefits.[1] But if the area of the assessment district was not determined by the legislature, a landowner has the right to be heard respecting benefits to his property before it can be included in the

* *See also* p. 870.

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improvement district to be assessed for benefits.[2] Where the legislature sets up a board or commission to hear landowners on the question of benefits, the decision of the designated tribunal is sufficient unless made fraudulently or in bad faith.[3]

[1] Withnell v. Ruecking Constr. Co., 249 U. S. 63, 68 [1919].
[2] Fallbrook Irrig. District v. Bradly, 164 U. S. 112, 175 [1896].
[3] Embree v. Kansas City & L. Boulevard Road Dist., 240 U. S. 242, 247 [1916].

Furthermore, where the mode of assessment resolves itself into a mere mathematical calculation, there is no occasion for a hearing.[1] Statutes and ordinances providing for the paving and grading of streets, the cost thereof to be assessed on the front foot rule, do not by their failure to provide for a hearing or review of assessments deprive complainant generally of property without due process of law.[2] Where an attempt is made to cast upon particular property a certain proportion of the construction cost of a sewer not calculated by any mathematical formula, the taxpayer has a right to be heard.[3]

[1] Hancock v. Muskogee, 250 U. S. 454, 458 [1919].
[2] Detroit v. Parker, 181 U. S. 399 [1901].
[3] Paulsen v. Portland, 149 U. S. 30, 38 [1893].

A lot owner has no constitutional privilege to be heard in opposition to the adoption of a project of street improvement which may end in an assessment of his lot. It is enough that a hearing is permitted before the imposition of the assessment as a charge upon his land, or in proceedings for collection thereof.[1]

[1] Utley v. St. Petersburg, 292 U. S. 106, 109 [1934].

Eminent Domain Proceedings.*—Property owners in eminent domain proceedings are not entitled to a hearing on the question of necessity of the taking of their particular property. The necessity and expediency of the taking of private property for public use are legislative questions no matter who may be charged with their decision, and a hearing thereon is not essential to due process.[1]

[1] North Laramie Land Co. v. Hoffman, 268 U. S. 276, 285 [1925]; Bragg v. Weaver, 251 U. S. 57 [1919]; Joslin Mfg. Co. v. Providence, 262 U. S. 668, 678 [1923]; Georgia v. Chattanooga, 264 U. S. 472, 483 [1924]. In Carson v. Brockton Sewerage Comrs., 182 U. S. 398, 401 [1901] the Supreme Court speaking through Justice Brown said that "when land is proposed to be taken and devoted to the public service, or any serious burden is laid on it, the owner of the land must be given an opportunity to be heard with respect to the necessity of the taking." This case has not since been cited by the Supreme Court.

On the matter of compensation for the taking, a hearing becomes essential. A property owner must be afforded an opportunity to be heard on the question of damages to be allowed for the taking of his

* *See also* p. 824

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property by right of eminent domain, upon reasonable notice of the pending proceedings.[1] The mode of determining the compensation to be paid for property taken by eminent domain, to conform to due process, must afford the owner an opportunity to be heard.[2]

[1] North Laramie Land Co. *v.* Hoffman, 268 U. S. 276 [1925].
[2] Bragg *v.* Weaver, 251 U. S. 57 [1919].

To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he has no adequate defense upon the merits.[1]

[1] Coe *v.* Armour Fertilizer Works, 237 U. S. 413, 424 [1915].

Where the statute contains an adequate provision for assured payment of compensation without unreasonable delay, the taking of property by eminent domain may precede the ascertainment of compensation.[1]

[1] Hays *v.* Seattle, 251 U. S. 233, 238 [1920]; Bragg *v.* Weaver, 251 U. S. 57 [1919].

POWER OF STATES TO REGULATE PROCEDURE.

Generally.

The due process clause of the Fourteenth Amendment does not control mere forms of procedure in State courts or regulate practice therein.[1] The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of State regulation and control. In the exercise of that power and to satisfy a public need, a State may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice be not unreasonable or arbitrary, and the procedure it adopts satisfy the constitutional requirements of reasonable notice and opportunity to be heard.[2] Or, in the language of Justice Cardozo, a State is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.[3]

[1] Holmes *v.* Conway, 241 U. S. 624, 631 [1916]; Louisville & N. R. Co. *v.* Schmidt, 177 U. S. 230, 236 [1900].
[2] Hardware Dealers Mut. F. Ins. Co. *v.* Glidden Co., 284 U. S. 151, 158 [1931].
[3] Snyder *v.* Massachusetts, 291 U. S. 97, 105 [1934], citing Twining *v.* New Jersey, 211 U. S. 78, 106, 111, 112 [1908]; Rogers *v.* Peck, 199 U. S. 425, 434 [1905]; Maxwell *v.* Dow, 176 U. S. 581, 604 [1900]; Hurtado *v.* California, 110 U. S. 516 [1884]; Frank *v.* Mangum, 237 U. S. 309, 326 [1915]; Powell *v.* Alabama, 287 U. S. 45, 67 [1932]. *See also* Brown *v.* Mississippi, 297 U. S. 278, 285 [1936].

The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same

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remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding.[1]

[1] Bowman v. Lewis, 101 U. S. 22, 31 [1880].

The Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted gives reasonable notice and affords fair opportunity to be heard before the issues are decided.[1] The limit of the full control which the State has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.[2] When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present, the power of a State over its methods of procedure is substantially unrestricted by the due process clause of the Constitution.[3]

[1] Iowa C. R. Co. v. Iowa, 160 U. S. 389, 393 [1896]; Honeyman v. Hanan, 302 U. S. 375 [1937].

[2] West v. Louisiana, 194 U. S. 258, 263 [1904]; Ex parte Reggel, 114 U. S. 642 [1885]; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226 [1897]; Brown v. New Jersey, 175 U. S. 172, 175 [1899].

[3] Jordan v. Massachusetts, 225 U. S. 167, 176 [1912].

No one has a vested right in any given mode of procedure, and so long as a substantial and efficient remedy remains or is provided due process of law is not denied by a legislative change.[1] A State with its full power over remedies and procedure in its own courts can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants.[2]

[1] Crane v. Hahlo, 258 U. S. 142, 147 [1922].

[2] York v. Texas, 137 U. S. 15, 20 [1890], citing Antoni v. Greenhow, 107 U. S. 769 [1883].

Procedure does not run afoul of the Fourteenth Amendment because another method may seem fairer or wiser or give a surer promise of protection to a prisoner at the bar.[1] That a rule of procedure may work particular hardship on a particular defendant does not make the rule wanting in due process.[2] However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform. For instance, it does not constrain the States to accept particular modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in plead-

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ing, or give untrammelled liberty to make amendments. Nor does it require a State to relieve the hardship of an ancient and familiar method of procedure by dispensing with the exaction of special security from an appearing defendant in foreign attachment.[3]

[1] Snyder v. Massachusetts, 291 U. S. 97, 105 [1934].
[2] Ownbey v. Morgan, 256 U. S. 94 [1921].
[3] Ownbey v. Morgan, 256 U. S. 94, 112 [1921].

It is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights. The States have complete power to create such courts as are deemed essential, and to endow them with such jurisdiction as is considered appropriate.[1]

[1] Cincinnati Street R. Co. v. Snell, 193 U. S. 30, 36 [1904].

Causes of Action and Remedies.

A State with its power to regulate proceedings in its courts may declare what conduct shall be actionable. It may abridge certain remedies or rights which existed at common law. *A fortiori* causes of action purely statutory may be repealed. For example, a State may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the State and their performance would violate its law. Such refusal does not deprive a person of property without due process of law.[1]

[1] Home Ins. Co. v. Dick, 281 U. S. 397, 407 [1930].

Likewise, the repeal of a statute authorizing telegraph companies to obtain by condemnation an easement along a railroad right-of-way does not deprive the telegraph company of any vested right without due process of law, even when applied to proceedings already begun, with judgment entered for the telegraph company, but from which an appeal had been made.[1] The right of a taxpayer to a decree enjoining the maintenance of an illegal school district and issuance of bonds therefor, is not private but public in character; and its loss through an act of the legislature validating the district but not affecting his right to costs, does not deprive one of property without due process of law.[2] A State decision holding that words used in a pleading in another suit could not be the foundation of an action for libel does not deprive petitioner of property without due process, even if reputation can be deemed property within the meaning of the Fourteenth Amendment.[3]

[1] Western U. Teleg. Co. v. Louisville & N. R. Co., 258 U. S. 13 [1922].
[2] Hodges v. Snyder, 261 U. S. 600 [1923].
[3] Abbott v. National Bank of Commerce, 175 U. S. 409, 414 [1899].

But no one would contend that a law of a State forbidding all redress by actions at law for injuries to property would be upheld in the courts of the United States, for that would be to deprive one of his

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property without due process of law.[1] Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.[2]

[1] Poindexter v. Greenhow, 114 U. S. 270, 303 [1885].
[2] Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 682 [1930].

Furthermore, a State may not, in many cases at least, deprive a person of an existing cause of action by repealing the law which created the right. For instance, the repeal of a provision of the California corporation law which made directors liable for all moneys embezzled by corporate officers deprives creditors of property without due process of law, when the repealing statute prevents creditors from enforcing liability which had already arisen.[1] An existing right of action to recover damages for an injury is property; the legislature has no power to destroy such property.[2]

[1] Coombes v. Getz, 285 U. S. 434, 442, 448 [1932].
[2] Angle v. Chicago, St. P. M. & O. R. Co., 151 U. S. 1 [1894].

The refusal of a State to create certain causes of action or provide for certain procedure does not violate the due process clause of the Constitution. It is frivolous to claim that a statute of procedure, by its failure to give jurisdiction over foreign corporations in transitory actions arising in another State, constitutes a lack of due process.[1]

[1] Missouri P. R. Co. v. Clarendon Boat Oar Co., 257 U. S. 533, 536 [1922].

Although a vested cause of action is property and is protected from arbitrary interference, a person has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure.[1] An alteration in the remedy of holders of mechanics' liens does not deprive holder of prior mortgage of property without due process of law.[2] A mortgage law amendment suspending summary remedy as to holders of less than 25 percent of mortgage debt is valid.[3]

[1] Gibbes v. Zimmerman, 290 U. S. 326, 332 [1933].
[2] Red River Valley Nat. Bank v. Craig, 181 U. S. 548 [1901].
[3] United States Mortgage Co. v. Matthews, 293 U. S. 232 [1934].

A statute creating an additional remedy for enforcing stockholders' liability does not deprive persons then holding stock of property without due process of law.[1] For example, due process is not denied a stockholder of a domestic corporation by a statute enacted to make more effectual the constitutional liability of stockholders for the debts of the corporation.[2]

[1] Shriver v. Woodbine Sav. Bank, 285 U. S. 467 [1932].
[2] Bernheimer v. Converse, 206 U. S. 516 [1907].

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When Congress creates a right of action against a railroad for damage to an interstate shipment and makes no provision concerning the remedy, the Federal and State courts have concurrent jurisdiction. A consignee choosing a State court is entitled to whatever remedial advantage inheres in the forum. The enforcement of the consignee's claim by subjecting traffic balances due the railroad to its satisfaction, through attachment proceeding without personal service, does not enlarge the substantive remedy even though such relief was not available in a Federal court. Such proceedings are not in violation of due process.[1]

[1] Missouri ex rel. St. Louis, B. & M. R. Co. v. Taylor, 266 U. S. 200 [1924].

Trial by Jury.

DISPENSING WITH JURY TRIALS.

GENERALLY.—The Fourteenth Amendment neither guarantees any particular form or method of State procedure, nor implies that all trials must be by jury.[1] Consistently with the due process clause, trial by jury may be abolished.[2] Trial by jury is not essential to due process either in civil [3] or in criminal cases.[4]

[1] Hardware Dealers Mut. F. Ins. Co. v. Glidden Co., 284 U. S. 151, 158 [1931].

[2] Snyder v. Massachusetts, 291 U. S. 97, 105 [1934], citing Walker v. Sauvinet, 92 U. S. 90 [1876]; Maxwell v. Dow, 176 U. S. 581, 603 [1900]; New York C. R. Co. v. White, 243 U. S. 188, 208 [1917]; Wagner Electric Mfg. Co. v. Lyndom, 262 U. S. 226, 232 [1923].

[3] Frank v. Mangum, 237 U. S. 309, 340 [1915]; Walker v. Sauvinet, 92 U. S. 90 [1876].

[4] Hallinger v. Davis, 146 U. S. 314, 324 [1892]; Maxwell v. Dow, 176 U. S. 581, 594, 602, 604 [1900].

While a State cannot deprive a person of his property without due process of law, this does not necessarily imply that all trials in State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process according to the law of the land. This process in the States is regulated by the law of the State.[1] Nothing is more common than a new proceeding established by statute to be carried on without the aid of a jury: For instance, proceedings by way of eminent domain, for determining the right to office, for compelling delivery of seals, records, and papers of an office, for appointment of guardians of insane persons, for assessment of the value of improvements, for enforcement of statutory liens, for the assessment and collection of taxes, etc.[2]

[1] Walker v. Sauvinet, 92 U. S. 90, 92 [1876].

[2] Montana Co. v. St. Louis Min. & Mill. Co., 152 U. S. 160, 171 [1894].

CONTEMPT PROCEEDINGS.—A jury trial is not necessary to due process of law on an inquiry for contempt.[1] Courts have always had the right to punish persons for contempt and other offenses against

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the administration of justice. Such punishment may be inflicted by summary proceedings and without trial by jury. The due process clause was never intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or of a civil suit, and whether the penalty be fine or imprisonment. It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have the power to vindicate its dignity, to enforce its orders, to protect itself from insult, without the necessity of calling upon a jury to assist it in the exercise of its power to punish for contempt. In such cases a denial of jury trial is not a denial of due process of law.[2]

[1] Tinsley v. Anderson, 171 U. S. 101, 108 [1898].
[2] Ellenbecker v. District Court, 134 U. S. 31, 36, 39 [1890].

In fact, a witness who flatly refuses to answer further questions in a deposition proceeding before a notary is guilty of a patent contempt; his commitment by the presiding notary without further hearing is consistent with due process of law, even though a notary under Ohio law is not a judicial officer.[1]

[1] Bevan v. Krieger, 289 U. S. 459, 464 [1933].

Equity Proceedings.—The right of a court of chancery to proceed to a final determination of most important rights without a jury has not been abrogated by the adoption of the Fourteenth Amendment.[1] Proceedings in equity to abate liquor nuisances are not inconsistent with due process of law.[2] The Fourteenth Amendment does not prevent a State from giving to its equity courts jurisdiction of a suit brought by the owner of an equitable interest in land to establish his rights against the holder of legal title. Depriving the holder of the legal title to land of the right to a trial by jury which he would have in an action at law does not deprive him of property without due process of law.[3]

[1] Montana Company v. St. Louis Min. & Mill Co., 152 U. S. 160, 171 [1894].
[2] Mugler v. Kansas, 123 U. S. 623, 670 [1887].
[3] Church v. Kelsey, 121 U. S. 282 [1887].

Quo Warranto Proceedings.—A jury trial of charges against an officer is not necessary to constitute due process of law in suspending or removing him.[1] A State statute regulating proceedings for the removal of a person from a State office is not repugnant to the Federal Constitution if it provides for bringing the party against whom the proceeding is had into court, and notifying him of the case he has to meet, for giving him an opportunity to be heard in his defence, and for the deliberation and judgment of the court.[2]

[1] Wilson v. North Carolina ex rel Caldwell, 169 U. S. 586 [1898].
[2] Foster v. Kansas ex rel. Johnston 112 U. S. 201, 206 [1884]; Kennard v. Louisiana ex rel Morgan, 92 U. S. 480 [1876].

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CONDEMNATION PROCEEDINGS.*—Due process of law in condemnation proceedings does not require that the assessment of damages shall be made by a jury.[1] The reference of the problem of determining the amount of an award, especially in eminent domain proceedings, to a commission, or board, or sheriff's jury, or other nonjudicial tribunal was the practice at common law, and (when opportunity to be heard is given) such procedure satisfies the requirements of due process of law, especially when a right of review in the courts is given.[2]

[1] Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 694 [1897].
[2] Crane *v.* Hahlo, 258 U. S. 142, 147 [1922].

To have questions of compensation and necessity in eminent domain proceedings both passed upon by one and the same jury is not a fundamental right secured by the Constitution. The question of necessity may be left to the legislature or to the corporation vested with power of eminent domain. The question of compensation may be left to a commission.[1] Due process is afforded in street-opening proceedings, where ample provision is made for an inquiry as to damages by a competent court, and for review of those proceedings by appeal, even though no trial by jury is afforded.[2]

[1] Backus (A.), Jr. & Sons *v.* Fort Street Union Depot Co., 169 U. S. 557, 568 [1898].
[2] Pearson *v.* Yewdall, 95 U. S. 294 [1877].

MANDAMUS PROCEEDINGS.—The determination of the facts by a jury in a mandamus case is not a necessary preliminary to a valid judgment.[1]

[1] Delgado *v.* Chavez, 140 U. S. 586, 588 [1891].

DIRECTED VERDICTS.—One cannot claim to be deprived of property without due process of law merely because the judge took the case from the jury and directed a verdict for one of the parties.[1]

[1] Brand *v.* Union Elev. R. Co., 238 U. S. 586 [1915].

ENFORCEMENT OF LIENS.—A statute which does not provide for a trial by jury in an action to enforce a lien is not for that reason invalid as a denial of due process.[1]

[1] Marvin *v.* Trout, 199 U. S. 212, 226 [1905].

ENLARGING FUNCTIONS OF JURIES.

There is nothing in the Federal Constitution which requires a State to maintain the line with which we are familiar between the functions of the jury and those of the court. It may confer larger powers upon a jury than those that generally prevail.[1] For example, a State may authorize the use of a jury in certain equity proceedings. Similarly a State may provide that the defenses of contributory negligence, assumption of risk, or fellow servant shall be questions of

*See also pp. 820, 883, 911.

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fact at all times to be left to the jury, thereby preventing State judges from directing a verdict as a matter of law.[2]

[1] Chicago, R. I., & P. R. Co. v. Cole, 251 U. S. 54, 56 [1919].
[2] Herron v. Southern P. Co., 283 U. S. 91 [1931]; Chicago, R. I., & P. R. Co. v. Cole, 251 U. S. 54, 55 [1919].

While a State, without violating the requirements of due process, may make a jury the sole arbiter of the existence or nonexistence of contributory negligence, the Federal courts are not required by the Conformity Act or the State law to submit such questions to the jury and may direct a verdict for the defendant, when it appears as a matter of law that the plaintiff was guilty of contributory negligence.[1]

[1] Herron v. Southern P. Co., 283 U. S. 91, 93 [1931].

VARIATIONS FROM COMMON LAW JURIES.

The Supreme Court has sustained the States in establishing a great variety of departures from the common law rules respecting selection and number of jurors.[1] A State may, for instance, alter the number of the petit jury from that provided by the common law. It may provide for a jury of 8 rather than 12.[2] Statutes authorizing a struck jury, even in criminal proceedings, are not invalid.[3] A State may reduce the number of peremptory challenges which were allowed at common law.[4] A State may in civil cases dispense with a unanimous verdict, and provide for a verdict concurred in by 10 out of 12 jurors.[5]

[1] Frank v. Mangum, 237 U. S. 309, 342 [1915].
[2] Maxwell v. Dow, 176 U. S. 581, 602 [1900].
[3] Brown v. New Jersey, 175 U. S. 172, 175 [1899].
[4] Frank v. Mangum, 237 U. S. 309, 342 [1915].
[5] Jordan v. Massachusetts, 225 U. S. 167, 176 [1912].

Pleading and Practice.

COMMENCEMENT OF ACTIONS.—How a suit shall be begun, whether by writ or by informal notice, is a question of the practice of the State or of its forms and modes of proceedings. If the method employed gives reasonable notice and affords fair opportunity to be heard before the issues are determined, the Constitution of the United States does not attempt to make a choice between one method and another.[1]

[1] Chisholm v. Gilmer, 299 U. S. 99, 102 [1936].

A State may impose certain conditions on the right to institute litigation. For example, a State statute which requires a plaintiff, before commencing an action on a claim involving $200 or less, to file with the court a certificate showing an attempt to effect a settlement of the claim by conciliation does not violate the due process clause of the Constitution.[1] A State may impose upon nonresidents as a condition to filing suit in the local courts that they stand ready to answer all cross actions filed by resident defendants. Hence, a statutory provision requiring a nonresident plaintiff to answer to any

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action brought against him by way of set off by the party sued, where the writ in such cross action is served on the attorney of record for the plaintiff in the original action, is not invalid.[2] Similarly a State may rquire a foreign corporation doing business in the State to file a copy of its charter and take certain other specified steps before it can maintain an action in the court of that State.[3] In exercising its right to impose reasonable conditions upon the bringing of suits, a State properly may treat as a separate class actions to recover damages resulting to crops from harmful or deficient fertilizers, and require a chemical analysis as a condition precedent, without excluding other evidence. Such a requirement is not arbitrary or unreasonable, and is consistent with the due process clause of the Fourteenth Amendment.[4]

[1] Klein (Frank L.) v. Hutton, 49 N. D., 248 [1922].
[2] Young Co. v. McNeal-Edwards Co., 283 U. S. 398 [1931].
[3] Interstate Amusement Co. v. Albert, 239 U. S. 560 [1916].
[4] Jones v. Union Guano Co., 264 U. S. 171 [1924].

PLEAS IN ABATEMENT.—A State may without violating the due process clause of the Fourteenth Amendment prescribe that a voluntary special appearance in one of its courts, even for the purpose of objecting to the jurisdiction, shall be deemed a general appearance.[1] A statute converting an appearance by defendant for the sole purpose of questioning the jurisdiction of the court into a general appearance and submission to the jurisdiction of the court is not invalid.[2]

[1] Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 271 [1914].
[2] York, v. Texas, 137 U. S. 15 [1890].

State legislation simply forbidding a defendant to come into court and challenge the validity of service upon him in a personal action, without thereby surrendering himself to the jurisdiction of the court, but which does not restrain him from fully protecting his substantive rights does not deprive him of property without due process of law.[1] Whether the filing of a plea in abatement or taking the question to a higher court, amounts to a general appearance is a question of State law, and a party who has taken that course cannot be said to have been deprived of due process.[2]

[1] Kauffman v. Wooters, 138 U. S. 285, 287 [1891]; York v. Texas, 137 U. S. 15, 19 [1890].
[2] Chicago L. Ins. Co. v. Cherry, 244 U. S. 25 [1917].

A nonresident party against whom a personal action is instituted in a State court without service of process upon him may, if he please, ignore the proceedings as wholly ineffective, and set up the invalidity of the judgment if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. But if he desires to raise the question of the validity of the proceedings in the court in which it is instituted, so as to avoid even

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the semblance of a judgment against him, it is within the power of a State to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled.[1]

[1] Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 273 [1914]; Chicago L. Ins. Co. v. Cherry, 244 U. S. 25 [1917].

SET-OFF.—A State may allow the defendant to interpose a plea of set-off as a defense or partial defense to an action, or it may require him to institute a special suit to recover thereon. The abrogation by the legislature of a right previously given to a municipality to set off against its charges for water supplied by a public corporation the unpaid taxes levied against such corporation does not deprive the municipality of property without due process of law.[1]

[1] New Orleans v. New Orleans Waterworks Co., 142 U. S. 79 [1891].

DEFENSES.—A State constitutional provision making the defense of contributory negligence or assumption of risk a question of fact at all times to be left to the jury does not contravene the Fourteenth Amendment.[1] A person has no vested right to the defense of contributory negligence. It may be taken away altogether, as it has been done under workmen's compensation laws.[2] Consistently with due process, a State may provide that the doctrines of contributory negligence, assumption of risk, and fellow servant shall not bar recovery in actions brought against an employer for death or injury resulting from dangerous machinery improperly safeguarded.[3]

[1] Herron v. Southern P. Co., 283 U. S. 91 [1931].
[2] Chicago, R. I. & P. R. Co. v. Cole, 251 U. S. 54, 55 [1919].
[3] Bowersock v. Smith, 243 U. S. 29, 34 [1917].

A State may attach some conditions to the interposition of certain defenses. A statute which affords a nonresident defendant in a suit begun by foreign attachment an opportunity to appear and defend only in case he gives bail or security for the discharge of the property seized does not deny due process of law, even though defendant may have no resources or credit aside from the property attached.[1] A statute providing that one sued in a possessory action cannot bring an action to try title until after judgment shall have been rendered in the possessory action, and until he shall have paid the judgment if the decision shall have so awarded, is equally valid.[2]

[1] Ownbey v. Morgan, 256 U. S. 94 [1921].
[2] Grant Timber & Mfg. Co. v. Gray, 236 U. S. 133 [1915].

AMENDMENTS AND CONTINUANCES.—The allowance by a trial court after testimony was in of an amendment to bring the case specifically under the Employers' Liability Act rather than under a Lord Campbell's Act is not so arbitrary as to amount to a denial of due

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process of law.[1] The granting of amendments to a declaration by consent of counsel does not deprive a person of property without due process of law, on the ground that counsel had no authority to give consent thereto.[2]

[1] Seaboard Air Line R. Co. *v.* Koennecke, 239 U. S. 352 [1915].
[2] Rothschild *v.* Knight, 184 U. S. 334, 341 [1902].

The refusal of a State court to grant an application for leave to file a supplementary answer is not a taking of property without due process of law when there is no abuse of discretion.[1] Similarly the denial by a State court of an application to amend a petition for removal of a cause to a Federal court is not a denial of any right secured by the Constitution.[2]

[1] Sawyer *v.* Piper, 189 U. S. 154 [1903].
[2] Carr *v.* Nichols, 157 U. S. 370 [1895].

The granting and denial of continuances are matters within the discretion of a trial court and are not ordinarily reviewable; generally the refusal to grant a continuance does not amount to a denial of due process of law to the accused.[1]

[1] Franklin *v.* South Carolina, 218 U. S. 161, 168 [1910].

Costs, Damages, and Penalties.—A State statute which provides that whenever it appears to the court or jury trying the case that the prosecution was instituted without probable cause and from malicious motives, the name of the prosecutor shall be ascertained and stated in the finding, and shall be adjudged to pay costs does not deny such prosecutor of property without due process of law in a case when he was not denied an opportunity to present evidence of good faith.[1] Similarly a statute providing for the recovery of reasonable attorney's fees in actions on small claims against unsuccessful defendants does not deprive such persons of property without due process of law.[2] The question what costs are allowed by law is for the court to determine; and an erroneous judgment of what the law allows does not deprive a party of due process of law.[3] A State statute reducing the rate of interest upon all judgments obtained within the courts of the State does not, even when applied to a judgment previously obtained, deprive the judgment creditor of property without due process of law.[4]

[1] Lowe *v.* Kansas, 163 U. S. 81, 87 [1896].
[2] Missouri K. & T. R. Co. *v.* Cade, 233 U. S. 642, 650 [1914].
[3] Ballard *v.* Hunter, 204 U. S. 241, 259 [1907].
[4] Morley *v.* Lake Shore & M. S. R. Co., 146 U. S. 162, 171 [1892].

A State law allowing punitive damages to be assessed in actions against employers for deaths caused by negligence of their employees—the object of the statute being to prevent negligent destruction of human life—does not violate the due process clause.[1] Nor does a

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State statute allowing a recovery of damages and attorney's fees against insurance companies for vexatious delay in paying claims deprive the company of property without due process of law.[2] And a statute subjecting an insurance company to 12 percent damages and reasonable attorney fees when payment of a policy has been wrongfully refused is not a denial of property without due process of law, even in cases where the refusal was in good faith.[3]

[1] Pisits (Louis) Dry Goods Co. *v.* Yeldell, 274 U. S. 112, 114 [1927].
[2] Hartford L. Ins. Co. *v.* Blincoe, 255 U. S. 129, 137 [1921].
[3] Life & C. Ins. Co. *v.* McCray, 291 U. S. 566 [1934].

A State has power to impose penalties sufficiently heavy to secure obedience to provisions of law, rate orders, etc., provided the penalties are not so severe as to preclude an appeal to the courts to test the validity of the law or order,* and provided that the penalties are not so unreasonable as to be arbitrary.[1]

[1] Wadley Southern R. Co. *v.* Georgia, 235 U. S. 651 [1915].

It is within the police power of the State to provide a penalty for delay as a reasonable incentive for prompt settlement without suit of just demands of a class admitting of special legislative treatment.[1] " * * * common carriers engaged in the public business of transportation may be grouped in a special class to secure the proper discharge of their functions, and to meet their liability for injuries inflicted upon the property of members of the public in their performance; that the seasonable payment of just claims against them for faulty performance of their functions is a part of their duty, and that a reasonable penalty may be imposed on them for failure promptly to consider and pay such claims, in order to discourage delays by them. This penalty or stimulus may be in the form of attorney's fees * * * such penalties or fees must be moderate and reasonably sufficient to accomplish their legitimate object and * * * the imposition of penalties or conditions that are plainly arbitrary and oppressive and violate the rudiments of fair play insisted on in the Fourteenth Amendment, will be held to infringe it."[2]

[1] Yazoo & M. V. R. Co. *v.* Jackson Vinegar Co., 226 U. S. 217 [1912].
[2] Chicago & N. W. R. Co. *v.* Nye, Schneider Fowler Co., 260 U. S. 35, 43–44 [1922].

Many types of penalties have been upheld: For example a statute imposing on common carriers the duty of seasonably considering and settling claims for loss or damage of freight, under pain of being required to pay 7 percent on the recovery and reasonably attorney's fees, to be fixed by the court, in any case where the claimant recovers judgment for more than has been tendered him by the carrier, is not *per se* violative of the Fourteenth Amendment. Such statutes are to be judged by their application in the particular case;

* *See also*, p. 887.

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where the result is fair and reasonable, they will be sustained; *aliter* where it is so arbitrary, unequal and oppressive as to shock the sense of fairness inspiring the Fourteenth Amendment.[1] Similarly, a State may impose upon a railway double damages and an attorney's fee for failure to pay, within a reasonable time after demand, the amount claimed by an owner for stock killed, when a jury subsequently awards the amount claimed in an action thereon.[2]

[1] Chicago & N. W. R. Co. v. Nye, Schneider Fowler Co., 260 U. S. 35 [1922].

[2] Kansas City Southern R. Co. v. Anderson, 233 U. S. 325 [1914].

Likewise, a statute imposing a penalty on common carriers for failure to settle claims for lost or damaged freight in shipment within the State within a reasonable specified period is not unconstitutional.[1] A State law requiring railroads to pay or reject claims for loss or damage to freight within 90 days of their presentation, under penalty that, otherwise, the claims shall stand as liabilities due and payable in their full amounts and recoverable in any court of competent jurisdiction, does not violate the due process clause of the Fourteenth Amendment.[2] Similarly a statute requiring railroads to erect and maintain fences and cattle guards and making the railroads liable in double amount of damages resulting from their failure to maintain such protection is not invalid.[3] The cattle train speed act of Nebraska establishing a rate of speed on branch lines within the State and imposing a penalty of $10 per car per hour, is not unconstitutional under the Fourteenth Amendment as depriving the railroad company of its property without due process of law because it fixes an arbitrary amount as liquidated damages.[4]

[1] Yazoo & M. V. R. Co. v. Jackson Vinegar Co., 226 U. S. 217 [1912].

[2] Southern R. Co. v. Clift. 260 U. S. 316 [1922].

[3] Missouri Pacific R. Co. v. Humes, 115 U. S. 512, 520 [1885].

[4] Chicago, B. & Q. R. Co. v. Cram, 228 U. S. 70 [1913].

On the other hand, certain types of penalties have been held to deprive a defendant of property without due process of law. A State statute which attaches onerous penalties to the nonpayment of extravagant demands is invalid. For example, an Arkansas statute providing that railroad companies must pay claims for livestock killed or injured by their trains within 30 days after notice and that failure to do so shall entitle the owner to double damages and an attorney's fee, even where the amount sued for is less than the amount originally demanded, is unconstitutional.[1]

[1] St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354 [1912].

A South Dakota statute making railroad companies liable for double damages in case of failure to pay a claim or to offer a sum equal to what the jury finds the claimant entitled to for destruction of property by fire, was held to be unconstitutional. A law requiring

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a company to guess rightly what a jury will find, or pay double if that body sees fit to add 1 cent to the amount that was tendered is arbitrary.[1]

[1] Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165 [1914]; Yazoo & M. V. R. Co. v. Jackson Vinegar Co., 226 U. S. 217 [1912] distinguished. Followed in Chicago, M. & St. P. R. Co. v. Kennedy, 232 U. S. 626 [1914].

LIENS.—A State statute giving a wife a right of action against any person who injures her means of support by selling intoxicating liquor to her husband does not violate the due process clause by providing further that the judgment so recovered shall be a lien upon premises where the liquor was sold, as against an owner who knowingly permitted the use of said premises for the sale of liquor.[1] The owner of a building which he knowingly permits to be used for gaming purposes is not deprived of his property without due process of law merely because said building may be subjected to a judgment obtained by an informer for recovery of money lost there at play.[2]

[1] Eiger v. Garrity, 246 U. S. 97 [1918].
[2] Marvin v. Trout, 199 U. S. 212 [1905].

A State law authorizing the attachment of bonds on deposit within the State and owned by a nonresident, at the suit of a nonresident, does not deny due process of law.[1] A corporation of a foreign country is not denied due process of law by a judgment dissolving an attachment sued out by such corporation on a fund within the State the effect of which if sustained would have been to remove the fund from the State, when a citizen of the State claimed an interest in it.[2]

[1] De Bearn v. Safe Deposit & T. Co., 233 U. S. 24 [1914].
[2] Disconto Gesellschaft v. Umbreit, 208 U. S. 570 [1908].

Holders of stock in an insolvent bank are not unconstitutionally deprived of property by a statute permitting the superintendent of banks to issue execution against them for the amount of an assessment necessary to meet the claims of creditors, where they are permitted to interpose available defenses by an affidavit of illegality. Execution does not need the sanction of a judgment, and liens may attach in advance of judgment.[1]

[1] Coffin Bros. & Co. v. Bennett, 277 U. S. 29 [1928].

A State law providing that one embezzling public money shall be imprisoned and shall pay a fine equal to double the amount embezzled, which shall operate as a judgment for the use of persons whose money was embezzled, does not deprive a person convicted of embezzlement of his property without due process of law because it provides for such judgment irrespective of whether restitution has been made or not.[1]

[1] Coffey v. Harlan County, 204 U. S. 659, 664 [1907].

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A State statute which provides that judgments against a railroad for damages done to persons and property shall have priority over mortgages made by the railroad is not invalid, if such law was in force when the mortgage was made, even though the judgment is subsequent in point of time to the mortgage.[1] A statute making water rents due to a city a lien prior to all other incumbrances, in the same manner as taxes and assessments, does not deprive a mortgagee of property without due process of law when the mortgage was made after the enactment of the statute though the water rents were incurred subsequent to the mortgage.[2]

[1] East Tennessee V. & G. R. Co. *v.* Frazier, 139 U. S. 288 [1891].
[2] Provident Inst. for Savings *v.* Jersey City, 113 U. S. 506 [1885].

Statutes of Limitation.

A time not unreasonably short for the beginning of actions may be fixed by the legislature, having in view particular conditions, without violating the due process clause of the Constitution.[1] A statute of limitations may not only deny to the former owner a right of action to recover property but it may also give title to a disseisor after the lapse of a reasonable time allowed to the disseisee to bring an action to repossess.[2]

[1] Kentucky Union Co. *v.* Kentucky, 219 U. S. 140, 156 [1911].
[2] Davis *v.* Mills, 194 U. S. 451, 456, 457 [1904].

A statute of limitations does not deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce that right by suit.[1] A State may shorten the existing period of limitation, provided a reasonable time is allowed for bringing an action after the passage of the statute and before the bar takes effect.[2] A statute limiting the time within which actions may be brought to annul State patents for land and which, applied to a given case, prevents a senior grantee from asserting his rights accrued before the passage of the statute, against a junior patentee of the same land, does not deprive him of property without due process of law, if it allows a reasonable time after its enactment within which his suit may be begun.[3]

[1] Wheeler *v.* Jackson, 137 U. S. 245, 258 [1890].
[2] Turner *v.* New York, 168 U. S. 90, 94 [1897].
[3] Atchafalaya Land Co. *v.* Williams (F. B.) Cypress Co., 258 U. S. 190, 197 [1922].

What is a reasonable period is partly dependent on the nature of the right and particular circumstances. A Maine statute, with regard to wild land, which provided that when a person had been in possession under a recorded deed continuously for 20 years, and had paid taxes thereon during the time, and no former owner had during such time paid any taxes thereon, no action should be maintained to recover such land unless commenced within 20 years or with 5 years

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following adoption of statute, does not deprive former owner of property without due process of law in case of one in possession for 5 years after and 15 years before the enactment of the statute.[1]

[1] Soper v. Lawrence Bros. Co., 201 U. S. 359 [1906].

A State statute requiring actions for the recovery of real property sold for nonpayment of taxes to be brought within 5 years after the treasurer's deed has been recorded does not deprive one, claiming under a tax deed, of property without due process of law, when construed by the State courts to mean that the limitation begins to run at the time of the recording of the deed, irrespective of the question of adverse possession.[1] Similarly a statute making tax deeds recorded for 2 years conclusive evidence of the regularity of proceedings, unless an action was thereafter brought within 6 months, is not repugnant to the Constitution.[2]

[1] Barrett v. Holmes, 102 U. S. 651, 655 [1881].
[2] Turner v. New York, 168 U. S. 90, 94 [1897]; Saranac Land & Timber Co. v. Roberts, 177 U. S. 318 [1900].

A State statute of limitations allowing a little more than a year for the institution of a suit to recover his personal property by a party who has not been heard from for 14 years and for whose property a receiver has been appointed is not unconstitutional as depriving him of his property without due process of law.[1] An amendment to a Workmen's Compensation Act, limiting to 3 years the time within which a case may be reopened for the readjustment of compensation on account of aggravation, diminution, or termination of disability, does not deny due process to one who sustained a compensable injury while the earlier statute was in effect, even though said statute contained no such limitation.[2] Likewise a statute of limitation allowing more than a year to sue directors of corporations on an existing cause of action is sufficient.[3]

[1] Blinn v. Nelson, 222 U. S. 1 [1911].
[2] Mattson v. Dept. of Labor, 293 U. S. 151, 154 [1934].
[3] Davis v. Mills, 194 U. S. 451 [1904].

A State may not only shorten but it may also extend the time within which suit may be brought in its own courts if in doing so it violated no agreement of the parties. In fact, in many instances, it may entirely remove the statutory bar to the commencement of a suit. For instance, the application of a local statute of limitation to a right created in another jurisdiction does not, generally, deprive a person of property without due process of law, even where the remedy in the jurisdiction of origin is barred. But because of contractual provisions, such a statute may be invalid when applied to certain causes of action. For example a Texas statute forbidding insurance companies to limit the time for bringing a suit on a policy to a shorter period than 2 years is invalid as to a contract which was entered into

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in Mexico with a Mexican company and which was subsequently assigned to a citizen of Texas residing in Mexico, said policy containing a stipulation that suit thereon must be brought within 1 year. To deprive the Mexican company of the defense of limitations was to impose a greater liability on the company than it had assumed, and hence amounted to a deprivation of property without due process of law.[1]

[1] Home Ins. Co. *v.* Dick, 281 U. S. 397 [1930].

The repeal of a statute of limitation on actions for personal debts, even as to debts already barred, does not deprive a debtor of his property without due process of law. But the removal of the bar by a legislative act passed after the bar has become perfect would be a deprivation of property without due process in an action to recover real or personal property, because in the latter situation the property had become the defendant's; i. e., legal title and real ownership had become vested in the adverse possessor. The repeal of the bar of the statute would in effect transfer title to the plaintiff and deprive the defendant of vested property without due process of law.[1] As respects suits to recover real or personal property where the right of action has been barred by a statute of limitations, a later act attempting to repeal or remove that bar after it has become complete would be inconsistent with constitutional provisions forbidding a deprivation of property without due process of law.[2]

[1] Campbell *v.* Holt, 115 U. S. 620, 623 [1885].
[2] Stewart *v.* Keyes, 295 U. S. 403, 417 [1935].

Evidence and Presumptions.

ADMISSION OF EVIDENCE.—It is within the established power of a State to prescribe the evidence which is to be received in its own courts.[1] No Federal right of a defendant is violated by admitting in evidence a deposition (taken before a committing magistrate, in the presence of the accused) of a witness who had been cross-examined by the counsel for the accused and who was permanently absent from the State at the time of the trial. Its admission was but a slight extension, if any, of the rule of the common law relative to depositions. The extension is not of such fundamental character as to deprive the accused of due process of law.[2]

[1] Hawes *v.* Georgia, 258 U. S. 1, 4 [1922]; Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61, 81 [1911]; Adams *v.* New York, 192 U. S. 585, 588 [1904].
[2] West *v.* Louisiana, 194 U. S. 258, 263 [1904].

But the constitutional requirement of due process is not satisfied where a conviction is obtained by the presentation of testimony known to the prosecuting authorities to be perjured.[1] A State, through the action of its officers, may not contrive a conviction through the pretense of a trial which in truth is "but used as a means of depriving a

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defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."[2]

[1] Mooney v. Holohan, 294 U. S. 103, 112 [1935].
[2] Brown v. Mississippi, 297 U. S. 278, 286 [1936].

PRODUCTION OF EVIDENCE.—Due process of law is not denied by a State law requiring a corporation doing business in the State to produce before its tribunals books and papers kept by it within the State, although at the time the books may be elsewhere.[1] In fact, a foreign corporation doing business in the State may be required to produce books and papers permanently kept outside of the State. A statute requiring such production does not amount to an unreasonable search or seizure or a denial of due process of law.[2] Neither the Fourteenth Amendment nor the commerce clause affords any basis for saying that a person is immune from giving information appropriate to a legislative or judicial inquiry. A foreign corporation engaged exclusively in interstate commerce within the State is amenable to process there as are citizens and corporations engaged in local business.[3]

[1] Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 552 [1908].
[2] Hammond Packing Co. v. Arkansas, 211 U. S. 322, 348 [1909].
[3] Natural Gas Pipeline Co. v. Slattery, 302 U. S. 300 [1937].

A provision in the Kansas antitrust law compelling witnesses to testify as to violations of the act, and granting immunity from prosecution for violations testified to, or the use of the testimony against the witnesses, are not void under the Fourteenth Amendment, because immunity from Federal prosecution is not granted.[1] A State statute authorizing the answer of a defendant who refuses to produce certain witnesses to be stricken out, and judgment by default to be entered, relates to a matter of procedure and practice in procuring testimony in trials, and does not deprive a defendant of due process.[2]

[1] Jack v. Kansas 199 U. S. 372 [1905].
[2] Hammond Packing Co. v. Arkansas 211 U. S. 322, 349 [1909].

A person convicted of murder is not deprived of life or liberty without due process of law by the inability of the State to provide for the compulsory attendance of absentee witnesses and by the failure of the State to provide for the introduction of depositions in criminal cases.[1]

[1] Minder v. Georgia, 183 U. S. 559, 562 [1902]

PRESUMPTIONS.—The establishment of presumptions is clearly within the domain of State governments.[1] State legislation declaring that the proof of one fact or a group of facts shall constitute prima facie evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. If the presumption is not unreasonable and is not con-

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clusive of the rights of the person against whom raised, it does not constitute a denial of due process of law.[2]

[1] Hawkins *v.* Bleakly, 243 U. S. 210, 214 [1917].

[2] Manley *v.* Georgia, 279 U. S. 1, 5 [1929]; Western & A. R. Co. *v.* Henderson, 279 U. S. 639, 642 [1929]; James-Dickinson Farm Mortg. Co. *v.* Harry, 273 U. S. 119, 124 [1927]; Hawes *v.* Georgia, 258 U. S. 1, 4 [1922].

A State, in the exercise of its general power to prescribe rules of evidence, may provide that proof of a particular fact, or of several facts taken collectively, shall be *prima facie* evidence of another fact where there is some rational connection between the fact proved and the ultimate fact presumed.[1] The legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense.[2]

[1] Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61, 81 [1911]; Bailey *v.* Alabama, 219 U. S. 219, 238 [1911].

[2] Bandini Petroleum Co. *v.* Superior Ct., 284 U. S. 8, 18 [1931]; Mobile, J. & K. C. R. Co. *v.* Turnipseed, 219 U. S. 35, 42 [1910].

A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Mere legislative fiat may not take the place of fact in the determintaion of issues involving life, liberty, or property.[1]

[1] Manley *v.* Georgia, 279 U. S. 1, 6 [1929]; Bailey *v.* Alabama, 219 U. S. 219, 233 [1911]; Western & A. R. Co. *v.* Henderson, 279 U. S. 639, 642 [1929].

Many presumptions established by statute have been sustained by the Supreme Court. For example: A South Carolina statute that raises a presumption of negligence against the railroad in a grade-crossing accident upon proof of failure to give prescribed warning signals, is not contrary to due process if the presumption amounts merely to a temporary inference which may be rebutted by evidence and is thereafter to be excluded in determining proximate cause.[1] Likewise, a Georgia statute providing that when distillery apparatus is found upon the premises of an individual, the same shall be *prima facie* evidence of actual knowledge of the presence of the same is not so unreasonable or conclusive as to amount to a denial of due process.[2]

[1] Atlantic Coast Line R. Co. *v.* Ford, 287 U. S. 502 [1933], contrasting Mobile, J. & K. C. R. Co. *v.* Turnipseed, 219 U. S. 35 [1910], and Western & A. R. Co. *v.* Henderson, 279 U. S. 639 [1929].

[2] Hawes *v.* Georgia, 258 U. S. 1 [1922].

Similarly, the alien land law of California which specifies that the taking of title in the name of a person eligible to hold land where the consideration is furnished by one ineligible to acquire agricultural land shall raise a *prima facie* presumption that the conveyance is

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made to evade the law is not repugnant to the due process clause. It does not operate to preclude any defense. The inference drawn from payment of consideration by an ineligible person is not fanciful, arbitrary, or unreasonable. There is a rational connection between the facts and the intent authorized to be inferred from them. The statute merely creates a presumption which may be overcome by evidence sufficient to raise a reasonable doubt.[1]

[1] Cockrill v. California, 268 U. S. 258, 261 [1925].

And a Utah statute which provides that any person who drives stock over a public highway constructed along a hillside shall be liable for banks destroyed or rocks rolled upon said highway does not deprive the stockowner of property without due process of law. The statute simply creates a conclusive presumption of negligence from a particular state of facts. It is within the province of the State legislature to provide the nature and extent of the legal presumption to be deduced from given facts.[1]

[1] Jones v. Brim, 165 U. S. 180, 183 [1897].

A provision in the California Oil and Gas Conservation Act making the blowing, release, or escape of natural gas into the air *prima facie* evidence of unreasonable waste was held not to deprive a defendant of property without due process of law.[1]

[1] Bandini Petroleum Co. v. Superior Ct., 284 U. S. 8, 19 [1931].

A New York statute making a previous conviction of a felony conclusive evidence of bad character, justifying a denial to such person of a license to practice medicine, is constitutional.[1]

[1] Hawker v. New York, 170 U. S. 189 [1898].

On the other hand, the Supreme Court has indicated that certain presumptions would be so arbitrary as to be invalid. "The legislature may go a good way in raising [a presumption] or in changing the the burden of proof, but there are limits. * * * It is not within the province of a legislature to declare an individual guilty or presumptively guilty." [1] Likewise, the creation by a State law of an arbitrary and unreasonable presumption of death resulting from absence for a brief period would be repugnant to the due process clause.[2] A provision of a State banking law of Georgia making proof of insolvency *prima facie* evidence of fraud on the part of directors was deemed unreasonable and arbitrary. "Inference of crime and guilt may not reasonably be drawn from mere inability to pay demand deposits and other debts as they mature." [3]

[1] McFarland v. American Sugar Ref. Co., 241 U. S. 79, 86 [1916].
[2] Cunnius v. Reading School District, 198 U. S. 458, 476 [1905].
[3] Manley v. Georgia, 279 U. S. 1 [1929].

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BURDEN OF PROOF.—It is well settled that a State may change the burden of proof.[1] The establishment of rules respecting the burden of proof is clearly within the domain of State governments.[2] The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the State in criminal prosecutions and cast on a defendant without depriving him of liberty without due process of law. Section 9b of the California alien land law casting upon a Japanese defendant the burden of proving citizenship after proof of his race had been given by the State was not an impairment of his immunities under the Federal Constitution.[3]

[1] James-Dickinson Farm Mortgage Co. *v.* Harry, 273 U. S. 119, 124 [1927]; Minneapolis & St. L. R. Co. *v.* Minnesota ex rel. Railroad & W. Commission, 193 U. S. 53 [1904].

[2] Hawkins *v.* Bleakly, 243 U. S. 210, 214 [1917].

[3] Morrison *v.* California, 291 U. S. 82, 88 [1934].

A State statute placing on the defendant the burden of proving that he has complied with an act requiring dangerous machinery to be safeguarded does not deprive him of property without due process of law.[1] A statute making a sheriff's deed to land sold for nonpayment of taxes *prima facie* evidence of the facts stated in such deed merely changes the burden of proof and casts it on the party attacking the sale and deed. It does not deprive a person of property without due process.[2]

[1] Bowersock *v.* Smith, 243 U. S. 29, 34 [1917].

[2] Turpin *v.* Lemon, 187 U. S. 51 [1902]; Reitler *v.* Harris, 223 U. S. 437, 442 [1912].

A statute regulating fire-insurance contracts which directs that in case of total loss of the property insured the measure of damages shall be the face value of the policy less depreciation in the interim is not invalid, because it precludes the company from proving that the property was not worth the full amount of the insurance issued, or because it places on the company the burden of proving the depreciation.[1]

[1] Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 564 [1899].

But a statute placing burden of proving citizenship or eligibility to citizenship upon defendants, where the indictments under the California alien land law allege alienage and conspiracy to evade the law, is invalid as a denial of due process of law. In the case of the white lessor, the statutory presumption of a lessee's disqualification and the lessor's knowledge of it, based on lease and possession, is arbitrary; in the case of the Japanese lessee, the shifting of burden of proof is unjustifiable because the lease of agricultural land conveys no hint of criminality, and because there is no practical necessity of relieving prosecution from proving Japanese race.[1]

[1] Morrison *v.* California, 291 U. S. 82 [1934].

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Criminal Proceedings.

GENERALLY.—The law is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof.[1]

[1] Snyder v. Massachusetts, 291 U. S. 97, 122 [1934].

However, a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the Constitutional sense.[1]

[1] Frank v. Mangum, 237 U. S. 309, 326 [1915].

Due process is accorded when the accused is regularly indicted, has a trial according to the forms and modes prescribed by the State, and when, in that trial and proceedings he is deprived of no rights to which he is lawfully entitled.[1] When ample notice was given and disregarded, followed by an orderly trial and conviction before a duly constituted tribunal for a plainly defined statutory offense, resulting in a sentence not alleged to be unreasonable, the accused has been afforded due process.[2] The State has the right to determine for itself the courts in which crime may be prosecuted, and the appellate tribunals, if any, to which such causes may be carried for review.[3]

[1] Ker v. Illinois, 119 U. S. 436, 440 [1886]; Miller v. Texas, 153 U. S. 535, 539 [1894].
[2] Butler v. Perry, 240 U. S. 328, 333 [1916].
[3] Rogers v. Peck, 199 U. S. 425, 435 [1905].

In extradition cases, the courts of the State where the crime was committed will not inquire into the method by which the fugitive was returned. A person brought back by force and thus subjected to trial is not deprived of life or liberty without due process, because due process does not include the means by which the fugitive was returned to the State and thus brought within the jurisdiction of the court.[1]

[1] Mahon v. Justice, 127 U. S. 700 [1888].

ABOLITION OF THE GRAND JURY.—An indictment or presentment by a grand jury, as known to the common law of England, is not essential to due process of law even when applied to prosecutions for felonies. Substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-

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examination of the witnesses produced for the prosecution is due process of law.[1]

[1] Hurtado *v.* California, 110 U. S. 516, 520, 538 [1884].

While at common law an indictment by the grand jury was an essential preliminary to trial for felony, it is within the power of a State to abolish the grand jury entirely and proceed by information.[1] It can no longer be contended that in proceeding by information instead of indictment there is any violation of the requirement of due process of law.[2]

[1] Brown *v.* New Jersey, 175 U. S. 172, 175 [1899]; Hurtado *v.* California, 110 U. S. 516 [1884]; Maxwell *v.* Dow, 176 U. S. 581, 602 [1900].

[2] Graham *v.* West Virginia, 224 U. S. 616, 627 [1912]; Jordan *v.* Massachusetts, 225 U. S. 167, 176 [1912]; Frank *v.* Mangum, 237 U. S. 309, 340 [1915]; Lem Woon *v.* Oregon, 229 U. S. 586, 589 [1913]; Palko *v.* Connecticut, 302 U. S. 319 [1937].

Furthermore due process does not require that the information filed by the prosecuting attorney should have been preceded by the arrest or preliminary examination of the accused.[1] The prosecuting attorney may file the information pending an investigation by the coroner without thereby violating due process of law.[2]

[1] Lem Woon *v.* Oregon, 229 U. S. 586, 590 [1913].

[2] Gaines *v.* Washington, 277 U. S. 81, 86 [1928].

A State constitution which delares that felonies may be prosecuted by information after the commitment by a magistrate is self-executing, and a prosecution for a capital felony under such a procedure does not deny due process of law.[1]

[1] Davis *v.* Burke, 179 U. S. 399, 403 [1900].

Arraignments.—Want of a formal arraignment, treated by the State as depriving the accused of no substantial right and as having been waived and thereby lost, does not amount to a deprivation of liberty without due process of law. The want of a formal arraignment to a second information of the same offense does not deprive the accused of any substantial right.[1]

[1] Frank *v.* Mangum, 237 U. S. 309, 343 [1915]; Garland *v.* Washington, 232 U. S. 642, 645 [1914].

Trial by Jury.—A verdict by a jury is not an essential part in prosecution for felonies without which the accused can be said to have been condemned without due process of law. An act of a State legislature providing for the trial of felonies otherwise than by a common law jury, composed of 12 men, is not unconstitutional. One charged with crime may waive a trial by jury, and elect to be tried by a court, when there is a positive legislative enactment giving the accused such a right.[1]

[1] Hallinger *v.* Davis, 146 U. S. 314, 317 [1892]; Maxwell *v.* Dow, 176 U. S. 581 [1900]; Palko *v.* Connecticut, 302 U. S. 319 [1937].

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It is not a denial of a right protected by the Constitution of the United States to refuse a jury trial, even though it may have been clearly erroneous to construe the laws of the State as justifying the refusal.[1]

[1] Iowa C. R. Co. v. Iowa, 160 U. S. 389, 394 [1896].

If a State dispenses with a jury trial, some other procedure must be substituted to determine questions of fact—a bench, board, or commission. Merely because a State may dispense with a jury trial without violating due process, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand.[1]

[1] Brown v. Mississippi, 297 U. S. 278, 285 [1936].

Certain questions may be submitted separately to the same jury or to different juries or to boards—e. g., questions of sanity, identity, or previous convictions. If, after a regular conviction of murder and sentence of death has been imposed, a suggestion of then existing insanity is made, it is not necessary, in order to constitute due process of law, that the question so presented be tried by a jury.[1] One who has been convicted before is not denied due process of law by having the question of identity passed upon separately from the question of guilt of the second offense, in a State which imposes a heavier punishment for repeaters.[2]

[1] Nobles v. Georgia, 168 U. S. 398, 405 [1897].
[2] Graham v. West Virginia, 224 U. S. 616, 625 [1912].

The Supreme Court has sustained the States in establishing a great variety of departures from the common law procedure respecting jury trials in criminal cases. Due process is not denied by a State law which dispenses with the necessity of a jury of 12, or unanimity in the verdict.[1] Whether a trial in criminal cases not capital shall be by a jury composed of 8 instead of 12 jurors, and whether in case of an infamous crime a person shall only be liable to be tried after presentment or indictment by a grand jury, are eminently proper to be determined by the citizens of each State for themselves. So long as all persons within the State are made liable to be proceeded against by the same kind of trial and equal protection of the laws is secured to them, the Fourteenth Amendment has been observed.[2]

[1] Jordan v. Massachusetts, 225 U. S. 167, 176 [1912].
[2] Maxwell v. Dow, 176 U. S. 581, 604 [1900].

A statute providing for a trial by a struck jury, empanelled in accordance with the provisions of law, does not trespass upon any fundamental right of the defendant. "The accused cannot complain if he is tried by an impartial jury. He can demand nothing more.[1] The right to challenge is the right to reject, not to select a juror. If from those who remain an impartial jury is obtained, the constitu-

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tional right of the accused is maintained." [2] Nor is there anything in the Fourteenth Amendment to prevent a State from excluding certain classes from jury service on the *bona fide* ground that it was for the good of the community that their regular work should not be interrupted, provided that the exclusion is not the result of race or class prejudice.[3]

[1] Brown *v.* New Jersey, 175 U. S. 172, 175 [1899]; Northern Pacific Railroad *v.* Herbert, 116 U. S. 642 [1886].

[2] Brown *v.* New Jersey, 175 U. S. 172, 175 [1899]; Hayes *v.* Missouri, 120 U. S. 68, 71 [1887].

[3] Rawlins *v.* Georgia, 201 U. S. 638, 640 [1906].

Nor does a law reducing the number of peremptory challenges allowed a defendant deprive him of any fundamental right.[1] In a trial on two indictments, each charging a capital offense, the State can undoubtedly limit the number of challenges to 10 on each indictment instead of 20. A State can authorize the whole story of two closely connected murders to be brought out before a jury at once, even though two indictments were involved, without denying due process of law. The defendant cannot complain that he was deprived of the full number of challenges he would have had if he had been tried separately upon each indictment.[2] The fact that one of the jurors who tried the petitioner was an alien is not a denial of due process of law.[3]

[1] Brown *v.* New Jersey, 175 U. S. 172, 175 [1899]; Frank *v.* Mangum, 237 U. S. 309, 342 [1915].

[2] Ashe *v.* United States ex rel. Valotta, 270 U. S. 424, 425 [1926].

[3] Kohl *v.* Lehlback, 160 U. S. 293 [1895].

COUNSEL.—The State may not deny to the accused the aid of counsel.[1] "With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel." [2] The right to the aid of counsel is of such fundamental character as to be embodied in the concept of due process of law.[3]

[1] Brown *v.* Mississippi, 297 U. S. 278, 286 [1936].

[2] 1 Cooley's Const. Lim. 8th ed. 700, quoted with approval in Powell *v.* Alabama, 287 U. S. 45, 70 [1932].

[3] Powell *v.* Alabama, 287 U. S. 45, 68 [1932].

At least in capital cases where the defendant is unable to employ counsel and is incapable adequately of making his own defense because of ignorance, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law. The duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in preparation and trial of the case. Under certain circumstances (e. g., ignorance and illiteracy of defendants, their youth, public hostility, imprisonment and close surveillance by military forces, fact that friends and families are in other States, and that

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they stand in deadly peril of their lives) the necessity of counsel is so vital and imperative that the failure of a trial court to make an effective appointment of counsel is a denial of due process of law.[1]

[1] Powell *v.* Alabama, 287 U. S. 45, 71 [1932].

But when he was not prevented from consulting with counsel or securing needed witnesses, the contention that a defendant is denied due process because he was constantly in the custody of the warden of the penitentiary, inside and outside of the court room, during the trial, is frivolous.[1]

[1] Kelley *v.* Oregon, 273 U. S. 589, 591 [1927].

PRESENCE OF THE ACCUSED.—The Supreme Court has never "squarely held" [1] that the Fourteenth Amendment guarantees to a defendant in a State court the privilege to be present in his own person throughout a trial or the privilege of confronting and cross-examining his accusers face to face, privileges assured to a defendant in a Federal court by the Sixth Amendment.

[1] Snyder *v.* Massachusetts, 291 U. S. 97, 106 [1934].

Several decisions would seem to indicate that the presence of the accused may be dispensed with at various stages of the proceedings. In the case of Frank *v.* Mangum[1] the Court held that the presence of the prisoner when the verdict is rendered is not so essential a part of the hearing that a rule of practice allowing the accused to waive it and holding him bound by the waiver amounts to a deprivation of due process of law. The Court pointed out that many departures from the common law procedure respecting jury trials did not run afoul of the Fourteenth Amendment, including provisions waiving the presence of the accused during portions of the trial. In that case it appeared that the accused and his counsel were advised by the trial judge not to be present when the verdict was returned lest an acquittal would result in mob violence.

[1] 237 U. S. 309, 343 [1915].

In Howard *v.* Kentucky [1] a juror was discharged in a murder trial before he was sworn, for cause sufficient to the court. The prospective juror was questioned in the absence of the accused and his counsel, but with the latter's consent. The Kentucky courts had held that the occasional absence of an accused during a trial, from which no injury resulted to his substantial rights, was not a denial of due process. The Supreme Court decided that such a holding was not reversible error.

[1] 200 U. S. 164 [1906].

The holding in the case of Felts *v.* Murphy[1] tends to indicate, by analogy, that the right of presence, confrontation, and cross-examination face to face are not essential. The record in that case showed

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that the defendant was so deaf that he had not been able to hear any of the testimony of witnesses, that he could only hear by means of an ear trumpet, and that the evidence had not been repeated to him. The Supreme Court, while regretting that the trial court had not had the testimony read or repeated to the accused, held that a deaf person is not denied due process of law because he had not heard a word of the evidence.

[1] 201 U. S. 123 [1906].

At other times the Court has broadly intimated that the privileges of presence, confrontation, and cross-examination face to face are essential to due process. "The personal presence of the accused, from the beginning to the end of a trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defence, and cannot be dispensed with." [1]

[1] Schwab *v.* Berggren, 143 U. S. 442, 448 [1892].

The Supreme Court in Snyder *v.* Massachusetts[1] assumed in aid of the petitioner that in prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge, and further assumed that the accused has the privilege to confront one's accusers and cross-examine them face to face. The majority then held that the presence of the accused at a view might be dispensed with without infringing the due process clause, even assuming that the Fourteenth Amendment generally protected a defendant's right to be present at most stages of the trial.[1]

[1] 291 U. S. 97, 105–106 [1934].

The four justices (Roberts, Brandeis, Sutherland, and Butler) who dissented in the Snyder case asserted that the presence of the accused, even at a view, was essential to due process.[1] And Justice Harlan in Hurtado *v.* California [2] likewise thought that "due process of law" included the right to be confronted by witnesses against him.

[1] Snyder *v.* Massachusetts, 291 U. S. 97, 128 [1934].
[2] 110 U. S. 516, 548 [1884].

In Gaines *v.* Washington[1] the contention that the defendant was denied due process of law because the record did not affirmatively show his presence at all times at the trial was summarily disposed of in view of the fact that the record did contain daily entries showing "all parties and counsel present", making it unnecessary to pass on the constitutional question.

[1] 277 U. S. 81, 87 [1928].

Self Incrimination.—Exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the

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Federal Constitution.[1] The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the State.[2] In fact the Fourteenth Amendment would not prevent a State from adopting or continuing the civil-law instead of the common-law system; the privilege against self-incrimination is not allowed by the civil law.[3]

[1] Twining v. New Jersey, 211 U. S. 78 [1908]; Frank v. Mangum, 237 U. S. 309, 342 [1915]; Palko v. Connecticut, 302 U. S. 319 [1937].

[2] Snyder v. Massachusetts, 291 U. S. 97, 105 [1934].

[3] Twining v. New Jersey, 211 U. S. 78, 113 [1908]; Holden v. Hardy, 169 U. S. 366, 387, 389 [1898].

On several occasions the Supreme Court has disposed of certain cases in which counsel urged that the Fourteenth Amendment protected the accused against compulsory self-incrimination by accepting the argument *ex hypothesi*, and then finding that the law in question did not destroy said right. For example, in Hammond Packing Co. *v.* Arkansas [1] the Court reasoned: Conceding, for the sake of argument only and not so deciding, that the due process clause of the Fourteenth Amendment embraces in its generic terms a prohibition against unreasonable searches and seizures, a law requiring a corporation doing business within the State to produce books is not invalid. Similarly in Jack *v.* Kansas [2] the Court argued in this fashion: Assuming that a State statute requiring a witness to answer incriminating questions would violate the Fourteenth Amendment, and that an imprisonment by virtue of the statute would be depriving the witness of his liberty without due process of law, the Kansas antitrust law compelling witnesses to testify is not invalid where it grants immunity from prosecution in the State courts, even though such testimony might be used in a Federal prosecution for violation of Federal antitrust laws.

[1] 212 U. S. 322, 347 [1909].

[2] 199 U. S. 372, 380 et seq. [1905].

The fact that a State may consistently with the Fourteenth Amendment withdraw the privilege against self-incrimination does not mean that a State can convict a prisoner on testimony obtained by torture. While compulsion may be used to require the appearance and testimony of the accused without violating due process, compulsion by torture to extort a confession is a different matter.[1]

[1] Brown v. Mississippi, 297 U. S. 278, 285 [1936].

Convictions of murder which rest solely upon confessions shown to have been extorted by officers of the State by torture of the accused are void under the due process clause of the Fourteenth Amendment. A trial is a mere pretense where the State authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires "that State action, whether through

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one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[1]

[1] Brown *v.* Mississippi, 297 U. S. 278, 296 [1936]; Hebert *v.* Louisiana, 272 U. S. 312, 316 [1926].

PUBLIC TRIALS.—The Sixth Amendment specifies that the accused shall in the Federal courts enjoy the right to a "public trial." It has been urged that star-chamber or secret proceedings in State courts would be violative of the Fourteenth Amendment, that the right to a public trial is so fundamental as to be embraced in the phrase "due process of law." This point was raised in Gaines *v.* Washington.[1] In that case the trial court had announced at the close of the afternoon session on the ninth day of a sensational muder trial, in the month of August, that the atmosphere was "pretty unbearable", and that the general public would be excluded beginning on the morrow. The State supreme court found on examination of affidavits that the order was never carried out. Hence, the Supreme Court of the United States found it unnecessary to decide whether the Fourteenth Amendment requires a public trial in a State court to the extent that the Sixth Amendment requires such a trial in a Federal court.

[1] 277 U. S. 81, 85 [1928].

DOUBLE JEOPARDY.—The Fifth Amendment specifically provides that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. Does the Fourteenth Amendment afford the accused similar protection against State action? In several early cases, the Court reasoned as follows: "If the due process of law required by the Fourteenth Amendment embraces the guarantee that no person be put twice in jeopardy of life or limb—upon which question we need not now express an opinion—what was said in United States *v.* Perez is applicable to this case [viz, that a retrial after a hung jury does not constitute double jeopardy]."[1] "As it was * * * correctly decided that the accused was not, by the present indictment, put in jeopardy for the second time for the same offense, we need not go further [and decide whether such right is protected by the Fourteenth Amendment]."[2]

[1] Dreyer *v.* Illinois, 187 U. S. 71, 86 [1902].
[2] Shoener *v.* Pennsylvania, 207 U. S. 188, 196 [1907].

In Murphy *v.* Massachusetts,[1] the Supreme Court held that a prisoner who had served a portion of the term for which he was sentenced may be resentenced if it turns out on writ of error brought by the prisoner that the original sentence was unlawful. Since the second sentence did not put the prisoner in double jeopardy, it was unnecessary to examine the contention of counsel for defendant (which included Mr. Louis D. Brandeis) that such double jeopardy abridged his privileges and immunities, and denied him of his liberty

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without due process of law. Again in Keerl *v.* Montana [2] the Court found that it was not necessary to decide whether the due process provision of the Fourteenth Amendment in itself forbids a State from putting one of its citizens in second jeopardy, inasmuch as a retrial after the first jury has been discharged when a disagreement seemed probable does not constitute double jeopardy.

[1] 177 U. S. 155 [1900].
[2] 213 U. S. 135 [1909].

In Ex parte Ulrich [1] a lower Federal court held that the principle of the common law that no person shall be subject for the same offense to be twice put in jeopardy, recognized by the Fifth Amendment as a restriction upon the Federal Government, is also within the scope of the due process clause of the Fourteenth Amendment as an inhibition on the States.[1]

[1] 42 Fed. 587 [1890].

In Palko *v.* Connecticut, the Supreme Court decided that a Connecticut statute which allowed the State to appeal where errors of law were committed by the trial judge, and then to retry the accused, did not deprive the defendant of due process of law. "What the answer would have to be if the State were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider." [1]

[1] Palko *v.* Connecticut, 302 U. S. 319 [1937].

Excessive Bail, Cruel and Unusual Punishment.—While the Eighth Amendment respecting excessive bail, excessive fines, cruel and unusual punishment is not a limitation on the power of the States, some of these rights are deemed so fundamental as to be included in the concept of due process of law embodied in the Fourteenth Amendment. But notwithstanding the limitations of the due process clause, a State still possesses wide discretion in prescribing penalties for violation of its laws. To establish appropriate penalties for the commission of crime, and to confer upon judicial tribunals a discretion respecting the punishment to be inflicted in particular cases, within limits fixed by the law-making power, are functions peculiarly belonging to the several States.[1] Only where the penalty is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable can it be said to violate due process.[2]

[1] Collins *v.* Johnston, 237 U. S. 502, 510 [1915].
[2] St. Louis, I. M. & S. R. Co. *v.* Williams, 251 U. S. 63, 66 [1919]; Coffey *v.* Harlan County, 204 U. S. 659, 662 [1907]; Seaboard Air Line R. Co. *v.* Seegers, 207 U. S. 73, 78 [1907]; Waters-Pierce Oil Co. *v.* Texas, 212 U. S. 86, 111 [1909]; Collins *v.* Johnston, 237 U. S. 502, 510 [1915].

In Waters-Pierce Oil Co. *v.* Texas,[1] the Court used the following language: "The fixing of punishment for crime or penalties for

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unlawful acts against its laws is within the police power of the State. We can only interfere with such legislation and judicial action of the States enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law." The Supreme Court in that case refused to hold that a $1,600,000 fine levied against a corporation for violating State antitrust laws was so excessive as to amount to a deprivation of property without due process of law, where the corporation had $40,000,000 in assets, had paid dividends amounting to several hundred percent, and had profited by violating the law.[1] The Court has also said that a sentence of 14 years for perjury, the maximum allowed by a State statute, does not deprive a defendant of liberty without due process.[2]

[1] 212 U. S. 86, 111 [1909].
[2] Collins *v.* Johnston, 237 U. S. 502, 510 [1915].

A statute which prescribes a heavier penalty for second offenders does not violate any provision of the Federal Constitution.[1] An indeterminate sentence and parole act does not deprive a person of liberty without due process of law, because of a provision that no prisoner who has been twice previously convicted of a felony shall be eligible for parole.[2]

[1] Graham *v.* West Virginia, 224 U. S. 616, 623 [1912].
[2] Ughbanks *v.* Armstrong, 208 U. S. 481, 498 [1908].

The committal to prison of a person convicted of crime, without giving him an opportunity pending an appeal to furnish bail or without staying execution of the sentence of imprisonment does not violate the due process clause of the Fourteenth Amendment.[1]

[1] McKane *v.* Durston, 153 U. S. 684 [1894].

The infliction of the death penalty by electrocution is not such a cruel and unusual punishment as to deprive a citizen of life without due process of law.[1]

[1] Ex parte Kemmler, 136 U. S. 436 [1890].

INSTRUCTIONS.—Where the trial judge charged the jury that the guilt of the accused must be shown beyond a reasonable doubt, and that on a failure in this respect it was their duty to acquit, a refusal of the judge to instruct the jury on the presumption of innocence does not deprive the accused of liberty without due process of law.[1] Generally an error in a charge to a jury in a criminal case is not reviewable in a Federal court.[2]

[1] Howard *v.* Fleming, 191 U. S. 126, 136 [1903].
[2] Davis *v.* Texas, 139 U. S. 651 [1891].

SENTENCE AND PUNISHMENT.—The common-law rule that, in capital cases, an inquiry must be made of defendant, before judgment

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was passed, whether he had anything to say why sentence of death should not be pronounced upon him, certainly does not apply to an appellate court which upon review affirms the judgment of the trial court without rendering a new judgment.[1]

[1] Schwab *v.* Berggren, 143 U. S. 442, 446 [1892]. *See also* Fielden *v.* Illinois, 143 U. S. 452, 457 [1892].

A statute providing that a death sentence shall be carried out at a time to be fixed by the governor does not deprive one convicted of a capital offense of life without due process of law. The power conferred on the governor to fix the time of infliction is no more arbitrary in its nature than the same power would be if conferred upon the court.[1] The question whether a prisoner shall be executed by the warden of the penitentiary (as the law then provided), or by the sheriff (as the law provided at time of his trial or conviction) involves no question of due process of law under the Fourteenth Amendment.[2]

[1] Holden *v.* Minnesota, 137 U. S. 483, 495 [1890].
[2] Davis *v.* Burke, 179 U. S. 399, 404 [1900].

Upon conviction of a capital felony, when the time appointed for execution has passed pending an appeal to the State supreme court, the subsequent appointment by the State court and issue of a death warrant in accordance with State laws involves no violation of the Constitution.[1] Whether, after a reprieve, the State supreme court or the governor should fix a new day for execution, is purely a question of State practice, not controlled by the Federal Constitution.[2]

[1] Graemer *v.* Washington, 168 U. S. 124, 130 [1897].
[2] Rogers *v.* Peck, 199 U. S. 425 [1905].

A prisoner may be tried, convicted, and sentenced for another crime committed either prior to or during his imprisonment, and may suffer capital punishment and be executed during the term. A prisoner has no vested right to serve out an unexpired sentence. It is not a denial of due process to impose the death penalty on a person already serving a sentence in a penitentiary.[1]

[1] Kelley *v.* Oregon, 273 U. S. 589, 593 [1927].

Appeals.

GENERALLY.—Appeals, rehearings, or new trials are not essential to due process of law, either in judicial or administrative proceedings.[1] The power to render a final judgment must be lodged somewhere, and in every case a point is reached where litigation must cease. What that point is can be determined by the legislative power of the State, for right of appeal is not essential to due process of law.[2] There is no provision in the Federal Constitution which forbids a State from granting to a tribunal, whether called a court or a board of

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registration, the final determination of a legal question (e. g., qualifications of applicants to practice medicine).[3]

[1] James v. Appel, 192 U. S. 129, 137 [1904]; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421 [1894]; Reetz v. Michigan, 188 U. S. 505, 508 [1903]; Andrews v. Swartz, 156 U. S. 272, 275 [1895]; Twining v. New Jersey, 211 U. S. 78 [1908].

[2] Standard Oil Co. v. Missouri ex rel. Hadley, 224 U. S. 270, 286 [1912].

[3] Reetz v. Michigan, 188 U. S. 505, 507 [1903].

No right to litigate the same question twice is guaranteed by the due process clause of the Fourteenth Amendment.[1] If a single hearing is not due process, doubling it will not make it so.[2] The right of review in an appellate court is purely a matter of State concern; a denial of the right of appeal altogether would constitute no violation of the Federal Constitution.[3]

[1] Baldwin v. Iowa State Traveling Men's Assoc., 283 U. S. 522, 524 [1931].

[2] Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 427 [1894].

[3] Kohl v. Lehlback, 160 U. S. 293, 299 [1895].

The right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance.[1] But if the original proceeding deprived a person of fundamental rights, a right of appeal becomes essential. The State may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process.[2] While the Fourteenth Amendment does not require that a State provide for an appellate review in criminal cases,[3] nevertheless where an appeal is provided for, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which a defendant is held in custody by the State, and is to be considered in determining any question of alleged deprivation of his life or liberty contrary to the Fourteenth Amendment.[4] The prohibition against depriving a person of life, liberty, or property is addressed to the State; if it be violated, it makes no difference in a Federal court by what agency of the State this is done; but, if a violation be threatened by one agency of the State, and prevented by another agency or higher authority, there is no violation by the State of due process.[5]

[1] Ohio ex rel. Bryant v. Akron Metropolitan Park Dis., 281 U. S. 74 [1930].

[2] Brown v. Mississippi, 297 U. S. 278, 286 [1936]; Moore v. Dempsey, 261 U. S. 86, 91 [1923].

[3] McKane v. Durston, 153 U. S. 684, 687 [1894]; Andrews v. Swartz, 156 U. S. 272, 275 [1895]; Rogers v. Peck, 199 U. S. 425, 435 [1905]; Reetz v. Michigan, 188 U. S. 505, 508 [1903].

[4] Frank v. Mangum, 237 U. S. 309, 327 [1915].

[5] Frank v. Mangum, 237 U. S. 309, 328 [1915]

Restricting Right of Review.—Since a review by an appellate court of the final judgment in a criminal case, however grave the

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offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law, it is wholly within the discretion of the State to allow or not to allow such review. It is clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper.[1]

[1] McKane v. Durston, 153 U. S. 684, 687 [1894]; Murphy v. Massachusetts, 177 U. S. 155, 158 [1900].

An appeal from a judgment of conviction is not a matter of absolute right, independently of State constitutional or statutory provisions allowing such an appeal.[1] Hence a statute which declares that writs of error in criminal cases punishable with death shall be considered writs of grace and not writs of right does not violate the Federal Constitution.[2]

[1] McKane v. Durston, 153 U. S. 684, 687 [1894].
[2] Andrews v. Swartz, 156 U. S. 272, 275 [1895].

A property owner is not deprived of due process if, pending the proceeding to determine the amount of damage done by an elevated viaduct to adjoining property, his general right of review by a court is limited by an amendatory law making the award final as to amount but leaving it reviewable for lack of jurisdiction, fraud or wilful misconduct of appraisers.[1]

[1] Crane v. Hahlo, 258 U. S. 142 [1922].

The dismissal of a writ of error because on the day assigned for its hearing it appeared from affidavits that the accused had escaped from jail and was at that time a fugitive from justice is not a denial of due process, the court having entered an order that the writ be dismissed unless the accused surrender himself within 60 days or be recaptured.[1]

[1] Allen v. Georgia, 166 U. S. 138 [1897].

Granting Right of Review.—A statute which gives an appeal from a judgment which would otherwise be final does not violate the Constitution.[1] One who has obtained a judgment at law is not deprived of property without due process of law because a court of chancery enjoins its enforcement. A bill in chancery is one of the recognized processes of law for reexamining a judgment and enjoining its execution.[2] Hence, a bill in equity to enjoin the execution of a judgment obtained for a tort committed during the Civil War, and a decree granting such relief do not deprive the judgment creditor of property without due process of law, when subsequent to the rendition of the judgment the State constitution established the rule of law that in such cases the defense that a party was acting in accordance with belligerent rights was a sufficient defense.[2]

[1] Essex Public Road Bd. v. Skinkle, 140 U. S. 334, 343 [1891].
[2] Freeland v. Williams, 131 U. S. 405, 418 [1889].

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A statute allowing a State to appeal for errors of law committed by the trial judge in criminal cases does not deprive the accused of life or liberty without due process of law.[1]

[1] Palko v. Connecticut, 302 U. S. 319 [1937].

FEDERAL REVIEW OF STATE PROCEDURE.

Generally.

It was never intended that the Supreme Court should, as a result of the Fourteenth Amendment, be transformed into a court of appeal, where all decisions of State courts involving merely questions of general justice and equitable considerations in the taking of property should be submitted to that court for its determination.[1] The decision of a State court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. Otherwise every judgment of a State court respecting ownership of property could be brought to the Supreme Court for review.[2]

[1] Fallbrook Irrig. District v. Bradley, 164 U. S. 112, 157 [1896].
[2] Tracy v. Ginsberg, 205 U. S. 170, 178 [1907].

Questions arising over the interpretation of State laws do not give rise to a Federal question, provided that the law as interpreted does not violate due process. Whether the court of last resort of a State has properly construed its own constitution and laws in determining that a summary process under those laws was applicable to the matter which it adjudges is purely the decision of a question of State law, binding upon the Supreme Court.[1] The Fourteenth Amendment does not impair the authority of the States to determine finally according to their settled usages and established modes of procedure, questions, which do not involve any right secured by the constitution, an act of Congress, or a treaty.[2]

[1] Iowa C. R. Co. v. Iowa, 160 U. S. 389, 393 [1896].
[2] Tracy v. Ginsberg, 205 U. S. 170 [1907].

If the essential requisites of full notice and an opportunity to defend were present, the Supreme Court will accept the interpretation given by the State court as to the regularity under the State statute of the practice pursued in the particular case.[1] If the State courts have acted in consonance with the constitutional laws of a State and its own procedure, it could only be in exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. The Supreme Court might have

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pursued a different course in the case, but that is not the test. The defendant must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of a citizen, to justify an interference.[2]

[1] Simon v. Craft, 182 U. S. 427, 437 [1901].
[2] Allen v. Georgia, 166 U. S. 138, 140 [1897].

Mere irregularities in the procedure not affecting substantial rights [1] are matters solely for the consideration of the judicial tribunal within the State empowered by the laws of the State to review and correct errors committed by its courts. Such errors affect merely matters of State law and practice, in no way depending upon the Constitution of the United States.[2] A decision upon a matter of practice under the State procedure does not draw in question any right under the due process clause.[3] For example, an appellate court of a State may, without violating the Fourteenth Amendment, correct its interlocutory decision upon a first appeal when the same case with the same parties again comes before it; and whether this may be done in a particular case is a local question upon which the decision of the highest court of the State is controlling.[4] Likewise, the Supreme Court accepts as conclusive the ruling of a State supreme court that the jury which passed on the lunacy proceeding was a lawful jury.[5]

[1] Cross v. North Carolina, 132 U. S. 131 [1889].
[2] Iowa C. R. Co. v. Iowa, 160 U. S. 389 [1896].
[3] Thorington v. Montgomery, 147 U. S. 490, 492 [1893].
[4] Moss v. Ramey, 239 U. S. 538 [1916].
[5] Simon v. Craft, 182 U. S. 427 [1901].

No question of repugnancy to the Federal Constitution can be fairly said to arise when the inquiry of the State courts is directed to the sufficiency of an indictment in the ordinary administration of criminal law, and the statutes authorizing the form of indictment pursued are not obviously violative of the fundamental constitutional principles.[1] Whether an indictment sufficiently charged the crime of murder in the first degree was for the State court to determine.[2]

[1] Caldwell v. Texas, 137 U. S. 691, 692, 698 [1891].
[2] Bergemann v. Backer, 157 U. S. 655, 656 [1895].

But if the State proceedings are wanting in those essentials of procedural due process—a tribunal with jurisdiction affording to the parties an opportunity to be heard after due notice—then the Supreme Court has jurisdiction to review and reverse the proceedings of the State tribunal (assuming that the Constitutional question has been properly reserved). Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of judgments wanting

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in due process may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of the parties over which the court has no jurisdiction do not constitute due process of law.[1]

[1] Pennoyer *v.* Neff, 95 U. S. 714, 733 [1878].

Because of the complete control which a State possesses over appellate proceedings in its courts, particular provisions concerning or mere irregularities in appellate procedure are not generally reviewable by the Supreme Court of the United States.* For instance, a failure of a State to maintain a county appellate court as required by the State constitution cannot be said to deprive the accused of liberty in violation of the Federal Constitution.[1]

[1] Rogers *v.* Peck, 199 U. S. 425, 435 [1905].

Likewise, a failure of the State supreme court to transfer a cause from a division of that court which had heard it to the court *in banc* may violate the State constitution, but it does not violate the Fourteenth Amendment or present a Federal question.[1]

[1] Goldsmith *v.* Prendergast Construction Co., 252 U. S. 12, 18 [1920]

Similarly, when a defendant's conviction was affirmed by an equally divided State court of six judges, three of whom did not hear oral arguments and one of whom (voting for affirmance) was appointed subsequent to such arguments, the affirmance is not in violation of due process of law (the accused failing to avail himself of an opportunity to reargue the case). The right of appeal is not essential to due process. It is competent for the State to prescribe the procedure and conditions for allowing appeals.[1]

[1] Lott *v.* Pittman, 243 U. S. 588, 591 [1917].

The machinery for review of the judgments of courts of first instance is wholly within the control of the State legislature, and when the review by four judges is given, and an opinion is rendered by three of them, constituting the quorum, the mere fact that the fourth did not hear the oral argument but wrote the opinion on the printed arguments is at most an irregularity which does not in the slightest degree affect the validity of the judgment.[1] The provision of the Ohio constitution preventing its supreme court from invalidating State laws "without a concurrence of at least all but one of the judges" of said court does not violate the Fourteenth Amendment.[2]

[1] Wagner Electric Mfg. Co. *v.* Lyndon, 262 U. S. 226, 232 [1923].
[2] Ohio ex rel. Bryant *v.* Akron Metropolitan Park Dist., 281 U. S. 74, 79 [1930].

*See p. 943.

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Errors in State Decisions.

When a State legislature enacts laws for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish the parties the necessary constitutional protection to life, liberty, and property, it has performed its duty.[1] If the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a State court, acting within its jurisdiction, does not deprive the unsuccessful party of his property without due process of law.[2] Errors or irregularities in the suit do not take from it or its decree the attribute of due process.[3] The Constitution does not guarantee that the decisions of State courts shall be free of error.[4]

[1] Arrowsmith *v.* Harmoning, 118 U. S. 194 [1886].

[2] Central Land Co. *v.* Laidley, 159 U. S. 103, 112 [1895]; Bonner *v.* Gorman, 213 U. S. 86, 91 [1909]; American R. Exp. *v.* Kentucky, 273 U. S. 269, 273 [1927]; Ex parte Converse, 137 U. S. 624, 631 [1891]; Howard *v.* Kentucky, 200 U. S. 164, 173 [1906]; Delmar Jockey Club *v.* Missouri, 210 U. S. 324, 335 [1908]; Walker *v.* Sauvinet, 92 U. S. 90 [1876]; Head *v.* Amoskeag Mfg. Co., 113 U. S. 9, 26 [1885]; Morley *v.* Lake Shore & M. S. R. Co., 146 U. S. 162, 171 [1892]; Bergemann *v.* Backer, 157 U. S. 655 [1895]; Seattle, R. & S. R. Co. *v.* Washington ex rel. Linhoff, 231 U. S. 568 [1914].

[3] Ballard *v.* Hunter, 204 U. S. 241, 258 [1907].

[4] Worcester County Trust Co. *v.* Riley, 302 U. S. 292 [1937], citing Central Land Co. *v.* Laidley, 159 U. S. 103 [1895]; Tracy *v.* Ginsberg, 205 U. S. 170 [1907].

Whenever a wrong judgment is entered against a defendant his property is taken when it should not have been, but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights. An erroneous decision, per se, is not such a denial.[1]

[1] Chicago L. Ins. Co. *v.* Cherry, 244 U. S. 25, 30 [1917].

The due process clause does not give jurisdiction to the Supreme Court to review mere errors of law alleged to have been committed by a State court in performance of its duties within the scope of its authority concerning matters non-Federal in character.[1] A mere mistake as to the law of another State, being a question of fact, is not a denial of due process of law.[2] If a State court errs in deciding what the common law is, yet if no fundamental right is denied to an accused, and no specific provision of the constitution is violated, he is not denied due process of law.[3] It is not for the Supreme Court to determine whether there has been an erroneous construction of a State statute or the common law, if the defendant has been given that character of notice and opportunity to be heard which is essential to due process of law.[4] In general the decision of a State court upon a question of local law, however wrong, is not an infraction of the Fourteenth Amendment merely because it is wrong.[5] The failure of

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a trial judge to give further instructions which were not requested is not a denial of due process, reviewable in a Federal court.[6]

[1] McDonald v. Oregon R. & Nav. Co., 233 U. S. 665, 670 [1914].
[2] Chicago L. Ins. Co. v. Cherry, 244 U. S. 25, 30 [1917].
[3] West v. Louisiana, 194 U. S. 258 [1904].
[4] Standard Oil Co. v. Missouri, ex rel. Hadley 224 U. S. 270, 287 [1912].
[5] Patterson v. Colorado ex rel. Attorney General, 205 U. S. 454, 461 [1907].
[6] Backus (A) Jr. & Sons v. Fort Street Union Depot Co., 169 U. S. 557 [1898].

An error of judgment on the part of a liquidating agency of a closed bank in the compromise of liabilities is not a taking of property in violation of the Constitution.[1]

[1] Doty v. Love, 295 U. S. 64, 74 [1935].

Changes in State Decisions.

In general the decision of a State court upon a question of local law, however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because earlier decisions are reversed.[1] A departure by a State decision from a rule of property established by earlier State decisions does not deprive a person of property without due process.[2] The mere fact that a State supreme court decides against a party's claim of property or contract right by reversing its earlier decision of the law applicable to such cases, does not deprive him of his property without due process of law.[3]

[1] Patterson v. Colorado ex rel. Attorney General, 205 U. S. 454, 461 [1907].
[2] O'Neil v. Northern Colorado Irrig. Co., 242 U. S. 20, 26 [1916].
[3] Tidal Oil Co. v. Flanagan, 263 U. S. 444 [1924].

A court may, in overruling an earlier decision, make its new rule prospective in operation, and continue to apply the former rule as to past transactions, or it may make such rule retroactive in operation, in either case without depriving a person of property in violation of the Constitution.[1]

[1] Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U. S. 358 [1932].

The Constitution of the United States offers no impediment to a change of judicial construction of antecedent legislation, where the good faith of the court's declaration is not successfully impeached.[1]

[1] Stockholders v. Sterling, 300 U. S. 175, 182 [1937].

Equal Protection of the Laws.

In General.

RELATION TO DUE PROCESS CLAUSE.

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of

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law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no difference or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. * * * Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." [1]

[1] Barbier v. Connolly, 113 U. S. 27, 31–32 [1885].

"This brings us to consider the effect in this case of that provision of the Fourteenth Amendment which forbids any State to deny to any person the equal protection of the laws. The clause is associated in the amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The due process clause * * * tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty, and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general,

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fundamental principle of equality of application of the law. * * * But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty. The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process." [1]

[1] Truax *v.* Corrigan, 257 U. S. 312, 331–333 [1921].

LIMITATION ON STATE AGENCIES.

The inhibition contained in the Fourteenth Amendment has exclusive reference to State action and means 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.[1]

[1] Ex parte Virginia, 100 U. S. 339 [1880]. *See also* Iowa-Des Moines Nat. Bank *v.* Bennett, 284 U. S. 239 [1931].

CORPORATIONS.

That corporations are persons within the meaning of the equal protection clause is settled.[1]

[1] Smyth *v.* Ames, 169 U. S. 466, 522 [1898]. *See also* Santa Clara County *v.* Southern P. R. Co., 118 U. S. 394, 396 [1886]; Pembina Consol. Silver Min. & Mill. Co. *v.* Pennsylvania, 125 U. S. 181 [1888]; Charlotte, C. & A. R. Co. *v.* Gibbes, 142 U. S. 386, 391 [1892]; Covington & L. Turnp. Road Co. *v.* Sandford, 164 U. S. 578 [1896]; Gulf, C. & S. F. R. Co. *v.* Ellis, 165 U. S. 150, 154 [1897]; Crescent Cotton Oil Co. *v.* Mississippi, 257 U. S. 129 [1921]; Kentucky Finance Corp. *v.* Paramount Auto Exch. Corp., 262 U. S. 544, 550 [1923]; Power Mfg. Co. *v.* Saunders, 274 U. S. 490, 496–497 [1927]; Frost *v.* Railroad Commission, 271 U. S. 583; 599 [1926]; Liggett (Lewis K.) Co. *v.* Baldridge, 278 U. S. 105 [1928].

MUNICIPALITIES.

The States have very broad powers over municipalities and may exercise them in many ways giving rise to inequalities between municipalities without violating the equal protection clause.[1] This clause cannot be invoked by a city against its State.[2] The legislature is not precluded from putting a burden upon one municipality because it may result in an incidental benefit to another.[3]

[1] Stewart *v.* Kansas City, 239 U. S. 14 [1915].

[2] Newark *v.* New Jersey, 262 U. S. 192 [1923]. *See also* Trenton *v.* New Jersey, 262 U. S. 182 [1923].

[3] Joslin Mfg. Co. *v.* Providence, 262 U. S. 668, 674 [1923].

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There is no discrimination in requiring individuals to remove timber refuse from vicinity of municipal watersheds while not requiring like service by municipalities to individuals.[1]

[1] Perley *v.* North Carolina, 249 U. S. 510 [1919].

CLASSIFICATION.

The equal protection clause does undoubtedly prohibit discriminating and partial legislation by any State in favor of particular persons as against others in like condition. Equality of protection implies not merely equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind. But the clause does not limit, nor was it designed to limit, the subjects upon which the police power of the State may be exerted.[1]

[1] Minneapolis & St. L. R. Co. *v.* Beckwith, 129 U. S. 26, 28–29 [1889].

The equal protection clause requires laws of like application to all similarly situated, but the legislature is allowed wide discretion in the selection of classes.[1] While a State legislature may not arbitrarily select certain individuals for the operation of its statutes, the selection in order to be obnoxious to the equal protection clause of the Fourteenth Amendment must be clearly and actually arbitrary and unreasonable and not merely possibly so.[2] The inequality prohibited by the Fourteenth Amendment is only such as is actually and palpably unreasonable and arbitrary.[3] But the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary.[4] Incidental individual inequality resulting in some instances does not deny the equality guaranteed by the amendment.[5]

[1] Barrett *v.* Indiana, 229 U. S. 26 [1913].
[2] Bachtel *v.* Wilson, 204 U. S. 36 [1907].
[3] Frost *v.* Corporation Commission, 278 U. S. 515, 522 [1929].
[4] Smith *v.* Cahoon, 283 U. S. 553, 566–567 [1931].
[5] Phelps *v.* Board of Education, 300 U. S. 319 [1937].

The legislature may estimate the degrees of evil and adjust its legislation according to the existing exigency; and, without offending the equal protection clause, may prohibit the sale of particular articles if it does not exceed the bounds of reasonable classification.[1] "This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms. * * * Their relative need in the presence

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of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment." [2]

[1] Price v. Illinois, 238 U. S. 446 [1915].

[2] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 400 [1937], citing Carroll v. Greenwich Ins. Co., 199 U. S. 401, 411 [1905]; Patsone v. Pennsylvania, 232 U. S. 138, 144 [1914]; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 227 [1914]; Sproles v. Binford, 286 U. S. 374, 396 [1932]; Semler v. Oregon State Dental Examiners, 294 U. S. 608, 610, 611 [1935].

The power of classification which may be exerted in the legislation of States has a very broad range; and a classification is not invalid under the equal protection provision because of simple inequality.[1] Classification will not render a State police statute unconstitutional as denying equal protection of the laws so long as there is a reasonable basis for such a classification; nor will exceptions of specified classes render the law unconstitutional unless there is no fair reason for the law that would not equally require its extension to the excepted class.[2] Classification for purposes of legislation is not invalid because not depending on scientific or marked differences in things or persons or in their relations; it suffices if it is practical, and is not reviewable unless palpably arbitrary.[3] Police legislation cannot be judged by abstract or theoretical comparisons, but it must be presumed to have been induced by actual experience. One who is discriminated against cannot attack a police statute because it does not go further; and if what it enjoins of one it enjoins of all others in the same class, that person cannot complain on account of matters of which neither he nor any of his class are enjoined.[4] A classification as to time that is not arbitrary is not repugnant to the Constitution. The Fourteenth Amendment does not forbid statutory changes to have a beginning and thus discriminate between rights of an earlier and later time.[5]

[1] International Harvester Co. v. Missouri ex rel. Atty. Gen., 234 U. S. 199 [1914].

[2] Watson v. Maryland, 218 U. S. 173 [1910].

[3] Orient Ins. Co. v. Daggs, 172 U. S. 557 [1899].

[4] Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680 [1913].

[5] Williams v. Walsh, 222 U. S. 415 [1912].

There is a strong presumption that discriminations in State legislation are based on adequate grounds, and the mere fact that a law regulating certain classes might properly have included others does not comdemn it under the equal protection clause.[1] The rule that every presumption is in favor of the validity of legislation applies to a city ordinance and it will not be held to be unconstitutional within the meaning of the Fourteenth Amendment, as denying the equal protection of the laws, where the party attacking it as imposing unequal rates upon it does not clearly show an improper classification.[2]

[1] Middleton v. Texas Power & Light Co., 249 U. S. 152 [1919].

[2] Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265 [1908].

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Women may be put in a special class under the States' protective power.[1]

[1] West Coast Hotel Co. *v.* Parrish, 300 U. S. 397, 400 [1937]. *See also* Miller *v.* Wilson, 236 U. S. 373, 384 [1915]; Bosley *v.* McLaughlin, 236 U. S. 385, 394, 395 [1915]; Radice *v.* New York, 264 U. S. 292, 295–298 [1924].

LEGISLATION LIMITED TO CERTAIN CITIES, ETC.

"The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the State."[1] Similarly, the fact that a particular business is not prohibited in all sections of a municipality, does not for that reason, make the ordinance unconstitutional.[2] A discrimination between agricultural lands and other lands in respect to the right of a city to annex them is not a denial of equal protection.[3]

[1] Ft. Smith Light & Traction Co. *v.* Board of Improvement, 274 U. S. 287, 391 [1927], citing Bowman (Missouri) *v.* Lewis, 101 U. S. 22, 31 [1880]; Hayes *v.* Missouri, 120 U. S. 68 [1887]; Missouri P. R. Co. *v.* Mackey, 127 U. S. 205, 209 [1888]; Williams *v.* Eggleston, 170 U. S. 304 [1898]. Mason *v.* Missouri ex rel. McCaffery, 179 U. S. 328 [1900]; Mallett *v.* North Carolina, 181 U. S. 589 [1901]. *See also* Munn *v.* Illinois, 94 U. S. 113, 135 [1877]; Budd *v.* New York, 143 U. S. 517 [1892]; Brass *v.* North Dakota ex rel. Stoeser, 153 U. S. 391, 405 [1894]; Chicago *v.* Sturges, 222 U. S. 313 [1911]; Brown Holding Co. *v.* Feldman, 256 U. S. 170 [1921]; Packard *v.* Banton, 264 U. S. 140 [1924].

[2] Hadacheck *v.* Sebastian, 239 U. S. 394 [1915].

[3] Clark *v.* Kansas City, 176 U. S. 114 [1900].

DISCRETION TO GRANT OR WITHHOLD PERMIT.

A municipal ordinance which vests in the supervisors the right to grant or withhold their assent to the use of wooden buildings as laundries, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places but as to persons is a denial of equal protection when it is made to appear that the petitioners have complied with every requisite deemed by law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire or as a precaution against injury to the public health, and no reason appears why they should not be permitted to carry on their occupation.[1]

[1] Yick Wo *v.* Hopkins, 118 U. S. 356 [1886].

Reservation of authority in a city council to make exceptions, in case of exceptional hardship, from a regulation confining the construction of buildings to a building line set back from the street, does not violate the equal protection clause.[1]

[1] Gorieb *v.* Fox, 274 U. S. 603 [1927].

It is within the power of a municipality when authorized by law, to make a general police regulation subject to exceptions, and to

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delegate the discretion of granting the exceptions to a municipal board or officer, and the fact that some may be favored and some not, does not, if the ordinance is otherwise constitutional, deny those who are not favored the equal protection of the laws.[1] An ordinance requiring the written permission of the mayor or president of the city council before any person shall move a building on the streets is not denial of equal protection.[2]

[1] Fischer v. St. Louis, 194 U. S. 361 [1904].
[2] Wilson v Eureka City, 173 U. S. 32 [1899].

EMINENT DOMAIN.

A statute authorizing the condemnation of lands and water sites to manufacture, supply, and sell to the public, power produced by water as a motive force, does not deny the equal protection of the laws because of the exception of certain lands and sites.[1]

[1] Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U. S. 30 [1916].

A statute providing for the taking of land for public use does not deny the equal protection of the laws by granting the owner of any business on the land established prior to the passage of the act the right to recover for injury thereto, while withholding such compensation from those whose businesses have been established since; and by limiting the privilege of recovering the cost of moving machinery to a new location within defined geographical limits, and not extending it to locations not within those limits.[1]

[1] Joslin Mfg. Co. v. Providence, 262 U. S. 668 [1923].

PUNISHMENT FOR CRIME.

Comparative gravity of criminal offenses is a matter for the State itself to determine, and the fact that some offenses are punished with less severity than others does not deny equal protection of the laws.[1] Thus, sentences imposed on a conviction for a common law offense more severe than ever before inflicted in the State for a like offense, and giving two of the codefendants larger terms than a third, is not a denial of equal protection.[2]

[1] Collins v. Johnston, 237 U. S. 502 [1915]; Pennsylvania ex rel. Sullivan v. Ash, 302 U. S. 51 [1937].
[2] Howard v. Fleming, 191 U. S. 126 [1903].

A habitual criminal statute imposing a penalty of 25 years' imprisonment for a felony committed by anyone who has been twice imprisoned (within or without the State) for periods of at least 3 years each does not deny equal protection of the law.[1] Such a statute may

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be applied to a subsequent offense by one convicted of a crime against the United States for which he had been pardoned.[2]

[1] McDonald *v.* Massachusetts, 180 U. S. 311 [1901]. *See also* Moore *v.* Missouri, 159 U. S. 673 [1895]; Graham *v.* West Virginia, 224 U. S. 616 [1912].

[2] Carlesi *v.* New York, 233 U. S. 51 [1914].

A State law doubling the sentence on prisoners attempting to escape from prison does not deny equal protection merely because several prisoners who attempted to escape together will each receive a different sentence depending on his original sentence.[1]

[1] Pennsylvania ex rel. Sullivan *v.* Ash, 302 U. S. 51 [1937].

A statute inflicting the death penalty for assaults with intent to kill committed by life term convicts in the State prison is not unconstitutional because its provisions are not applicable to convicts serving lesser terms.[1]

[1] Finley *v.* California, 222 U. S. 28 [1911].

While there is no rule permitting a person to disobey a statute with impunity at least once for the purpose of testing its validity, where such validity can only be determined by judicial investigation and construction, a provision in the statute, which imposes such severe penalties for disobedience of its provisions as to intimidate the parties affected thereby from resorting to the courts to test its validity, practically prohibits those parties from seeking such judicial construction and denies them the equal protection of the law.[1]

[1] Ex parte Young, 209 U. S. 123 [1908].

Aliens, Nonresidents, and Foreign Corporations.

ALIENS.*

Although the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens,[1] it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification.[2]

[1] Yick Wo *v.* Hopkins, 118 U. S. 356 [1886]; Truax *v.* Raich, 239 U. S. 33 [1915].

[2] Ohio ex rel. Clarke *v.* Deckebach, 274 U. S. 392 [1927].

Thus legislation has been upheld under which aliens were forbidden to take game or possess shotguns, etc.,[1] to conduct pool rooms,[2] or to own real estate if nonresidents [3] or if ineligible to citizenship.[4]

[1] Patsone *v.* Pennsylvania, 232 U. S. 138 [1914].

[2] Ohio ex rel. Clarke *v.* Deckebach, 274 U. S. 392 [1927].

[3] Toop *v.* Ulysses Land Co., 237 U. S. 580 [1915].

[4] Terrace *v.* Thompson, 263 U. S. 197 [1923]; Porterfield *v.* Webb, 263 U. S. 225 [1923]; Webb *v.* O'Brien, 263 U. S. 313 [1923]; Frick *v.* Webb. 263 U. S. 326 [1923].

* *See also* pp. 164, 283, 645, 657 for other cases involving aliens.

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A discrimination between citizens and aliens in the matter of employment on public works is not by reason thereof unconstitutional.[1]

[1] Heim *v.* McCall, 239 U. S. 175 [1915]; Crane *v.* New York, 239 U. S. 195 [1915].

A statute requiring that employers of five or more workers employ not less than 80 percent qualified electors or natural born citizens denies equal protection of the laws.[1]

[1] Truax *v.* Raich, 239 U. S. 33 [1915].

NONRESIDENTS.

A registration fee, not unreasonable in amount, which is exacted by a State from residents and nonresidents alike as a condition to the use of its highways by motor vehicles, is not a discrimination against the citizens of other States either (*a*) because the amount of the fee is fixed for each calendar year without reference to the extent to which the highways are used, or (*b*) because the liability of nonresidents to pay is not tempered by the allowance of any period of free use in reciprocation for like privileges allowed by the States in which they reside.[1]

[1] Kane *v.* New Jersey, 242 U. S. 160 [1916].

An act forbidding registration for voting of persons coming from outside the State until 1 year after his intent to become a legal voter shall have been recorded does not deny equal protection of the laws.[1]

[1] Pope *v.* Williams, 193 U. S. 621 [1904].

A nonresident mortgagee is not within the jurisdiction of the State merely because he has a mortgage on property therein, so as to be deprived of the equal protection of the laws by a statute denying him the right to participate on terms of equality in the distribution of the assets of an insolvent foreign corporation.[1]

[1] Sully *v.* American Nat. Bank, 178 U. S. 289 [1900].

A State statute declaring that "it shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches, or canals, the waters of any fresh-water lake, pond, brook, creek, river, or stream of this State into any other State, for use therein," does not deny to the citizens of such other State the equal protection of the laws.[1]

[1] Hudson County Water Co. *v.* McCarter, 209 U. S. 349 [1908].

A State law allowing a dower right in the lands of which the husband was seized of an estate of inheritance at any time during the marriage, but restricting this, when the wife at the time of death is a

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nonresident of the State, to the lands of which the husband died seized, does not deprive the nonresident widow of equal protection of the laws.[1]

[1] Ferry v. Spokane, P. & S. R. Co., 258 U. S. 314 [1922].

FOREIGN CORPORATIONS.*

A foreign corporation within the State under an annual license is subject to the power of the State to change at any time the conditions of admission for the future; and if it fails to pay an increased license tax established as a prerequisite to doing business in any subsequent year, it is not within the jurisdiction of the State so as to be within the equal protection clause in respect to an imposition upon it of unequal burdens as compared with foreign corporations of other States.[1] Similarly, a foreign corporation not subject to process from the courts of a State is not within the jurisdiction of the State so as to entitle it to claim denial of equal protection of the laws under a statute preferring resident creditors of foreign corporations to nonresident creditors of such corporations.[2]

[1] Fire Asso. of Philadelphia v. New York, 119 U. S. 110 [1886]. *See also* Atlantic Refining Co. v. Virginia, 302 U. S. 22, 31 [1937].
[2] Blake v. McClung, 172 U. S. 239 [1898].

While the general rule is that a foreign corporation may not carry on its business within a State except by complying with the conditions prescribed by it, a well settled limitation is that the State may not impose conditions which require the relinquishment of rights guaranteed by the Federal Constitution.[1]

[1] Williams v. Standard Oil Co., 278 U. S. 235, 240 [1929]. *See also* Frost v. Railroad Commission, 271 U. S. 583, 593 [1926]; Hanover F. Ins. Co. v. Carr (Harding), 272 U. S. 494 [1926].

There are differences between foreign and domestic corporations and between foreign corporations and individuals that justify classification in certain instances.[1] Foreign corporations and domestic corporations having their place of business outside the State may be placed on the same footing in respect to the service of process.[2]

[1] South Carolina ex rel. Phoenix Mut. L. Ins. Co. v. McMaster, 237 U. S. 63 [1915]; Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U. S. 544 [1923]; Washington ex rel. Bond & Goodwin & Tucker v. Superior Court, 289 U. S. 361 [1933]; Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580 [1935].
[2] St. Mary's Franco-American Petroleum Co. v. West Virginia, 203 U. S. 183 [1906].

Racial Discrimination.

IN GENERAL.

The guarantees of protection contained in the Fourteenth Amendment extend to all persons within the territorial jurisdiction

* *See also* pp. 135, 195, 989

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of the United States, without regard to differences of race, of color, or of nationality.[1] An alleged discrimination against Chinese in the enforcement of a gambling ordinance (not unconstitutional on its face) will not be sufficient to call for holding the ordinance unconstitutional. It is a matter of proof; no latitude of intention will be indulged; it must appear that the conditions to which the law was directed do not exclusively exist among that class, and that there are other offenders against whom the law is not enforced.[2]

[1] Yick Wo *v.* Hopkins, 118 U. S. 356 [1886].
[2] Ah Sin *v.* Wittman, 198 U. S. 500 [1905].

There is no denial of the equal protection of the laws by a statute of descent providing that the land of an intestate shall pass to his brothers and sisters in case he die without issue, when said statute is construed as applying only to brothers and sisters born free.[1]

[1] Jones *v.* Jones, 234 U. S. 615 [1914].

JURY SERVICE.*

While a State, consistently with the purposes for which the amendment was adopted, may confine the selection of jurors to males, to freeholders, to citizens, to persons within certain ages, or to persons having certain educational qualifications, and while a mixed jury in a particular case is not, within the meaning of the Constitution, always or absolutely necessary to the enjoyment of equal protection of the laws, and therefore an accused, being of the colored race, cannot claim as a matter of right that his race shall be represented on the jury, yet a denial to citizens of the African race, because of their color, of the right or privilege awarded to white citizens of participating as jurors in the administration of justice would be a discrimination against the former inconsistent with the amendment, and within the power of Congress, by appropriate legislation to prevent.[1]

[1] Gibson *v.* Mississippi, 162 U. S. 565, 580 [1896]. *See also* In Re Virginia (Virginia *v.* Rives), 100 U. S. 313 [1880]; Bush *v.* Kentucky, 107 U. S. 110 [1883]; Murray *v.* Louisiana, 163 U. S. 101 [1896]; Tarrance *v.* Florida, 188 U. S. 519 [1903]; Brownfield *v.* South Carolina, 189 U. S. 426 [1903]; Martin *v.* Texas, 200 U. S. 316 [1906]; Thomas *v.* Texas, 212 U. S. 278 [1909]; Franklin *v.* South Carolina, 218 U. S. 161 [1910].

The Court in reviewing its opinions has said: "Summing up precisely the effect of earlier decisions, this Court thus stated the principle in Carter *v.* Texas, 177 U. S. 447, in relation to exclusion from service on grand juries: 'Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to

* *See also* pp. 283, 501, 661, 679, 693, 916, 1002.

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the Fourteenth Amendment of the Constitution of the United States. Strauder *v.* West Virginia, 100 U. S. 303; Neal *v.* Delaware, 103 U. S. 370, 397; Gibson *v.* Mississippi, 162 U. S. 565.' This statement was repeated in the same terms in Rogers *v.* Alabama, 192 U. S. 226, 231, and again in Martin *v.* Texas, 200 U. S. 316, 319. The principle is equally applicable to a similar exclusion of negroes from service on petit juries. Strauder *v.* West Virginia, *supra;* Martin *v.* Texas, *supra.* And although the State statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the State through its administrative officers in effecting the prohibited discrimination. Neal *v.* Delaware, *supra,* Carter *v.* Texas, *supra.* Compare Virginia *v.* Rives, 100 U. S. 313, 322, 323; In re Wood, 140 U. S. 278, 285; Thomas *v.* Texas, 212 U. S. 278, 282, 283." [1]

[1] Norris *v.* Alabama, 294 U. S. 587, 589 [1935]. *See also* Hollins *v.* Oklahoma, 295 U. S. 394 [1935].

ELECTION PRIVILEGES.

A State constitution making ability to read or understand a provision of the Constitution a necessary qualification for voting, does not on its face discriminate between the white and negro races and does not deny equal protection of the laws.[1]

[1] Williams *v.* Mississippi, 170 U. S. 213 [1898].

"States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case"—i. e., denying negroes the right to vote in the primary of the Democratic Party.[1] Similarly, action of a State executive committee of a political party, excluding negroes from participation in its primary, pursuant to authority conferred not by the party itself but by statute, is invalid,[2] but the denial to a negro of a ballot in the Democratic primary pursuant to a resolution of the State convention limiting membership in the party to white persons is not State action and is not forbidden discrimination.[3]

[1] Nixon *v.* Herndon, 273 U. S. 536, 541 [1927].
[2] Nixon *v.* Condon, 286 U. S. 73 [1932].
[3] Grovey *v.* Townsend, 295 U. S. 45 [1935].

EDUCATION.

The action of a local board of education in suspending temporarily and for economic reasons a high school for colored children is not a sufficient reason why the board should be restrained by injunction from maintaining an existing high school for white children, when the evidence in the record would not permit a finding that it had proceeded in bad faith, or had abused the discretion with which it was invested by the statute under which it had proceeded, or had

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acted in hostility to the colored race.[1] A child of Chinese blood, born in, and citizen of, the United States, is not denied the equal protection of the laws by being classed by the State among the colored races who are assigned to public schools separate from those provided for the whites, when equal factilities for education are afforded to both classes.[2]

[1] Cumming *v.* County Board of Education, 175 U. S. 528 [1899].
[2] Gong Lum *v.* Rice, 275 U. S. 78 [1927].

RAILWAY ACCOMMODATIONS.

A statute providing for separate railway carriages for white and colored persons, does not deny equal protection of the laws,[1] but a separate coach law is invalid insofar as it permits hauling of sleeping and dining cars only for white persons, notwithstanding recognition by the legislature that there would be little demand for them by colored persons.[2]

[1] Plessy *v.* Ferguson, 163 U. S. 537 [1896].
[2] McCabe *v.* Atchison, T. & S. F. R. Co., 235 U. S. 151 [1914].

PUNISHMENT FOR CRIME.

A statute prohibiting a white person and a negro from living with each other in adultery or fornication, is not in conflict with the equal protection clause, although it prescribes penalties more severe than those to which the parties would be subject, were they of the same race or color.[1]

[1] Pace *v.* Alabama, 106 U. S. 583 [1883].

Labor Relations.*

HOURS OF LABOR.

A statute in limiting hours of employees in mills, factories, and manufacturing establishments does not unduly discriminate against their employers as compared with other employers not included in the classification.[1] Acts limiting to 8 hours the daily employment in mines underground and smelters[2] or on public works,[3] are not unconstitutional.

[1] Bunting *v.* Oregon, 243 U. S. 426 [1917].
[2] Holden *v.* Hardy, 169 U. S. 366 [1898].
[3] Atkin *v.* Kansas, 191 U. S. 207 [1903].

The regulation of hours of labor for women falls within the police power of the State, and a 10-hour limitation so far as laundries are concerned is not unconstitutional.[1] An act limiting the hours of labor of women in certain occupations is not unconstitutional because

* *See also* pp. 160, 781

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it might have been made broader and other women brought within its terms.[2] A law limiting hours for women in hotels is not unconstitutional because excepting certain railroad restaurants.[3]

[1] Muller *v.* Oregon, 208 U. S. 412 [1908].
[2] Miller *v.* Wilson, 236 U. S. 373 [1915]; Bosley *v.* McLaughlin, 236 U. S. 385 [1915]; Radice *v.* New York, 264 U. S. 292 [1924].
[3] Dominion Hotel *v.* Arizona, 249 U. S. 265 [1919].

CHILD LABOR.

A State statute forbidding employment of minors under 16 in dangerous occupations is a reasonable classification.[1]

[1] Sturges & B. Mfg. Co. *v.* Beauchamp, 231 U. S. 320 [1914].

PAYMENT OF WAGES.

A statute forbidding manufacturers, mine operators, etc., to issue orders for payment of labor unless redeemable at face value in cash does not deny equal protection because not applicable to other classes of employers.[1] It is not unreasonable to limit a police regulation with respect to measuring the wages of miners, to mines employing 10 or more.[2]

[1] Keokee Consol. Coke Co. *v.* Taylor, 234 U. S. 224 [1914].
[2] McLean *v.* Arkansas, 211 U. S. 539 [1909].

EMPLOYMENT IN MINES.

It is an appropriate exercise of the police power to regulate the use and enjoyment of mining properties, and mine owners are not denied equal protection by a law requiring employment of only licensed mine managers and mine examiners, and imposing upon the mine owners liability for willful failure of the managers and examiners to furnish a reasonably safe working place.[1] And statutes affecting operations are not rendered unconstitutional because limited to mines with five employees,[2] or because they will not become effective as to a mine until requested by the employees.[3] It is not arbitrary to exclude block mines from a statute regulating entrance to other coal mines.[4]

[1] Wilmington Star Min. Co. *v.* Fulton, 205 U. S. 60 [1907].
[2] Consolidated Coal Co. *v.* Illinois, 185 U. S. 203 [1902].
[3] Booth *v.* Indiana, 237 U. S. 391 [1915].
[4] Barrett *v.* Indiana, 229 U. S. 26 [1913].

SERVICE LETTERS ON DISCHARGE.

A law requiring public service corporations to issue to employees, when leaving their service, letters setting forth the nature of their service, the cause of leaving, etc., is not unconstitutional because not applicable to other corporations, individuals, etc.[1]

[1] Chicago, R. I. & P. R. Co. *v.* Perry, 259 U. S. 548 [1922].

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EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION.*

Statutes allowing employees a remedy against employers for the negligence of a fellow servant and depriving the employers of the defense of contributory negligence are not unconstitutional because limited to railroads.[1] And such statutes are not rendered unconstitutional because not applicable to employees engaged in constructing new and unopened railroads,[2] or because limited to railroads corporately owned.[3] They may include employees not subject to the hazards peculiarly resulting from the operation of a railroad,[4] or be confined to those whose occupation exposes them to hazards incident to operation of trains.[5]

[1] Missouri P. R. Co. *v.* Mackey, 127 U. S. 205 [1888]; Minneapolis & St. L. R. Co. *v.* Herrick, 127 U. S. 210 [1888]; Chicago, K. & W. R. Co. *v.* Pontius, 157 U. S. 209 [1895]; Tullis *v.* Lake Erie & W. R. Co., 175 U. S. 348 [1899]; Pittsburg, C. C. & St. L. R. Co. *v.* Lightheiser, 212 U. S. 560 [1908]; Missouri P. R. Co. *v.* Castle, 224 U. S. 541 [1912]; Easterling Lumber Co. *v.* Pierce, 235 U. S. 380 [1914].

[2] Minnesota Iron Co. *v.* Kline, 199 U. S. 593 [1905].

[3] Aluminum Co. *v.* Ramsey, 222 U. S. 251 [1911].

[4] Louisville & N. R. Co. *v.* Melton, 218 U. S. 36 [1910]; Mobile, J. & K. C. R. Co. *v.* Turnipseed, 219 U. S. 35 [1910].

[5] Chicago, I. & L. R. Co. *v.* Hackett, 228 U. S. 559 [1913].

In the absence of any particular showing of erroneous classification, the evident purpose of a workmen's compensation act to classify the various occupations according to the respective hazard of each is sufficient answer to any contention that it improperly distributes the burdens among the several industries.[1] The exemption of farm laborers, domestic servants, etc., does not render an act unconstitutional.[2]

[1] Mountain Timber Co. *v.* Washington, 243 U. S. 219 [1917].

[2] New York C. R. Co. *v.* White, 243 U. S. 188 [1917]; Middleton *v.* Texas Power & Light Co., 249 U. S. 152 [1919]; Ward & Gow *v.* Krinsky, 259 U. S. 503 [1922].

A workmen's compensation act denying nonconformers employing five or more persons of the defense of contributory negligence, assumed risk, and the negligence of fellow servants in negligence suits does not deny equal protection of the laws because not applicable to employers of less than five.[1] Equal protection is not denied an employer by a workmen's compensation act which allows him the common law defenses of assumption of risk, contributory negligence, and negligence of fellow servants only when he has accepted the act and the employee has not, while it withdraws them if employer and employee both, or employer alone, have rejected it.[2] The discrimination resulting between employees engaged in the same kind of work, where one employer exercises his option to come under the workmen's compensation act and another does not, is not inconsistent with the equal

* *See also* pp. 159, 162, 182, 235, 257, 783.

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protection clause.[3] There is a sufficient distinction between coal mining and other hazardous employments to justify a State in applying its workmen's compensation system to the one (coal mining) compulsorily, while leaving it permissive or not applying it at all as to others.[4]

[1] Jeffrey Manufacturing Co. v. Blagg, 235 U. S. 571 [1915].
[2] Hawkins v. Bleakly, 243 U. S. 210 [1917].
[3] Middleton v. Texas Power & Light Co., 249 U. S. 152 [1919].
[4] Lower Vein Coal Co. v. Industrial Board, 255 U. S. 144 [1921].

A workmen's compensation act taking away existing right of action for wrongful death of an employee not only as against the employer but as against any third person by whose negligence the death may have been caused is not a denial of equal protection.[1]

[1] Northern P. R. Co. v. Meese, 239 U. S. 614 [1916].

And an act imposing a liability on the wrongdoer to indemnify the insurer where an award has been paid to the State as required in the particular instance does not deny equal protection of the law.[1]

[1] Staten Island Rapid Transit R. Co. v. Phoenix Indemnity Co., 281 U. S. 98 [1930].

Public Utilities.

IN GENERAL.

Statutes charging the cost of administration against regulated utilities do not deny equal protection of the laws.[1]

[1] Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386 [1892]; New York ex rel. New York Electric Lines Co. v. Squire, 145 U. S. 175, 191 [1892].

Statutes empowering administrative commissions to control future contracts by utilities concerning rates but denying the power to alter existing contracts, cannot be said to violate the equal protection clause.[1]

[1] Arkansas Natural Gas Co. v. Arkansas R. Commission, 261 U. S. 379 [1923]; Georgia R. & Power Co. v. Decatur, 262 U. S. 432 [1923].

The objection that a State rate discriminates between shippers, in violation of the equal protection clause of the Fourteenth Amendment, is not available to a carrier.[1]

[1] Arkadelphia Mill. Co. v. St. Louis Southwestern R. Co., 249 U. S. 134 [1919].

The equal protection provision does not prevent a city from adopting a scheme of municipal ownership as to a single public utility, and a charter provision which prohibits franchises for that purpose does not violate the Fourteenth Amendment.[1] Municipalities operat-

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ing electric plants may be exempted from State rate regulation, while private corporations are subject thereto.[2] Similarly, a statute fixing one rate for gas sold to municipalities and another for that sold to individual consumers does not deny equal protection of the laws.[3]

[1] Denver *v.* New York Trust Co., 229 U. S. 123 [1913].
[2] Springfield Gas & E. Co. *v.* Springfield, 257 U. S. 66 [1921].
[3] Willcox *v.* Consolidated Gas Co., 212 U. S. 19 [1909].

RAILROADS AND STREET RAILWAYS.*

There is no unjust discrimination, and no denial of equal protection, in regulations of railroads which are applicable to all railroads alike.[1] An exception of electric lines and street railways does not offend the equal protection clause.[2]

[1] New York & N. E. R. Co. *v.* Bristol, 151 U. S. 556, 567 [1894]; Kansas City Southern R. Co. *v.* Anderson, 233 U. S. 325 [1914]; Atlantic Coast Line R. Co. *v.* Ford, 287 U. S. 502 [1933].
[2] Chesapeake & O. R. Co. *v.* Conley, 230 U. S. 513 [1913].

A State railroad rate statute which imposes such excessive penalties that parties affected are deterred from testing its validity in the courts denies the carrier the equal protection of the law without regard to the question of insufficiency of the rates prescribed.[1]

[1] Ex parte Young, 209 U. S. 123 [1908].

There is a difference between ordinary vehicles and electric cars which the State may, in the exercise of its police power, recognize without denying the company operating the electric cars the equal protection of the laws.[1]

[1] Detroit, Ft. W. & B. I. R. Co. *v.* Osborn, 189 U. S. 383 [1903].

Statutes and municipal ordinances applicable solely to railroads or street railways have been upheld that—

(1) Forbade operation on a certain street.[1]

(2) Required fences and cattle guards and allowed recovery of multiple damages for failure to comply.[2]

(3) Imposed an assessment tax to meet expenses and salaries of railroad commissioners.[3]

(4) Charged them with entire expense of altering a grade crossing.[4]

(5) Makes them responsible for fire communicated by their engines.[5]

(6) Require cutting of certain weeds, etc.[6]

(7) Enforce prompt settlement of damage claims.[7]

(8) Create a presumption against a railroad failing to give prescribed warning signals.[8]

(9) Require use of locomotive headlights of a specified form and power.[9]

* *See also* pp. 156, 177, 660, 808, 991.

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(10) Make railroads liable for damage caused by operation of their locomotives, unless they make it appear that their agents exercised all ordinary and reasonable care and diligence.[10]

(11) Require sprinkling of streets between tracks to lay the dust.[11]

[1] Richmond, F. & P. R. Co. *v.* Richmond, 96 U. S. 521 [1878].
[2] Missouri P. R. Co. *v.* Humes, 115 U. S. 512 [1885]; Minneapolis & St. L. R. Co. *v.* Beckwith, 129 U. S. 26 [1889]; Minneapolis & St. L. R. Co. *v.* Emmons, 149 U. S. 364 [1893].
[3] Charlotte, C. & A. R. Co. *v.* Gibbes, 142 U. S. 386 [1892].
[4] New York & N. E. R. Co. *v.* Bristol, 151 U. S. 556 [1894].
[5] St. Louis & S. F. R. Co. *v.* Mathews, 165 U. S. 1 [1897].
[6] Missouri, K. & T. R. Co. *v.* May, 194 U. S. 267 [1904]; Chicago, T. H. & S. E. R. Co. *v.* Anderson, 242 U. S. 283 [1916].
[7] Seaboard Air Line R. Co. *v.* Seegers, 207 U. S. 73 [1907]; Yazoo & M. V. R. Co. *v.* Jackson Vinegar Co., 226 U. S. 217 [1912]; Kansas City Southern R. Co. *v.* Anderson, 233 U. S. 325 [1914]; Chicago & N. W. R. Co. *v.* Nye Schneider Fowler Co., 260 U. S. 35 [1922].
[8] Atlantic Coast Line R. Co. *v.* Ford, 287 U. S. 502 [1933].
[9] Atlantic Coast Line R. Co. *v.* Georgia, 234 U. S. 280 [1914].
[10] Seaboard Air Line R. Co. *v.* Watson, 287 U. S. 86 [1932].
[11] Pacific Gas & Electric Co. *v.* Police Court, 251 U. S. 22 [1919].

"The legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross, or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws." [1]

[1] Dow *v.* Beidelman, 125 U. S. 680, 691 [1888]. *See also* Chesapeake & O. R. Co. *v.* Conley, 230 U. S. 513 [1913].

Statutes have been upheld that excepted one railroad company from operation of the speed law,[1] or excepted railroads less than 50 miles in length from heating regulations,[2] or full crew regulations.[3]

[1] Erb. *v.* Morasch, 177 U. S. 584, 585 [1900].
[2] New York, N. H. & H. R. Co. *v.* New York, 165 U. S. 628 [1897].
[3] Chicago, R. I. & P. R. Co. *v.* Arkansas, 219 U. S. 453 [1911].

A State police statute requiring railroad companies to use a specified safety device is not unconstitutional as denying equal protection of the laws because it does not affect receivers operating railroads; in view of the temporary and special character of a receiver's management, the classification is reasonable and proper.[1]

[1] Atlantic Coast Line R. Co. *v.* Georgia, 234 U. S. 280 [1914].

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TELEGRAPH COMPANIES.

A statute prohibiting a stipulation against liability for negligence in the delivery of an interstate message does not deny to telegraph companies the equal protection of the laws because express companies and other common carriers may by contract limit their liability.[1]

[1] Western U. Teleg. Co. v. Commercial Milling Co., 218 U. S. 406 [1910].

TOLL ROADS.

The equal protection clause, in its application to toll roads, does not require that all corporations exacting tolls shall be placed upon the same footing as to rates, but that justice to the public and to stockholders may require in respect to one road rates different from those prescribed for other roads and that rates on one road may be reasonable and just to all concerned, while the same rates would be exorbitant on another road.[1]

[1] Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578 [1896].

WATER COMPANIES.

A water company required to bear the entire expense of moving its pipes, as necessitated by the abolition of certain highway grade crossings of a steam railroad, is not denied the equal protection of the laws merely because a street-railway company occupying such streets, instead of being charged with the expense of moving its tracks, is charged 10 percent of the total expense at its crossing.[1]

[1] Erie R. Co. v. Public Utility Comrs., 254 U. S. 394 [1921].

A police statute may be confined to the occasion for its existence. If there is a substantial difference in part of harmful results between various methods of pumping gas and water, that difference justifies a classification, and the burden is on the attacking party to prove the classification unreasonable; and so it was held that the classification in a mineral springs act does not appear to be arbitrary, but to rest on a reasonable basis.[1]

[1] Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 [1911].

It is no denial of the equal protection of the laws to fix water rates so as to give an income of 6 percent upon the then value of the property actually used, for the purpose of supplying water as provided by law, even though the company had prior thereto been allowed to fix rates that would secure to it 1½ percent a month income upon the capital actually invested in the undertaking. If not hampered by an unalterable contract, providing that a certain compensation should always be received, a law which reduces the compensation theretofore allowed to 6 percent upon the present value of the property used for the public is not unconstitutional.[1]

[1] Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co., 192 U. S. 201, 213 [1904].

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Police Power.*

IN GENERAL.

"It is * * * thoroughly established in this court that the inhibitions of the Constitution of the United States upon * * * the deprivation of property without due process or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals." [1] But a police regulation is subject to the equal protection clause which, while not preventing proper classification, does entitle all persons and corporations to the protection of equal laws.[2]

[1] New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567 [1894].
[2] Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56 [1915].

The police power is one of the most essential powers of Government and one of the least limitable. However, it cannot be so arbitrarily exercised as to deny equal protection of the laws.[1]

[1] Hadacheck v. Sebastian, 239 U. S. 394 [1915].

It is clearly settled that any classification adopted by a State in the exercise of the police power which has a reasonable basis will be sustained against an attack based on the equal protection clause, and also that every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed.[1]

[1] Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129 [1921].

When forced to make a choice, the State does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.[1]

[1] Miller v. Schoene, 276 U. S. 272 [1928].

The equal protection clause forbids legislation, in whatever form it may be enacted, by which the property of one person is, without compensation, wrested from him for the benefit of another or for the public.[1]

[1] Reagan v. Farmers Loan & T. Co., 154 U. S. 362 [1894].

REGULATION OF CORPORATIONS.

The difference between the extent of the power which the State can exert over the doing of business within the State by an individual and that which it can exercise as to corporations furnishes a distinction authorizing a classification between the two.[1] A classification which

* *See also* pp. 149, 154, 174, 337, 565, 719, 827.

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is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual.[2]

[1] Hammond Packing Co. *v.* Arkansas, 212 U. S. 322 [1909].
[2] Frost *v.* Corporation Commission, 278 U. S. 515 [1929].

Corporations violating the antitrust law may be proceeded against by a bill in equity, while individuals are indicted and tried.[1] And while classification must be reasonable and corporations may not be arbitrarily selected for subjection to a burden to which individuals would as appropriately be subject, there is reasonable basis for classifying corporations on account of their peculiar attributes in regard to their participation in prohibited trusts and combinations.[2] Similarly, when the mischiefs to which a statute are directed are peculiarly an outgrowth of existing practices of corporations and are susceptible of a corrective in their case and not so readily applied in the case of individuals, there is no difficulty in sustaining the legislature in placing corporations in one class and individuals in another.[3]

[1] Standard Oil Co. *v.* Tennessee ex rel. Cates, 217 U. S. 413 [1910].
[2] Mallinckrodt Chemical Works *v.* Missouri ex rel. Jones, 238 U. S. 41 [1915].
[3] Prudential Ins. Co. *v.* Cheek, 259 U. S. 530 [1922].

REGULATION OF BUSINESSES, PROFESSIONS, ETC.

In General.

The right of the legislature, or a municipality under legislative authority, to regulate one trade and not another, is well settled as not denying equal protection of the laws.[1]

[1] Schmidinger *v.* Chicago, 226 U. S. 578 [1913]. *See also* Soon Hing *v.* Crowley, 113 U. S. 703 [1885].

"The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the State may 'be determined by degrees of evil or exercised in cases where detriment is specially experienced.' Armour & Co. *v.* North Dakota, 240 U. S. 510, 517. It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact."[1]

[1] Dominion Hotel *v.* Arizona, 249 U. S. 265, 268 [1919].

If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied, and it cannot be concluded that the failure to

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extend the law to other and distinct lines of businesses, having their own circumstances and conditions creates an arbitrary discrimination.[1]

[1] Miller *v.* Wilson, 236 U. S. 373, 384 [1915], citing Ozan Lumber Co. *v.* Union County Nat. Bank, 207 U. S. 251, 256 [1907]; Heath & M. Mfg. Co. *v.* Worst, 207 U. S. 338, 354 [1907]; Engel *v.* O'Malley, 219 U. S. 128, 138 [1911]; Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61, 78 [1911]; Mutual Loan Co. *v.* Martell, 222 U. S. 225, 235 [1911]; Central Lumber Co. *v.* South Dakota, 226 U. S. 157, 160 [1912]; Rosenthal *v.* New York, 226 U. S. 260, 270 [1912]; Barrett *v.* Indiana, 229 U. S. 26, 29 [1913]; Sturges & B. Mfg. Co. *v.* Beauchamp, 231 U. S. 320, 326 [1914]; German Alliance Ins. Co. *v.* Lewis, 233 U. S. 389, 418 [1914]; International Harvester Co. *v.* Missouri ex rel. Atty. Gen., 234 U. S. 199, 213 [1914]; Keokee Consol. Coke Co. *v.* Taylor, 234 U. S. 224, 227 [1914]; Atlantic Coast Line R. Co. *v.* Georgia, 234 U. S. 280, 289 [1914].

Prevention of Fraud, Oppression, etc.

ANTITRUST ACTS.—A State statute prohibiting combinations is not unconstitutional as a denial of equal protection because it embraces vendors of commodities and not vendors of labor and services.[1]

[1] International Harvester Co. *v.* Missouri ex rel. Atty. Gen., 234 U. S. 199 [1914].

A statute requiring officers of corporations to file annually an affidavit setting forth their nonparticipation in any pool, trust, agreement or combination under penalty of forfeiture of charter or right to do business in State is not a denial of equal protection of the laws.[1] An antitrust act exempting agricultural products or livestock is unconstitutional.[2]

[1] Mallinckrodt Chemical Works *v.* Missouri ex rel. Jones, 238 U. S. 41 [1915].

[2] Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540 [1902].

A State statute creating a rebuttable presumption that any person paying in that State a lower price for sugar than he pays in any other State is a party to a monopoly or conspiracy in restraint of trade, is a denial of equal protection of the laws.[1]

[1] McFarland *v.* American Sugar Ref. Co., 241 U. S. 79 [1916].

A corporation tried under information in the nature of quo warranto for combination in restraint of trade and sentenced to ouster and fine is not denied equal protection of the laws, because corporations prosecuted under the antitrust statute would not be subject to as severe a penalty.[1]

[1] Standard Oil Co. *v.* Missouri ex rel. Hadley, 224 U. S. 270 [1912].

GRANT OF MONOPOLY.—The grant of monopoly, if otherwise an appropriate exercise of the police power, is not void as denying equal protection of the laws.[1]

[1] Pacific States Box & Basket Co. *v.* White, 296 U. S. 176 [1935]. *See also* Slaughter House Cases, 16 Wall 36 [1873]; Nebbia *v.* New York, 291 U. S. 502, 529 [1934].

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PREVENTION OF DISCRIMINATION.—A statute prohibiting unfair discrimination by anyone engaged in manufacture or distribution of a commodity in general use for the purpose of intentionally destroying competition of any regular dealer in such commodity by making sales thereof at a lower rate in one section of the State than in another, after equalization for distance, is a constitutional exercise of the police power and does not deny equal protection of the laws.[1]

[1] Central Lumber Co. v. South Dakota, 226 U. S. 157 [1912].

Advertising.

Excepting newspapers, periodicals, and books from the operation of a statute forbidding the sale of articles upon which there is a representation of the flag for advertising purposes, does not deny equal protection of the laws.[1] A discrimination between billboard and newspaper advertising of cigarettes, regulation of the latter having been held void under the commerce clause, is not unconstitutional because applicable only to billboard advertising.[2] Prohibition in the use of advertising signs on motor busses is not unconstitutional because not applicable to signs on other vehicles.[3]

[1] Halter v. Nebraska, 205 U. S. 34 [1907].
[2] Packer Corp. v. Utah, 285 U. S. 105 [1932].
[3] Fifth Ave. Coach Co. v. New York, 221 U. S. 467 [1911].

Amusements.

A city ordinance passed in pursuance of the police power forbidding keeping of billiard halls for hire, except in case of hotels having 25 or more rooms for use of regular guests, does not deny equal protection as applied to one not having such a hotel.[1]

[1] Murphy v. California, 225 U. S. 623 [1912].

Banks.

A depositors' guaranty fund statute does not deny equal protection because it applies only to banks which contribute to the fund, or on account of preferences between classes of depositors, or because incorporated banks with a 10 percent surplus have privileges over unincorporated banks.[1] Neither is such a statute unconstitutional because it discriminates against national banks in favor of State banks.[2]

[1] Assaria State Bank v. Dolley, 219 U. S. 121 [1911].
[2] Abilene Nat. Bank v. Dolley, 228 U. S. 1 [1913].

A statute forbidding the business of private banking without a license from the comptroller does not deny the equal protection of the laws by excepting those in whose business the average amount of each sum received is not less than $500 and those who give bonds in specified amounts.[1] A law forbidding individuals or unincorporated associations to engage in the business of receiving money in install-

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ments, for cooperative, mutual loan, savings, or investment purposes, in sums of less than $500 each is not unconstitutional.[2]

[1] Engel *v.* O'Malley, 219 U. S. 128 [1911].
[2] Dillingham *v.* McLaughlin, 264 U. S. 370 [1924].

A State law allowing State banks to pay checks in exchange when presented by a Federal Reserve bank, or through post office or express company, and when not made payable otherwise by maker, does not deprive the Reserve bank of equal protection.[1]

[1] Farmers & M. Bank *v.* Federal Reserve Bank, 262 U. S. 649 [1923].

An escheat statute applicable to unclaimed deposits in savings banks does not deny equal protection of the laws because not applicable to deposits in other banks.[1]

[1] Provident Inst. for Savings *v.* Malone, 221 U. S. 660 [1911].

A statute limiting interest on loans is not unconstitutional as denying equal protection of the laws because it excepts loans made by banks or trust companies and bona fide mortgages on real and personal property.[1]

[1] Griffith *v.* Connecticut, 218 U. S. 563 [1910].

A statute making invalid assignments of wages to be earned as security for debts of less than $200 unless accepted in writing by the employer, consented to by the wife of the assignor, and filed in a public office does not deny equal protection because certain classes of financial institutions are exempted from its provisions.[1]

[1] Mutual Loan Co. *v.* Martell, 222 U. S. 225 [1911].

Barber Shops.

A law forbidding Sunday labor except works of necessity or charity, and specifically forbidding the keeping open of barber shops, does not deny equal protection in determining as matter of law that keeping barber shops open on Sunday is not a work of necessity or charity, while leaving the matter undetermined as to all other kinds of labor.[1]

[1] Petit *v.* Minnesota, 177 U. S. 164 [1900].

Black Powder.

A Kansas statute regulating sales of black powder is not unconstitutional as denying equal protection of the law because it excepts from its operation sales to be made under existing contracts.[1]

[1] Williams *v.* Walsh, 222 U. S. 415 [1912].

Cattle.

A classification of sheep, as distinguished from other cattle, is not unreasonable and arbitrary in a regulation regarding the use of public lands.[1]

[1] Bacon *v.* Walker, 204 U. S. 311 [1907]. *See also* Omaechevarria *v.* Idaho, 246 U. S. 343 [1918].

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A statute under which persons driving cattle, etc., over hillside highways shall be liable for damage by the cattle to banks or in rolling rocks upon the highway, the statute embracing all persons under substantially like circumstances does not deny equal protection of the laws.[1]

[1] Jones v. Brim, 165 U. S. 180 [1897].

Cotton Gins.

In a State where cotton gins are held to be public utilities and their rates regulated, the granting of a license to a cooperative association distributing profits ratably to members and nonmembers does not deny other persons operating gins equal protection when there is nothing in the laws to forbid them to distribute their net earnings among their patrons.[1]

[1] Corporation Commission v. Lowe, 281 U. S. 431 [1930].

Fish Reduction.

The differences between a process of canning the edible portions of fish in their original form for food, and a more rapid process of reducing them to a flour or meal which may be readily diverted to other purposes than human consumption, are enough to justify, consistently with equal protection, restrictions of the latter process not imposed upon the former, in regulations adopted by a State to conserve her fish supply for food.[1]

[1] Bayside Fish Flour Co. v. Gentry, 297 U. S. 422 [1936].

Food.

The equal protection clause is not violated by statutes pertaining to milk under which—

(1) The industry is placed in a special class for regulation.[1]

(2) Vendors producing milk outside the city are classified separately.[2]

(3) Adulterated milk regulations distinguishing between producing and nonproducing vendors.[3]

(4) The fixed minimum price at which storekeepers may buy milk from dealers is greater than the minimum price at which dealers may buy from producers, and the maximum price allowed dealers in sales to consumers is higher than that allowed storekeepers.[4]

(5) A price differential is given sellers of milk not having a well advertised trade name.[5]

[1] New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552 [1905].
[2] Adams v. Milwaukee, 228 U. S. 572 [1913].
[3] St. John v. New York, 201 U. S. 633 [1906].
[4] Nebbia v. New York, 291 U. S. 502 [1934].
[5] Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251 [1936].

But a discrimination between milk dealers without well advertised trade names who entered business before and those who entered

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after a specified date, giving the former but not the latter the benefit of a price differential, is invalid as violating the equal protection clause.[1]

[1] Mayflower Farms, Inc. v. Ten Eyck, 297 U. S. 266 [1936].

The equal protection clause is not violated by statutes under which—

(1) Oleomargarine may not be colored to resemble butter.[1]

(2) Butter and oleomargarine are classified separately for tax purposes.[2]

(3) Lard not sold in bulk must be put up in containers holding 1, 3, or 5 pounds or some whole multiple thereof.[3]

(4) Bread sold in loaves must be of prescribed standard sizes.[4]

(5) Table syrups must be so labeled as to disclose the ingredients and their proportions.[5]

(6) Meat not "kosher" may not be labeled as such.[6]

(7) Food preservatives containing boric acid may not be sold.[7]

[1] Capital City Dairy Co. v. Ohio ex rel. Attorney General, 183 U. S 238 [1902].
[2] Magnano (A). Co. v. Hamilton, 292 U. S. 40 [1934].
[3] Armour & Co. v. North Dakota, 240 U. S. 510 [1916].
[4] Schmidinger v. Chicago, 226 U. S. 578 [1913].
[5] Corn Products Ref. Co. v. Eddy, 249 U. S. 427 [1919].
[6] Hygrade Provision Co. v. Sherman, 266 U. S. 497 [1925].
[7] Price v. Illinois, 238 U. S. 446 [1915].

Grain Elevators.

A general statute regulating the business and charges of public warehousemen engaged in elevating and storing grain for profit, does not deny equal protection of the laws.[1] Elevators not situated on a railroad right-of-way may be excepted from such a statute.[2]

[1] Brass v. North Dakota ex rel. Stoeser, 153 U. S. 391, 405 [1894].
[2] Cargill (W. W.) Co. v. Minnesota ex rel. Railroad & W. Commission, 180 U. S. 452 [1901].

Harvesting and Threshing Machinery.

A statute prohibiting waiver of warranty of fitness in sale of harvesting and threshing machinery does not deny equal protection of the laws.[1]

[1] Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283 [1932].

Hotels.

A statute requiring keepers of hotels having over 50 rooms to keep night watchmen to guard against fire and to awaken guests is not discriminatory because applicable only to hotels having over 50 rooms.[1]

[1] Miller v. Strahl, 239 U. S. 426 [1915].

Insurance Companies.

A statute regulating fire-insurance rates, but exempting farmers' mutuals does not deny equal protection,[1] whereas a statutory dis-

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crimination between the mutual companies and the stock companies which write fire, casualty, etc., insurance in the State, forbidding stock companies to act through agents who are their salaried employees but permitting this to mutual companies, is repugnant to the equal protection clause of the Fourteenth Amendment.[2]

[1] German Alliance Ins. Co. *v.* Lewis, 233 U. S. 389 [1914].
[2] Hartford Steam Boiler Inspection & Ins. Co. *v.* Harrison, 301 U. S. 459 [1937].

A statute imposing on all fire companies which are connected with a tariff association a liability to be received by the insured of 25 percent in excess of the amount of the policy is not unconstitutional as denying them equal protection of the laws.[1]

[1] German Alliance Ins. Co. *v.* Hale, 219 U. S. 307 [1911].

A fire-insurance company is not denied equal protection of the laws by a statute applicable to fire-insurance companies only and which makes the entire amount of the insurance payable in case of total loss, except as reduced by depreciation of the property after it was insured.[1] A State statute providing that "no answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false and was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, moreover, that the agent of the company had no knowledge of the falsity or fraud of such answer," does not show such an arbitrary classification or unlawful discrimination as would justify the court in saying that the Constitution had been violated in the exercise in this regard, by a State, of its undoubted power over corporations.[2] A statute cutting off defense by a life-insurance company based on false and fraudulent statements in the application, unless the matter misrepresented actually contributed to death of insured, does not deny equal protection of the laws.[3]

[1] Orient Ins. Co. *v.* Daggs, 172 U. S. 557 [1899].
[2] Hancock (John) Mut. L. Ins. Co. *v.* Warren, 181 U. S. 73 [1901].
[3] Northwestern Nat. L. Ins. Co. *v.* Riggs, 203 U. S. 243 [1906].

Intoxicating Liquors.

Laws regulating liquors are not unconstitutional because excepting druggists, manufacturers, etc.,[1] or because wines from grapes grown in the State while in the hands of the producer are exempt from a tax.[2]

[1] Ohio ex rel. Lloyd *v.* Dollison, 194 U. S. 445 [1904]; Eberle *v.* Michigan, 232 U. S. 700 [1914].
[2] Cox *v.* Texas, 202 U. S. 446 [1906].

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A license tax on persons compounding, rectifying, adulterating, or blending distilled spirits, is not a denial of equal protection of the law because it discriminates in favor of the distillers and rectifiers of straight distilled spirits.[1]

[1] Brown-Forman Co. v. Kentucky, 217 U. S. 563 [1910].

Junk Dealers.

A statute forbidding junk dealers to buy wire, copper, etc., used by or belonging to a railroad, telephone, or telegraph company without first ascertaining by diligent inquiry that seller had a legal right to sell does not deny equal protection of the laws.[1]

[1] Rosenthal v. New York, 226 U. S. 260 [1912].

Markets.

City ordinance forbidding keeping of private market within 6 squares of public market does not deny equal protection of the laws.[1]

[1] Natal v. Louisiana, 139 U. S. 621 [1891].

Medicine, Dentistry, Etc.

"A statute which places all physicians in a single class, and prescribes a uniform standard of professional attainment and conduct, as a condition of the practice of their profession, and a reasonable procedure applicable to them as a class to insure conformity to that standard, does not deny the equal protection of the laws within the meaning of the Fourteenth Amendment." [1]

[1] Missouri ex rel. Hurwitz v. North, 271 U. S. 40 [1926].

A State medical registration law may make reasonable exemptions to it.[1]

[1] Watson v. Maryland, 218 U. S. 173 [1910].

A statute requiring drugless practitioners to have certain qualifications and be licensed but not applicable to those who profess to heal by prayer, does not deny equal protection of the laws.[1]

[1] Crane v. Johnson, 242 U. S. 339 [1917].

An osteopathic physician is not denied equal protection by a regulation excluding osteopaths from practicing in a hospital maintained by the State and a municipality.[1]

[1] Hayman v. Galveston, 273 U. S. 414 [1927].

A statute requiring persons treating inflammation of the eyes and fitting glasses without the use of drugs to be licensed under the name of "optometrists" is not unconstitutional because excepting persons treating eyes by the use of drugs, they being regulated under another statute.[1]

[1] McNaughton v. Johnson, 242 U. S. 344 [1917].

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A regulation preventing advertising by dentists does not deny equal protection of the laws because not applicable to other professional classes.[1]

[1] Semler v. Oregon State Dental Examiners, 294 U. S. 608 [1935].

Natural Gas.

The equal protection of the laws is not denied by a State statute which makes the location of a well or other source of supply of natural gas within 10 miles of an incorporated town or industrial plant essential to render applicable the prohibition of the statute against the use of natural gas for products where such gas is burned or consumed without fully and actually applying and utilizing the heat therein contained for other manufacturing or domestic uses, and against the sale or disposition of such gas by the owner or lessee of the wells for the purpose of manufacturing or producing carbon or other resultant products from the burning or consumption of such gas unless the heat therein contained is fully and actually applied and utilized for other manufacturing or domestic purposes.[1] And a statute prohibiting the use of sweet natural gas for the manufacture of carbon black is not unconstitutional because not applicable to sour gas, or because not prohibiting use of sweet gas as fuel by manufacturers of other articles.[2]

[1] Walls v. Midland Carbon Co., 254 U. S. 300 [1920].
[2] Henderson Co. v. Thompson, 300 U. S. 258 [1937].

Paints.

A statute of North Dakota requiring the manufacturers and vendors of mixed paints to label the ingredients composing them is not unconstitutional as denying equal protection of the laws because the requirements of the statute may not apply to paste paints.[1]

[1] Heath & M. Mfg. Co. v. Worst, 207 U. S. 338 [1907].

Sale of Patented Articles.

A statute requiring that a negotiable instrument taken in payment for a patented article show on its face what it was given for is not void because it exempts merchants and dealers selling patented articles in the usual course of business.[1]

[1] Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251 [1907].

Peddlers, Drummers, Collectors, Etc.

A State may classify and regulate itinerant vendors and peddlers,[1] may regulate the sale by them of drugs and medicines,[2] prohibit drumming or soliciting on trains for business for hotels, medical practitioners, etc.,[3] or solicitation by a layman engaged in the business of collecting and adjusting claims.[4]

[1] Emert v. Missouri, 156 U. S. 296 [1895].
[2] Baccus v. Louisiana, 232 U. S. 334 [1914].
[3] Williams v. Arkansas, 217 U. S. 79 [1910].
[4] McCloskey v. Tobin, 252 U. S. 107 [1920].

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Sale of Securities, Futures, Etc.

A prohibition on the sale of capital stock on margin or for future delivery which is not applicable to other objects of speculation, e.g., cotton, grain, does not deny equal protection of the laws.[1]

[1] Otis v. Parker, 187 U. S. 606 [1903].

A classification of persons keeping places where stocks, bonds, and such commodities as grain, petroleum, and cotton are dealt in for future and not actual delivery, is a reasonable one.[1]

[1] Broadnax v. Missouri, 219 U. S. 285 [1911].

Sales in Bulk.

A statute requiring retail merchants, but not wholesale merchants, making sales in bulk to record the same does not deny equal protection of the laws.[1]

[1] Lemieux v. Young, 211 U. S. 489 [1909].

Stock Yards and Slaughter Houses.

A statute limiting the slaughter of cattle to a company created by it does not deny other butchers equal protection of the law.[1] A stock-yard company is denied equal protection by an act which limits the charges to be made by it without limiting the charges made by similar companies doing a smaller business.[2]

[1] Slaughter House Cases, 16 Wall. 36, 81 [1873].
[2] Cotting v. Godard, 183 U. S. 79 [1901].

REGULATIONS AFFECTING MOTOR VEHICLES.*

Laws affecting motor vehicles are not wanting in equal protection because—

(1) Other vehicles are exempt from guest-passenger regulations.[1]

(2) Small vehicles are exempt from graduated registration fees on carriers for hire.[2]

(3) Vehicles from other States are exempt from registration requirements.[3]

(4) "Driverless automobiles for hire" are classified as public vehicles, and required to procure a license and liability insurance.[4]

(5) Buses and temporary movements of farm implements and machinery and trucks making short hauls from common carriers are exempt from net load and length of truck requirements.[5]

(6) Uncertificated carriers are not permitted to operate.[6]

(7) Persons whose chief business is farming and dairying but who occasionally haul farm and dairy products for compensation, and certain lumber haulers are exempt from regulations affecting carriers for hire.[7]

(8) Persons whose vehicles haul passengers and farm products between points not having railroad facilities or hauling farm and dairy

* *See also* pp. 187, 211, 790, 818, 851, 994.

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products for a producer are exempt from a vehicle license tax on private motor carriers.[8]

(9) Private vehicles, street cars, and omnibuses are exempt from insurance requirements applicable to taxicabs.[9]

[1] Silver v. Silver, 280 U. S. 117 [1929].
[2] Carley & Hamilton v. Snook, 281 U. S. 66 [1930].
[3] Storaasli v. Minnesota, 283 U. S. 57 [1931].
[4] Hodge Drive-It-Yourself Co. v. Cincinnati, 284 U. S. 335 [1932].
[5] Sproles v. Binford, 286 U. S. 374 [1932].
[6] Bradley v. Public Utilities Commission, 289 U. S. 92 [1933].
[7] Hicklin v. Coney, 290 U. S. 169 [1933].
[8] Aero Mayflower Transit Co. v. Georgia Pub. Serv. Commission, 295 U. S. 285 [1935].
[9] Packard v. Banton, 264 U. S. 140 [1924].

But a compulsory insurance statute for common and private motor carriers that exempts carriers of farm and dairy products and fish denies equal protection of the laws.[1]

[1] Smith v. Cahoon, 283 U. S. 553 [1931].

BUILDING HEIGHTS.

A State statute under which a municipal commission may limit the height of buildings in commercial districts to 125 feet and in districts other than commercial districts to 80–100 feet does not deny protection of the laws.[1]

[1] Welch v. Swasey, 214 U. S. 91 [1909].

CANCELLATION OF LAND CONTRACT.

A statute providing that the vendor of lands cannot cancel the contract without reasonable notice with opportunity to the vendee to comply with the terms is within the police power and not a denial of equal protection.[1]

[1] Selover, B. & Co. v. Walsh, 226 U. S. 112 [1912].

DUCK BLINDS.

A State law for the conservation of waterfowl and for the protection of persons engaged in shooting them, which provides that duck blinds in the public waters shall be at least 500 yards apart and gives the riparian owner a preferential right to select the position for a blind, but which forbids him to place one within 250 yards of the land of an adjoining owner without the latter's consent, does not violate the equality clause of the Fourteenth Amendment as a discrimination in favor of persons owning a water frontage of more than 500 yards and against those who own less. That the law does not apply uniformly to all the waters of the State, in that for some the minimum distance between blinds is 250 yards and for others there are special exemptions, is not a ground for declaring it invalid, in the absence of facts proving the classification unreasonable.[1]

[1] Wampler v. Lecompte, 282 U. S. 172 [1930].

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STERILIZATION OF DEFECTIVES.

A statute providing for sterilization of defectives in institutions does not deny equal protection of the laws because not applicable to defectives outside the institutions.[1]

[1] Buck v. Bell, 274 U. S. 200 [1927].

SECRET SOCIETIES.

A statute prohibiting Greek-letter fraternities and other societies in the educational institutions of the State does not deny equal protection by reason of permitting those students already members of such societies to continue their membership under specified conditions.[1]

[1] Waugh v. University of Mississippi, 237 U. S. 589 [1915].

Regulation of secret societies does not violate the equal protection clause when applied to one class of oath-bound associations and not to another, if the class regulated has a tendency to make the secrecy of its purpose and membership a cloak for conduct inimical to the personal rights of others and to the public welfare, while the other class is free from that tendency; confining such regulations to associations having a membership of 20 or more persons is not an unreasonable discrimination.[1]

[1] New York ex rel. Bryant v. Zimmerman, 278 U. S. 63 [1928].

SYNDICALISM.

A criminal syndicalism statute does not deny equal protection in penalizing those who advocate a resort to violent and unlawful methods as a means of changing industrial and political conditions while not penalizing those who advocate resort to such methods for maintaining such conditions.[1]

[1] Whitney v. California, 274 U. S. 357 [1927].

RED-LIGHT DISTRICTS.

A municipal ordinance prescribing limits in that city outside of which no woman of lewd character shall dwell does not deny property owners within the prescribed limits of equal protection of the laws.[1]

[1] L'Hote v. New Orleans, 177 U. S. 587, 595 [1900].

Taxation.*

IN GENERAL.

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it

* *See also* pp. 204, 342, 361, 366, 531, 854.

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may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation." [1]

[1] Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 237 [1890]. *See also* Cincinnati, N. O. & T. P. R. Co. *v.* Kentucky (Kentucky Railroad Tax Cases), 115 U. S. 321 [1885]; Home Ins. Co. *v.* New York 134 U. S. 594 [1890]; Jennings *v.* Coal Ridge Improv. & Coal Co., 147 U. S. 147 [1893]; Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194 [1897]; Kehrer *v.* Stewart, 197 U. S. 60 [1905]; Armour Packing Co. *v.* Lacy, 200 U. S. 226 [1906]; Michigan C. R. Co. *v.* Powers, 201 U. S. 245, 293 [1906]; Southwestern Oil Co. *v.* Texas, 217 U. S. 114 [1910]; Brown-Forman Co. *v.* Kentucky, 217 U. S. 563, 573 [1910]; Kentucky Union Co. *v.* Kentucky, 219 U. S. 140 [1911]; Keeney *v.* New York, 222 U. S. 525 [1912]; Citizens' Teleph. Co. *v.* Fuller, 229 U. S. 322 [1913]; Northwestern Mut. L. Ins. Co. *v.* Wisconsin, 247 U. S. 132 [1918]; Swiss Oil Corp. *v.* Shanks, 273 U. S 407 [1927]; Hart Refineries *v.* Harmon, 278 U. S. 499 [1929]; State Tax Comrs. *v.* Jackson, 283 U. S. 527, 537 [1931]; Lawrence *v.* State Tax Commission, 286 U. S. 276 [1932]; Carmichael *v.* Southern Coal & Coke Co., 300 U. S. 644 [1937].

"The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances * * * and that it applies to the exercise of all the powers of the State which can affect the individual or his property, including the power of taxation." [1]

[1] Louisville Gas & E. Co. *v.* Coleman, 277 U. S. 32, 37 [1928].

Delegation by the legislature to city councils, etc., of power to divide occupations and privileges into classes is recognized, and the power of classification whether exercised by the State directly or by the municipality, is an exercise of legislative discretion and subject to guarantee of the Fourteenth Amendment.[1]

[1] Bradley *v.* Richmond, 227 U. S. 477 [1913].

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An alleged inconsistency in the reasoning of the court in tax cases is no ground for asserting denial of equal protection of the laws.[1]

[1] Lombard v. West Chicago Park, 181 U. S. 33 [1901].

WHO MAY ALLEGE DISCRIMINATION.

One not within the class claimed to be discriminated against cannot raise the question of constitutionality of a statute on the ground that it denies equal protection by such discrimination.[1] Municipal corporations have no standing to invoke the equal protection of the laws clause in opposition to a State statute.[2] If a State taxing provision results in the application of the tax to a class that may be separately taxed, those within the taxed class may not complain because the class might have been more aptly defined or because others, not of that class, are taxed improperly.[3] A State tax will not be upset upon hypothetical or unreal possibilities if good upon facts such as they are.[4]

[1] Darnell v. Indiana, 226 U. S. 390 [1912]; Farmers & M. Sav. Bank v. Minnesota, 232 U. S. 516 [1914].
[2] Williams v. Baltimore, 289 U. S. 36 [1933].
[3] Morf. v. Bingaman, 298 U. S. 407 [1936].
[4] Pullman Co. v. Knott, 235 U. S. 23 [1914].

CLASSIFICATION IN GENERAL.

"This court has frequently said that absolute equality in taxation cannot be obtained and is not required under the Fourteenth Amendment. This, of course, is not to say that, because some degree of inequality from the nature of things must be permitted, gross inequality must also be allowed. * * * If the evident intent and general operation of the tax legislation are to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied." [1]

[1] Colgate v. Harvey, 296 U. S. 404, 422 [1935]. *See also* St. Louis S. W. R. Co. v. Arkansas ex rel. Norwood, 235 U. S. 350 [1914]; Concordia F. Ins. Co. v. Illinois, 292 U. S. 535 [1934].

"It is settled beyond the admissibility of further inquiry that the equal protection clause of the Fourteenth Amendment does not preclude the States from resorting to classification for the purpose of legislation. Royster Guano Co. v. Virginia, 253 U. S. 412, 415. And 'the power of the State to classify for purposes of taxation is of wide range and flexibility * * *' Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 37." [1]

[1] Colgate v. Harvey, 296 U. S. 404, 422 [1935].

"If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." [1] But the classification may not be arbitrary; it must be based on a real and

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substantial difference.[2] It may not be altogether illusory,[3] but where there is a difference it need not be great or conspicuous in order to warrant classification.[4]

[1] Brown-Forman Co. *v.* Kentucky, 217 U. S. 563, 573 [1910]. *See also* Louisville Gas & E. Co. *v.* Coleman, 277 U. S. 32 [1928].

[2] Southern R. Co. *v.* Greene, 216 U. S. 400 [1910]; Quaker City Cab Co. *v.* Pennsylvania, 277 U. S. 389 [1928]; Colgate *v.* Harvey, 296 U. S. 404, 422 [1935].

[3] Royster Guano Co. *v.* Virginia, 253 U. S. 412 [1920].

[4] Keeney *v.* New York, 222 U. S. 525, 536 [1912]; State Tax Comrs. *v.* Jackson, 283 U. S. 527, 537 [1931].

Discriminations of an unusual character especially suggest careful considerations to determine whether they are obnoxious to the constitutional provision.[1] But it is not the function of the Court to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. It is the Court's duty to sustain the classification if there are substantial differences between the occupations separately classified. Such differences need not be great.[2] It is enough that there is no discrimination in favor of one as against another of the same class.[3]

[1] Louisville Gas & E. Co. *v.* Coleman, 277 U. S. 32, 37 [1928]. *See also* Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 237 [1890].

[2] State Tax Comrs. *v.* Jackson, 283 U. S. 527, 537 [1931].

[3] Giozza *v.* Tiernan, 148 U. S. 657 [1893].

"A State does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry."[1]

[1] Quong Wing *v.* Kirkendall, 223 U. S. 59, 62 [1912]. *See also* Hammond Packing Co. *v.* Montana, 233 U. S. 331 [1914].

A State may tax different types of taxpayers differently though they compete.[1]

[1] Puget Sound Power & Light Co. *v.* Seattle, 291 U. S. 619, 625 [1934].

A classification in State taxation required by the commerce clause,[1] or recognized by the Twenty-first Amendment,[2] cannot be held to violate the equal protection clause of the Fourteenth Amendment. Similarly, where the license tax for the business of producing the product cannot be imposed on the business beyond the State, it is not discriminatory.[3]

[1] Matson Navigation Co. *v.* Board of Equalization, 297 U. S. 441 [1936]. *See also* Raley & Bros. *v.* Richardson, 264 U. S. 157 [1924].

[2] State Board of Equalization *v.* Youngs Market Co., 299 U. S. 59 [1936].

[3] Brown-Forman Co. *v.* Kentucky, 217 U. S. 563 [1910].

A classification calculated to avoid double taxation cannot be condemned as arbitrary.[1]

[1] Colgate *v.* Harvey, 296 U. S. 404, 420 [1935].

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PROPERTY.

Classification and Exemption.

A State, upon reasonable grounds, may classify property and lay an appropriate tax upon each class.[1] "The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy," [2] and it matters not whether an exemption results from the plain language of a statute or from the conduct of a State official under it.[3] The fact that a statute can only meet conditions such as are embraced within the law in a part of the counties of the State does not render it obnoxious to the equal protection of the laws clause.[4]

[1] Alward *v.* Johnson, 282 U. S. 509 [1931].
[2] Royster Guano Co. *v.* Virginia, 253 U. S. 412, 414 [1920].
[3] Missouri ex rel. Hill *v.* Dockery, 191 U. S. 165 [1903].
[4] Kentucky Union Co. *v.* Kentucky, 219 U. S. 140, 161 [1911].

A State may tax the stock of foreign railroads held by citizens although it does not tax the stock of domestic railroads or foreign railroads doing business therein,[1] may tax membership in associations conducting exchanges in which business transactions are conducted for profit although membership in other associations not conducting business exchanges are exempt,[2] may tax membership of residents in nonresident stock exchange although membership in local exchanges are exempt,[3] may treat ore lands as a distinct class of property and impose upon them a tax not extended to quarries, forests, etc.,[4] may tax stock in corporations when less than 75 percent of their property is taxable and exempt stock in corporations when 75 percent of their property is taxable.[5]

[1] Kidd *v.* Alabama, 188 U. S. 730, 731 [1903].
[2] Rogers *v.* Hennepin County, 240 U. S. 184 [1916].
[3] Citizens' National Bank *v.* Durr, 257 U. S. 99 [1921].
[4] Lake Superior Consol. Iron Mines *v.* Lord, 271 U. S. 577 [1926].
[5] Klein *v.* Tax Supervisors, 282 U. S. 19 [1930].

Valuation.

The purpose of the equal protection clause is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by State officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property;[1] but mere errors in judgment resulting in unequal overvaluation or undervaluation, not intentional or systematic, will not support a claim of discrimination.[2] The discrimination may be the result of action by different officials.[3] An owner aggrieved by

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discrimination is entitled to have his assessment reduced to the common level.[4]

[1] Sunday Lake Iron Co. *v.* Wakefield Twp., 247 U. S. 350, 352 [1918]. *See also* Raymond *v.* Chicago Union Traction Co., 207 U. S. 20, 35, 37 [1907]; Downman *v.* Texas, 231 U. S. 353 [1914]; Sioux City Bridge Co. *v.* Dakota County, 260 U. S. 441 [1923]; Bohler *v.* Callaway, 267 U. S. 479 [1925]; Cumberland Coal Co. *v.* Board of Revision, 284 U. S. 23, 28 [1931]; Concordia F. Ins. Co. *v.* Illinois, 292 U. S. 535 [1934]; Great Northern R. Co. *v.* Weeks, 297 U. S. 135, 139 [1936].

[2] Ibid. *See also* Coulter *v.* Louisville & N. R. Co., 196 U. S. 599 [1905]; Chicago, B. & Q. R. Co. *v.* Babcock, 204 U. S. 585 [1907].

[3] Greene *v.* Louisville & I. R. Co., 244 U. S. 499 [1917]; Southern R. Co. *v.* Watts, 260 U. S. 519, 526 [1923].

[4] Sioux City Bridge Co. *v.* Dakota County, 260 U. S. 441 [1923].

Where assessments of tangible and intangible railroad property are made independently by separate boards, but the taxes are laid on both at the same rates and treated as constituting together a single ad valorem tax, systematic and intentional assessment of the intangibles at full value while tangible property in general is assessed at less, does not deny the railroad equal protection of the law, if, by reason of lower valuation of its tangible property, its property in the aggregate is not valued at a higher rate than other property.[1]

[1] Baker *v.* Druesedow, 263 U. S. 137 [1923].

A corporation whose valuations were accepted by the assessing commission, cannot complain that it was taxed disproportionately as compared with other railroads, the commission not having acted fraudulently.[1]

[1] St. Louis-San Francisco R. Co. *v.* Middlekamp, 256 U. S. 226 [1921].

The allowing of appeal by one class of taxpayers and not by another,[1] or giving assessors two chances to arrive at a valuation for one class and but a single chance in another,[2] does not work a denial of equal protection.

[1] Pittsburgh, C. C. & St. L. R. Co. *v.* Backus, 154 U. S. 421, 427 [1894].

[2] New York ex rel. New York Clearing House Bldg. Co. *v.* Barker, 179 U. S. 279, 285 [1900].

Payment by Lessees of State Lands.

Whether landlords or tenants shall pay taxes on leased property is a matter of private arrangement, and a statute compelling tenants of the State to pay taxes does not deny them equal protection of the laws because there may be a practice the other way in private leases.[1]

[1] Trimble *v.* Seattle, 231 U. S. 683 [1914].

ASSESSMENTS FOR PUBLIC IMPROVEMENTS.

Whenever a law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied.[1] "* * * only where there is manifest and unreasonable discrimi-

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nation in fixing the benefits which the several parcels will receive can the legislative determination be said to contravene the equal protection clause. * * *"[2]

[1] Walston *v.* Nevin, 128 U. S. 578, 582 [1888], citing Richmond, F. & P. R. Co. *v.* Richmond, 96 U. S. 521, 529 [1878]; Wurts *v.* Hoagland, 114 U. S. 606, 616 [1885].

[2] Kansas City S. R. Co. *v.* Road Improv. Dist., 266 U. S. 379, 386 [1924].

A tax in an improvement district does not become discriminatory merely because spread over the property on an ad valorem basis, nor does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community.[1]

[1] Memphis & C. R. Co. *v.* Pace, 282 U. S. 241 [1931].

Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality.[1] Thus, a special highway assessment against railroads based on real property, rolling stock, and other personal property was held unjustly discriminatory, when other assessments for the same improvement were based on real property alone.[2] But in taxing railroads within a levee district on a mileage basis, it is not necessarily arbitrary to fix a lower rate per mile for those having less than 25 miles of main line within the district than for those having more.[3]

[1] Kansas City S. R. Co. *v.* Road Improv. Dist., 256 U. S. 658, 661 [1921].

[2] Road Improv. Dist. *v.* Missouri P. R. Co., 274 U. S. 188 [1927]; *but see* Branson *v.* Bush, 251 U. S. 182 [1919]; and Thomas *v.* Kansas City S. R. Co., 261 U. S. 481 [1923].

[3] Columbus & G. R. Co. *v.* Miller, 283 U. S. 96 [1931].

An assessment against a street-railway company for paving between and near its tracks and rails, greater than the amount assessed for the rest of the pavement on abutting lots valued much higher than the railway property on the street, is not arbitrary or unreasonable.[1] Further, a statute construed as permitting paving assessments against street railways without regard to benefits and all others with regard to benefits, is not a denial of equal protection.[2]

[1] Durham Public Service Co. *v.* Durham, 261 U. S. 149 [1923].

[2] Georgia R. & E. Co. *v.* Decatur, 297 U. S. 620 [1936].

A provision in State statutes that certain improvements will not be made if a majority of the resident owners liable to taxation protest, is not unconstitutional in not extending the privilege to nonresident owners.[1]

[1] Field *v.* Barber Asphalt Paving Co., 194 U. S. 618 [1904].

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The owners of back-lying property are not denied the equal protection of the law if they have such notice and opportunity to be heard as is accorded to the owners of property abutting on the improvement.[1]

[1] Cleveland, C. C. & St. L. R. Co. *v.* Porter, 210 U. S. 177 [1908].

The Federal courts will not interfere with a sewer assessment because certain abutting property benefited by the improvement was excluded from the assessment.[1]

[1] Goldsmith *v.* Prendergast Constr. Co., 252 U. S. 12 [1920].

CORPORATIONS.

Measure and Basis of Tax.

As applied to domestic corporations doing only an intrastate business, a State franchise tax measured by a flat rate on authorized capital stock, adopting the par value for par-value stock and $100 per share for no-par stock, is not such a discrimination as infringes the equal protection of the Fourteenth Amendment, either (1) as between corporations whose authorized no-par shares may be of like number but represent very different capital values, or (2) as between corporations with par-value stock and corporations with no-par-value stock.[1] No-par stock may also be taxed at a flat rate per share and par-value stock taxed at a fixed percentage of par, for measuring a franchise or license tax.[2] But as applied to a foreign corporation doing both an intrastate and interstate business, a privilege tax based on a proportion of the authorized no-par stock, all not having been issued, is unconstitutional.[3]

[1] Roberts & S. Co. *v.* Emmerson, 271 U. S. 50 [1926]. *See also* International Shoe Co. *v.* Shartel, 279 U. S. 429 [1929].
[2] New York *v.* Latrobe, 279 U. S. 421 [1929].
[3] Air-way Electric Appliance Corp. *v.* Day, 266 U. S. 71 [1924].

A State law which taxes all the income of local corporations derived from business done outside the State and business done within it, while exempting entirely the income derived outside the State by local corporations which do no local business, is arbitrary and violates the equal protection clause.[1]

[1] Royster Guano Co. *v.* Virginia, 253 U. S. 412 [1920].

It is not an arbitrary discrimination for a State to impose privilege taxes upon domestic old line, level premium life-insurance companies while exempting fraternal societies having lodge organizations and insuring the lives of members only.[1] But a State statute taxing foreign insurance companies writing fire, marine, inland navigation, and casualty insurance, on net receipts, including receipts from casualty business, though not imposing a like tax on foreign companies writing only casualty insurance, violates the equal protection clause.[2]

[1] Northwestern Mut. L. Ins. Co. *v.* Wisconsin, 247 U. S. 132 [1918].
[2] Concordia F. Ins. Co. *v.* Illinois, 292 U. S. 535 [1934].

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A State may impose an entrance fee for a foreign corporation measured solely by the amount of its authorized capital stock.[1]

[1] Atlantic Refining Co. v. Virginia, 302 U. S. 22 [1937].

Discrimination Between Corporations and Individuals.

A gross-receipts tax levied on corporations operating a taxicab business but not on individuals operating such a business results in a discrimination not justified by any difference in the source of the receipts or in the situation or character of the property employed, and is violative of the equal protection clause.[1] But a State may tax its own corporations in respect of stock held by them in other domestic corporations, although unincorporated stockholders are exempt, the court declaring that "a discrimination between corporations and individuals with regard to a tax like this cannot be pronounced arbitrary, although we may not know the precise ground of policy that led the State to insert the distinction of law."[2]

[1] Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389 [1928].

[2] Ft. Smith Lumber Co. v. Arkansas ex rel. Arbuckle, 251 U. S. 532, 533 [1920].

"The mere fact that the law gives the assessors in the case of corporations two chances to arrive at a correct valuation of their real estate, when they have but one in the case of individuals cannot be held to be a denial of the equal protection of the laws, so long as the real estate of the individual is, in fact, generally assessed at its full value."[1]

[1] New York ex rel. New York Clearing House Bldg. Co. v. Barker, 179 U. S. 279, 285 [1900]. *See also* Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 427 [1894].

Discrimination Between Domestic and Foreign Corporations.*

A foreign corporation which is duly admitted to do business in a State is to be classified with similar domestic corporations in testing the equality of the laws enacted for the purpose of raising revenue.[1] "* * * to tax the foreign corporations for carrying on business * * * by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws * * *",[2] but this does not require identical taxes in all cases upon domestic and foreign corporations.[3]

[1] Hanover F. Ins. Co. v. Harding (Carr), 272 U. S. 494, 495 [1926].

[2] Southern R. Co. v. Greene, 216 U. S. 400, 418 [1910].

[3] Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 88 [1914]. *See also* Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111 [1916]; Cheney Bros. Co. v. Massachusetts, 246 U. S. 147 [1918].

It is not an arbitrary discrimination against domestic life-insurance corporations for a State to tax them by taking a percentage

* *See also* pp. 135, 195, 959.

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of their gross receipts, while exacting a fixed and comparatively slight fee from similar foreign corporations for the privilege of doing local business of the same kind.[1]

[1] Northwestern Mut. L. Ins. Co. v. Wisconsin, 247 U. S. 132 [1918].

BANKS.

A provision in a State tax statute excepting banks from an exemption, is not unconstitutional as discrimination against savings banks.[1] Savings banks may be classed separately from other banks.[2]

[1] Farmers & M. Sav. Bank v. Minnesota, 232 U. S. 516 [1914].
[2] National Bank of Redemption v. Boston, 125 U. S. 60 [1888].

Within the intendment of the Fourteenth Amendment, shares of national banks and shares of State banks are not essentially the same when considered from the standpoint of taxation, and thus where the State attempted to treat them alike and the tax as to national banks was held bad, it did not result in discrimination to continue to tax the State banks.[1] A State law taxing all the property of banks that make loans mainly from money of depositors, but excepting other competing moneyed capital employed in making loans mainly from money supplied otherwise than by deposits, is consistent with the equal protection of laws clause.[2] A State tax on interest-bearing deposits in national banks does not deny equal protection of the law on account of exemptions which it is within the power of the State to allow or on account of the exemption of noninterest-bearing accounts.[3]

[1] Union Bank & T. Co. v. Phelps, 288 U. S. 181 [1933].
[2] First Nat. Bank v. Louisiana Tax Commission, 289 U. S. 60 [1933].
[3] Clement Nat. Bank v. Vermont, 231 U. S. 120 [1914].

PUBLIC UTILITIES.

In General.

The action of a State board of equalization in assessing the franchises and other property of certain companies at a different rate and by a different method from that which had been employed by the board for other corporations of the same class for that year, resulting in an enormous disparity and discrimination between the various assessments upon the corporations, is a denial of the equal protection of the laws.[1]

[1] Raymond v. Chicago Union Traction Co., 207 U. S. 20 [1907].

"* * * equal protection does not require a city to abstain from taxing the business of a corporation organized for profit merely because in the public interest the municipality has acquired like property or conducts a like business. These differences are not lessened nor the constitutional exaction of uniformity increased because the city competes with a business which it taxes." [1]

[1] Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, 624 [1934].

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Railroads and Street Railways.

A gross receipts tax on railroads at one rate and on other utilities at a lower rate does not deny railroads equal protection of the laws,[1] nor is it an unlawful discrimination to place a heavier burden on railroads than on other common carriers by bus.[2]

[1] Ohio Tax Cases (Ohio River & W. R. Co. v. Dittey), 232 U. S. 576 [1914].

[2] Nashville, C. & St. L. R. Co. v. Wallace, 288 U. S. 249 [1933].

An income tax on railroads is not unconstitutional because it fails to allow deductions allowed other corporations and individuals, and because it exempts certain short line railroads from the necessity of keeping certain accounts.[1]

[1] Atlantic Coast Line R. Co. v. Daughton 262 U. S. 413 [1923].

A State tax system apportioning the transitory and unlocated property of a railroad among the several counties through which the road extends instead of taxing it at the principal office, does not deny equal protection of the laws. Likewise, railroad and corporate property may be taxed for State purposes at the average rate applicable to other property subject to ad valorem taxes.[1]

[1] Columbus S. R. Co. v. Wright, 151 U. S. 470 [1894].

Where three railroads operating solely in their respective States consolidated under concurrent legislative acts of the three States, the acts all treating the consolidation as a domestic corporation, a franchise tax, imposed equally on all corporations, consolidated or otherwise, and based on the entire paid-up capitalization, did not deny equal protection of the laws.[1]

[1] Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111 [1916].

The property of a street-railway company, in view of its peculiar character, may be classified differently from property of commercial steam railways, without violating the equal protection clause.[1] Street railways may be subjected to a tax for each mile of track, notwithstanding that steam railroads making an extra charge for local deliveries are not subject to such tax.[2] The difference between surface and subsurface street railways is sufficient to justify classification as to mode and extent of taxation.[3]

[1] Puget Sound & Power Light Co. v. King County, 264 U. S. 22 [1924].

[2] Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392 [1905].

[3] New York ex rel. Metropolitan Street R. Co. v. State Bd. of Tax Comrs., 199 U. S. 1 [1905].

Express Companies.

The classification of express companies with railroads and telegraph companies, as subject to the unit rule, does not deny them equal protection.[1] On the other hand, neither does the placing of them in

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a separate class for purpose of notice of certain proceedings deny them equal protection,[2] nor does the taxing of them while exempting persons owning their own means of transportation effect an unlawful discrimination.[3] An express company may be required to pay a tax before commencing business, while established companies have 30 days each year to renew their license.[4]

[1] Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194 [1897].
[2] Southeastern Exp. Co. *v.* Robertson, 264 U. S. 535 [1924].
[3] Pacific Exp. Co. *v.* Seibert, 142 U. S. 339, 353 [1892].
[4] Southeastern Exp. Co. *v.* Robertson, 264 U. S. 535 [1924].

Telephone and Telegraph.

Telephone and telegraph corporations may be classified according to size, and large corporations are not denied equal protection of the laws because corporations having gross receipts of less than $500 are exempt.[1]

[1] Citizens' Teleph. Co. *v.* Fuller, 229 U. S. 322 [1913].

Electricity.

A State tax on production and sale of electricity generated by water or steam power does not deny to those so producing it the equal protection of the laws because it does not extend to producers by internal combustion engines or to industrial plants generating electricity for their own use.[1] Municipal-owned systems may be exempted,[2] and so may be that portion of electricity produced as is used for pumping water for irrigating lands.[3]

[1] Broad River Power Co. *v.* Query, 288 U. S. 178 [1933].
[2] Puget Sound Power & Light Co. *v.* Seattle, 291 U. S. 619 [1934].
[3] Utah Power & Light Co. *v.* Pfost, 286 U. S. 165 [1932].

PRODUCTION OF NATURAL RESOURCES.

An occupation tax on the business of mining ore, measured by a percentage of the ore produced, applicable only to those engaged as owners or lessees on their own account, and not to those who did mining work for them under contract nor to development work by owners or lesees, is not a denial of equal protection of the laws.[1]

[1] Oliver Iron Min. Co. *v.* Lord, 262 U. S. 172 [1923].

The Fourteenth Amendment does not prohibit State legislation imposing a severance tax upon furs and hides of wild animals, even if no similar tax is levied upon other property of merchants.[1]

[1] Lacoste *v.* Department of Conservation, 263 U. S. 545 [1924].

A tax on natural gas production is not invalid because it provides for an exemption of $10,000, since the same privilege is extended to all producers.[1]

[1] Hope Natural Gas Co. *v.* Hall, 274 U. S. 284 [1927].

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In view of the differences between anthracite and bituminous coals in property and use, a State tax of 2½ percent on anthracite coal is not unreasonable and arbitrary because not levied on bituminous coal.[1]

[1] Heisler v. Thomas Colliery Co., 260 U. S. 245 [1922].

In laying a graduated specific severance tax per barrel on oils sold primarily for their gasoline content, resort to Baumé gravity, as the basis of classification cannot be regarded as palpably arbitrary, it appearing that gravity, though not invariably accurate as a test, is generally regarded in the industry as indicative of gasoline content and is used by the industry, including the complaining taxpayer, in fixing the price of such oils.[1]

[1] Ohio Oil Co. v. Conway, 281 U. S. 146 [1930].

SALES TAXES.

A tax on sales is in effect a tax on goods sold and such a tax graduated at increasing rates (a percentage of sales) with the volume of sales is arbitrary and violative of the equal protection clause; convenience in administration will not justify such a tax as a method of taxing gains, when it ignores the consequent inequalities of burden.[1] However, a license fee in specified sums graduated according to the volume of sales is not unconstitutional.[2]

[1] Stewart Dry Goods Co. v. Lewis, 294 U. S. 550 [1935]. *See also* Valentine v. Great A. & P. Tea Co., 299 U. S. 32 [1936].
[2] Clark v. Titusville, 184 U. S. 329 [1902].

GASOLINE TAXES.

A distributor of gasoline, in being required to prepay to the State the taxes that are ultimately to be passed on to and paid by those who buy the gasoline for local consumption as motor-vehicle fuel, is not himself taxed but is merely made a collecting agency, and has no ground for alleging that he is deprived of equal protection of the laws by a statutory provision under which the tax, when paid on gasoline for other uses not taxed, is refunded to the consumer.[1]

[1] Monamotor Oil Co. v. Johnson, 292 U. S. 86 [1934].

Because the State legislature could have laid a tax upon the use of gasoline as well as upon its sale, it by no means follows that a failure to do so constituted a forbidden discrimination.[1]

[1] Hart Refineries v. Harmon, 278 U. S. 499 [1929].

A State may tax gasoline bought and imported from another State and which has come to rest within the taxing State and is stored there by the purchasers for future use in their local business, and such a tax is not a discrimination violative of the equal protection clause if the same burden is in effect imposed on all other consumers of gasoline through a tax on local sales which is passed on to the purchasers.[1]

[1] Gregg Dyeing Co. v. Query, 286 U. S. 472 [1932].

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MISCELLANEOUS SALES AND INSPECTION TAXES.

A statute levying a tax of 2 cents on each $100 of face value of stock for every sale or agreement to sell the same, to be paid by affixing and canceling stamps, does not deny equal protection of the laws.[1] A State may restrict the manufacture of oleomargarine in a way that does not hamper that of butter, and the State may express and carry out its policy by revenue legislation.[2]

[1] New York, ex rel. Hatch *v.* Reardon, 204 U. S. 152 [1907].
[2] Hammond Packing Co. *v.* Montana, 233 U. S. 331 [1914].

A fee exceeding the cost of inspection of petroleum and petroleum products, and fixed according to quantity, and imposed only once upon dealers at the time of first domestic sale, or during storage, and upon persons who import for their own consumption, is an excise and not arbitrary.[1]

[1] Texas Co. *v.* Brown, 258 U. S. 466 [1922].

CHAIN-STORE TAXES.

A State privilege tax on chain stores, graduated according to the number of stores maintained, is not invalid as discrimination in favor of single and department stores or voluntary chains;[1] and the tax may be made so heavy as to discourage multiplication of the units to an extent believed to be inordinate.[2] It is not a denial of equal protection of the laws to impose a license on chain stores based on the number of stores both within and without the State, in that it arbitrarily discriminates in favor of local as against national chains,[3] but the provision of a statute laying a heavier tax per store because the owner's stores are located in more than one county, is unreasonable and arbitrary.[4] Gasoline stations may be included [5] or excluded [6] from the operation of a tax on chains. The fact that gasoline chains are more numerous than other kinds and because of their size pay a large percentage of the total tax collected, is no evidence of an arbitrary discrimination.[7]

[1] State Tax Comrs. *v.* Jackson, 283 U. S. 527 [1931].
[2] Fox *v.* Standard Oil Co., 294 U. S. 87 [1935].
[3] Great A. & P. Tea Co. *v.* Grosjean, 301 U. S. 412 [1937].
[4] Liggett Co. *v.* Lee, 288 U. S. 517 [1933].
[5] Fox *v.* Standard Oil Co., 294 U. S. 87 [1935].
[6] Liggett Co. *v.* Lee, 288 U. S. 517 [1933].
[7] Fox *v.* Standard Oil Co., 294 U. S. 87 [1935].

MOTOR-VEHICLE TAXES.*

In demanding compensation for use of highways, and regulating that use for public safety, a State may treat motor vehicles as a special class, and may exempt certain types of vehicles according to the purpose for which used from a mileage tax on carriers.[1] A property tax on automotive vehicles that are used in operating a stage

* *See also* pp. 187, 211, 790, 818, 851, 979.

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line that makes constant and unusual use of the highways may be measured by gross receipts and be assessed at a higher rate than taxes on property not so employed.[2] Taxing common motor carriers of freight operating over regular routes between fixed termini at higher rates than other carriers, common and private, is not an unreasonable classification.[3]

[1] Continental Baking Co. v. Woodring, 286 U. S. 352 [1932].
[2] Alward v. Johnson, 282 U. S. 509 [1931].
[3] Bekins Van Line v. Riley, 280 U. S. 80 [1929].

A fee for the privilege of transporting motor vehicles on their own wheels over the highways of the State for purpose of sale, is not violative of the equal protection clause as applied to cars moving in caravans.[1]

[1] Morf v. Bingaman, 298 U. S. 407 [1936].

MISCELLANEOUS LICENSE TAXES.

Laws imposing miscellaneous license fees have been upheld as follows:

(1) Auctioneers: Classification as to rate according to location in Hawaii.[1]

(2) Cigarette dealers: Vesting in mayor power to grant or refuse license,[2] or taxing retailers and not wholesalers.[3]

(3) Commission merchants: Requirement that dealers in farm products on commission procure a license.[4]

(4) Elevators and warehouses: License limited to certain elevators and warehouses on right-of-way of railroad.[5]

(5) Emigrant agents: License for hiring persons to labor outside State limits.[6]

(6) Importers of beer: License for privilege of importing beer.[7]

(7) Insurance agents: Requirement that a foreign insurance company pay a $500 fee as a condition requisite to its right to appoint additional insurance agents.[8]

(8) Laundries: Exempting steam laundries and women engaged in the laundry business where not more than two women are employed from license tax requirement.[9]

(9) Meat-packing houses: License on all meat-packing houses.[10]

(10) Merchants: License on amount of purchases but exempting manufacturers within the State selling their own product.[11]

(11) Oyster packers: License of oyster packers.[12]

(12) Profit-sharing certificates: License on retail merchants issuing redeemable coupons or profit-sharing certificates.[13]

(13) Sewing machines: License on sale of sewing machines from delivery wagons.[14]

(14) Sugar refineries: License requirement applicable to refiners of sugar and molasses but exempting planters and farmers grinding and refining their own sugar and molasses.[15]

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(15) Theaters: License graded according to price of admission.[16]

(16) Wholesalers of oil: Occupation tax on wholesalers in oil but not applicable to wholesalers in other products.[17]

[1] Toyota *v.* Hawaii, 226 U. S. 184 [1912].
[2] Gundling *v.* Chicago, 177 U. S. 183 [1900].
[3] Cook *v.* Marshall County, 196 U. S. 261 [1905].
[4] Payne *v.* Kansas ex rel. Brewster, 248 U. S. 112 [1918].
[5] Cargill Co. *v.* Minnesota ex rel. Railroad & W. Commission, 180 U. S. 452 [1901].
[6] Williams *v.* Fears, 179 U. S. 270 [1900].
[7] State Board of Equalization *v.* Young's Market, 299 U. S. 59 [1936].
[8] Herbring *v.* Lee, 280 U. S. 111 [1929].
[9] Quong Wing *v.* Kirkendall, 223 U. S. 59 [1912].
[10] Armour Packing Co. *v.* Lacy, 200 U. S. 226 [1906]. *See also* Kehrer *v.* Stewart, 197 U. S. 60 [1905].
[11] Armour & Co. *v.* Virginia, 246 U. S. 1 [1918]. *See also* New York ex rel. Parke, D. & Co. *v.* Roberts, 171 U. S. 658 [1898].
[12] Leonard *v.* Earle, 279 U. S. 392 [1929].
[13] Rast *v.* Van Deman & L. Co., 240 U. S. 342 [1916].
[14] Singer Sewing Machine Co. *v.* Brickell, 233 U. S. 304 [1913].
[15] American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89 [1900].
[16] Metropolis Theatre Co. *v.* Chicago, 228 U. S. 61 [1914].
[17] Southwestern Oil Co. *v.* Texas, 217 U. S. 114 [1910].

But a license tax on persons selling automobiles, which license is reduced to one-fifth if the manufacturer has three-fourths of his assets invested in bonds of the State, its municipalities, or other property taxed in the State is unconstitutional.[1]

[1] Bethlehem Motors Corp. *v.* Flynt, 256 U. S. 421 [1921].

PERSONAL INCOME TAXES.

A State may tax a nonresident's income derived from salaries, or local property and business owned and managed by him, and the fact that the law permits residents to deduct losses sustained without as well as those sustained within the State, while nonresidents may deduct only those occurring within it, does not violate the equal protection clause.[1]

[1] Shaffer *v.* Carter, 252 U. S. 37 [1920]; Travis *v.* Yale & T. Mfg. Co., 252 U. S. 60 [1920].

INHERITANCE TAXES.

"They [inheritance taxes] are based on two principles: (1) An inheritance tax is not one on property, but one on the succession. (2) The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality

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of taxation."[1] And so it was held that there was no denial of equal protection either in discriminating between those lineally and those collaterally related to the decedent, and those standing as strangers to the blood, or in increasing the proportionate burden of the tax progressively as the amount of the benefit increased. An inheritance tax on life estates passing to collateral heirs but not to lineal heirs is not an arbitrary classification,[2] nor is it an arbitrary classification to tax bequests, etc., passing to a brother or sister while exempting those passing to a son-in-law or a daughter-in-law.[3]

[1] Magoun *v.* Illinois Trust & Sav. Bank, 170 U. S. 283, 288 [1898].
[2] Billings *v.* Illinois, 188 U. S. 97 [1903].
[3] Campbell *v.* California, 200 U. S. 87 [1906].

A State may tax the share of a wife in community property on the death of the husband,[1] transfers by deed intended to take effect in possession or enjoyment at or after death of the grantor,[2] and may impose an additional tax on certain securities which have escaped general property and alternative stamp taxes.[3]

[1] Moffett *v.* Kelly, 218 U. S. 400 [1910].
[2] Keeney *v.* New York, 222 U. S. 525 [1912].
[3] Watson *v.* State Comptroller (New York), 254 U. S. 122 [1920].

There are differences between vested and contingent remainders that justify classification in imposing inheritance taxes,[1] and it is not an unreasonable or arbitrary classification to exempt property bequeathed to charitable or educational institutions within the State while taxing those of other States.[2]

[1] Salomon *v.* State Tax Commission, 278 U. S. 484 [1929].
[2] Board of Education *v.* Illinois, 203 U. S. 553 [1906].

In computing the tax collectible from a nonresident decedent's property within the State, a State may apply the pertinent rates to the whole estate wherever located, and then take that proportion thereof which the property within the State bears to the total and this is no denial of equal protection as against the contention that a greater tax may result than would be assessed on an equal amount of property if owned by a resident.[1] An inheritance tax statute requiring payment of a tax where the decedent has real and personal property in the State but not requiring it where he has only personal property, does not deny equal protection.[2]

[1] Maxwell *v.* Bugbee, 250 U. S. 525 [1919].
[2] Beers *v.* Glynn, 211 U. S. 477 [1909].

A State statute passed after the death of a testator does not deny equal protection of the laws, because it applies to all successions not finally closed and administered, and all successions thereafter opened, and not to successions which have been closed.[1]

[1] Cahen *v.* Brewster, 203 U. S. 543 [1906].

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A State statute is unconstitutional insofar as it subjects the succession of interests under a trust created before 1907 to a tax at a higher rate than the succession of interests under a trust created subsequent to such year.[1]

[1] Binney v. Long, 299 U. S. 280 [1936].

POLL TAXES.

A poll tax statute exempting women, the aged, and minors does not make an arbitrary classification.[1]

[1] Breedlove v. Suttles, 302 U. S. 277 [1937].

PENALTIES.

A statute imposing a 50-percent penalty after judgment for nonpayment of taxes on certain public utilities, does not deny the equal protection of the laws.[1]

[1] Western U. Teleg. Co. v. Indiana, 165 U. S. 304 [1897].

An exemption of tracts of land less than 1,000 acres from forfeiture by reason of their not being on the land books for 5 years, does not deny owners having 1,000 or more acres equal protection.[1]

[1] King v. Mullins, 171 U. S. 404, 436 [1898].

A classification of distilled spirits in bond, as distinct from other property in regard to payment of interest on taxes due, does not constitute a discrimination amounting to a denial of equal protection of the laws.[1]

[1] Thompson v. Kentucky, 209 U. S. 340 [1908].

BACK TAXES.

There is nothing in the Federal Constitution which forbids a State to reach backward and collect taxes from certain kinds of property which were not at the time collected through lack of statutory provisions therefor, or in consequence of a misunderstanding as to the law, or from neglect of administrative officials, without also making provisions for collecting the taxes for the same years on other property.[1]

[1] Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471 [1902]. *See also* Ft. Smith Lumber Co. v. Arkansas ex rel. Arbuckle, 251 U. S. 532 [1920]; White River Lumber Co. v. Arkansas ex rel. Applegate, 279 U. S. 692 [1929].

Procedure.

STATE CONTROL OVER COURT PROCEDURE.

In General.

The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of State regulation and control. In the exercise of that power and to satisfy a public need, a State may choose the remedy best adapted, in the legislative judgment, to pro-

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tect the interests concerned, provided its choice be not unreasonable or arbitrary, and the procedure it adopts satisfy the constitutional requirements of reasonable notice and opportunity to be heard.[1]

[1] Hardware Dealers' Mut. F. Ins. Co. *v.* Glidden Co., 284 U. S. 151 [1931], holding that a statute requiring an arbitration clause for settlement of losses in all fire-insurance policies as a condition precedent for doing insurance business within the State did not deny either due process or equal protection of the laws.

A statute containing a provision which imposes such severe penalties for disobedience as to intimidate parties from resorting to the courts to test its validity was held practically to prohibit seeking such judicial construction and thus to deny parties the equal protection of the laws.[1]

[1] Ex parte Young, 209 U. S. 123, 145 [1908].

The equal protection clause does not exact uniformity of procedure. The legislature may classify litigation and adopt one type of procedure for one class and a different type for another.[1] However, when it is apparent that the same law or course of procedure would not, and could not, lawfully be applied to any other person in the State under similar circumstances, then equal protection is denied.[2] Likewise, the legislature may provide for diversity in the jurisdiction of the several courts of a State as to subject matter or finality of decision if all persons within the territorial limits of the respective jurisdictions of the State courts have an equal right in like cases under like circumstances to resort to them for redress.[3]

[1] Dohany *v.* Rogers, 281 U. S. 362, 399 [1930], holding that the legislature could prescribe a different procedure in condemnation suits brought by the State from that prescribed where the actor is a private corporation.
[2] Ex parte Stricker, 109 Fed. 145, 150 [1901].
[3] Bowman *v.* Lewis, 101 U. S. 22, 30 [1880]. *See also* Duncan *v.* Missouri, 152 U. S. 377 [1894]; Ohio ex rel. Bryant *v.* Akron Metropolitan Park Dist., 281 U. S. 74 [1930].

The legislative discretion to grant or withhold equitable relief in any class of cases must, under the equal protection clause, be so exercised as not to grant equitable relief to one, and to deny it to other under like circumstances and in the same territorial jurisdiction.[1]

[1] Truax *v.* Corrigan, 257 U. S. 312 [1921], holding that a State statute which contains a prohibition against interference by injunction in labor disputes between employers and employees denies the equal protection of the laws when applied to defeat injunctive relief which, under local statutes, would have been proper had the controversy been of any other kind.

There is no absolute right vested in the individual as against the power of the legislature to change modes of procedure. And a similar principle controls where the courts of the State have construed a

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statute as prescribing one form of procedure, and the parties have acted under that construction, and then subsequently the same court has held that the statute was theretofore misconstrued, and really provided a different mode of procedure. This last adjudication cannot be set aside in the Federal courts on the ground of an unjust discrimination or a denial of the equal protection of the laws.[1]

[1] Backus (A) Jr. & Sons *v.* Fort Street Union Depot Co., 169 U. S. 557, 571, [1898]. *See also* Milwaukee Elec. R. & Light Co. *v.* Wisconsin ex rel. Milwaukee, 252 U. S. 100, 196 [1920].

It cannot be said that there has been a denial of the equal protection of the law within the purview of the Fourteenth Amendment only because the State has allowed one person to seek one forum and has not allowed another person, asserted to be in the same class, to seek the same forum, if as to both persons the law has afforded a forum in which the same and equal laws are applicable and administered.[1]

[1] Cincinnati Street R. Co. *v.* Snell, 193 U. S. 30, 36 [1904].

The right to bring *quo warranto* to oust a corporation charged with misusing its license to do business in the State, does not deny equal protection of the laws to a corporation so proceeded against, when other corporations may be prosecuted in the same court for the same act by indictment with the right of trial by jury.[1]

[1] Standard Oil Co. *v.* Missouri ex rel. Hadley, 224 U. S. 270 [1912].

The refusal of a State court to grant an application for leave to file a supplementary answer is not a denial of the equal protection of the laws when there is no abuse of discretion.[1]

[1] Sawyer *v.* Piper, 189 U. S. 154 [1903].

A drainage law, providing for the sale of land for levee taxes, which requires personal service of summons upon resident owners of lands for at least 20 days before rendition of the decree of sale, and providing for constructive service by publication upon nonresident owners of only 4 weeks, does not deny to the nonresident owners equal protection of the laws.[1]

[1] Ballard *v.* Hunter, 204 U. S. 241 [1907].

An Oklahoma territorial statute authorizing the issue of an attachment against the property of a nonresident defendant in the case of an alleged fraudulent disposition of property, which in the case of an attachment against a resident requires as a condition the giving of a bond by the plaintiff in attachment, whilst it makes no such requirement in the case of an attachment against a nonresident, does not amount to a denial of the equal protection of the laws.[1]

[1] Central Loan & T. Co. *v.* Campbell Commission Co., 173 U. S. 84, 97 [1899].

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Venue.

In fixing the venue requirements in actions against corporations, a State has a large range of discretion. A statute permitting suits against domestic corporations to be brought in any county in which the cause arose, is not void as denying equal protection.[1]

[1] Bain Peanut Co. *v.* Pinson, 282 U. S. 499 [1931].

A statute authorizing actions against a foreign corporation in any county in the State is discriminatory and invalid, in view of the fact that actions against domestic corporations may be brought within that State only in counties where they have places of business or a chief officer resides.[1]

[1] Power Mfg. Co. *v.* Saunders, 274 U. S. 490 [1927].

Prima Facie Case.

A State possesses the general power to prescribe the evidence which shall be received and the effect which shall be given to it in her own courts and may exert this power by providing that proof of a particular fact or of several taken collectively, shall be *prima facie* evidence of another fact, so long as it is not a mere arbitrary mandate or does not discriminate invidiously between different persons in substantially the same situation.[1] By the California alien land law under which acquisition, use, or control of agricultural land is forbidden to aliens not eligible to citizenship under the laws of the United States, and interests which such persons cannot take are to escheat to the State when conveyed with intent to avoid that result, it is provided that a *prima facie* presumption that conveyance is made with that intent shall arise upon proof of the taking of the property in the name of a person not inhibited if the consideration is paid, or agreed or understood to be paid, by an alien of the disqualified classes. In a prosecution for conspiracy to violate the statute, where the conveyance was taken by an American citizen and the consideration paid by an ineligible Japanese, but with intent, as it was claimed, that the interest should be held for his children, who were American citizens by birth, it was held that the statutory presumption of intent is consistent with the due process and equal protection clauses of the Fourteenth Amendment.[2]

[1] Lindsley *v.* National Carbonic Gas Co., 220 U. S. 61 [1911]. *See also* Mobile, J. & K. C. R. Co. *v.* Turnipseed, 219 U. S. 35 [1910]; Adams *v.* New York, 192 U. S. 585 [1904].

[2] Cockrill *v.* California, 268 U. S. 258 [1925]. Similarly the provision of the same law placing the burden of proving citizenship by birth upon the alien after the State had proved him to be of a race ineligible for naturalization, does not violate this clause (Morrison *v.* California, 288 U. S. 591 [1933]). However, that section which places the complete burden of proving citizenship or eligibility to citizenship upon defendants, where indictment under alien land law alleges alienage and ineligibility to citizenship as applied to a criminal prosecution for conspiracy to violate such law, held invalid as denying due process (Morrison *v.* California, 291 U. S. 82 [1934]).

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Trial by Jury.*

The equal protection of laws is not denied by a provision in a State constitution abridging the right of trial by jury in the courts of a city within the State, without making a similar provision for the counties of the State.[1]

[1] Chappell Chemical & Fertilizer Co. *v.* Sulphur Mines Co., 172 U. S. 474, 475 [1899].

A State statute limiting liability for jury service to white male citizens of the State, held to deny a Negro convicted by such a jury the equal protection of the laws.[1] But an accused has no legal right to a jury composed wholly or in part of his own race. All that he can rightfully demand is a jury from which his own race is not excluded.[2]

[1] Strauder *v.* West Virginia, 100 U. S. 303 [1880]. *Cf.* Welosky, *v* Massachusetts, 284 U. S. 684 [1932].

[2] Ex parte Virginia, 100 U. S. 313 [1880]. For other cases on the subject of Negroes and jury service *see* Ex parte Virginia, 100 U. S. 339 [1880]; Neal *v.* Delaware, 103 U. S. 370 [1881]; Bush *v.* Kentucky, 107 U. S. 110 [1883]; Andrews *v.* Swartz, 156 U. S. 272 [1895]; Gibson *v.* Mississippi, 162 U. S. 565 [1896]; Smith *v.* Mississippi, 162 U. S. 592 [1896]; Murray *v.* Louisiana, 163 U. S. 101 [1896]; Williams *v.* Mississippi, 170 U. S. 213 [1898]; Carter *v.* Texas, 177 U. S. 442 [1900]; Rogers *v.* Alabama, 192 U. S. 226 [1904]; Tarrance *v.* Florida, 188 U. S. 519 [1903]; Brownfield *v.* South Carolina, 189 U. S. 426 [1903]; Martin *v.* Texas, 200 U. S. 316 [1906]; Franklin *v.* South Carolina, 218 U. S. 161 [1910]. *See also* Howard *v.* Kentucky, 200 U. S. 164 [1906].

A difference between a general law, under which the officers authorized to make and return the jury list are elected by the people in their several townships and in city wards, and which requires that jurors shall be selected from persons on the assessment roll; and a county jury law, under which the jury lists are made up and returned by a board of jury commissioners, appointed by the governor, with the consent of the senate, and the names of persons to be returned need not appear on the assessment rolls, does not deny to the people of the county the equal protection of the law.[1]

[1] Gardner *v.* Michigan, 199 U. S. 325 [1905].

The equal protection of the laws is not denied because a defendant is not given the same number of peremptory challenges upon an arraignment for trial by a struck jury that he would have in a trial before an ordinary jury.[1]

[1] Brown *v.* New Jersey, 175 U. S. 172, 176 [1899].

A State statute which provides that in all capital cases the State shall be allowed 8 peremptory challenges to jurors, except that

* *See also* pp. 283, 501, 661, 679, 693, 916, 960.

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in cities having a population of over 100,000 inhabitants, it shall be allowed 15, does not deny the equal protection of the laws.[1]

[1] Hayes v. Missouri, 120 U. S. 68, 69 [1887].

Conditions Precedent to Suit.

A State may prescribe a reasonable and appropriate condition to the bringing of a suit of a specified kind or class, so long as the basis of the distinction is real and the condition imposed has a reasonable relation to a legitimate object.[1]

[1] Jones v. Union Guano Co., 264 U. S. 171 [1924].

A State statute under which a foreign corporation, not domesticated or doing business in the State, may be compelled, as a condition to the maintenance of an action, to send its officer, with papers and books bearing on the matter in controversy, in order to submit to an adversary examination before answer, but which does not subject nonresident individuals to such examination, except when served with notice and subpoena within the State, and then only in the county where the service is had, and which limits such examination, in the case of residents, individual or corporate, to the county of their residence, violates the equal protection clause.[1]

[1] Kentucky Finance Corp. v. Paramount Auto Exch. Corp., 262 U. S. 544 [1923].

Nonresident Witnesses.

The failure of the law to provide a method for enforcing the attendance of nonresident witnesses, and for the procuring and reception of their depositions, is not in a particular case a denial to the accused of the equal protection of the laws.[1]

[1] Minder v. Georgia, 113 Ga. 772 [1901], affirmed 183 U. S. 559 [1902].

Production of Books and Papers.

A statute providing for the production of books and papers by a corporation upon notice, and for its punishment as for contempt for neglecting or refusing to comply after reasonable notice, does not, because it is confined to corporations alone, deny them the equal protection of the laws.[1]

[1] Consolidated Rendering Co. v. Vermont, 207 U. S. 541 [1908]. *See also* Hammond Packing Co. v. Arkansas, 212 U. S. 322 [1909].

Regulating Priorities.

A State statute which subordinates the claims of private business corporations, not within the jurisdiction of the State, to the claims of creditors residing in the State, is not a denial of the equal protection of the laws.[1]

[1] Blake v. McClung, 172 U. S. 239, 261 [1898]. *See also* Sully v. American Nat. Bank, 178 U. S. 289, 299 [1900].

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Costs.

A State statute which provides that "whenever it shall appear to the court or jury trying the case that the prosecution has been instituted without probable cause and from malicious motives, the name of the prosecutor shall be ascertained and stated in the finding; and such prosecutor shall be adjudged to pay the costs, and may be committed to the county jail until the same are paid, or secured to be paid," does not deny the equal protection of the laws, as the statute is applicable to all persons under like circumstances, and does not subject the individual to an arbitrary exercise of power.[1]

[1] Lowe *v.* Kansas, 163 U. S. 81 [1896].

Allowance for Attorneys' Fees and Costs.

A statute which provides that in actions for certain small claims against a railroad company, if the plaintiff obtains judgment he shall be entitled to recover the amount of such claim and all costs, and in addition thereto, all reasonable attorneys' fees, not to exceed $10, denies to the railroad companies the equal protection of the laws.[1] But a statute which provides for reasonable attorneys' fees in successful actions against railroads for damages caused by fires, is valid.[2] In distinguishing these cases the court pointed out that the statute involved in the first case, was not a police regulation based upon a reasonable classification, but "simply a statute imposing a penalty on railroad corporations for failing to pay certain debts."

[1] Gulf, C. & S. F. R. Co. *v.* Ellis, 165 U. S. 150 [1897]. *See also* Atchison, T. & S. F. R. Co. *v.* Vosburg, 238 U. S. 56 [1915].
[2] Atchison, T. & S. F. R. Co. *v.* Matthews, 174 U. S. 96 [1899].

A statute providing for the recovery of reasonable attorney's fees in actions on small claims against all classes of defendants, individual and corporate, does not deny a defendant in such cases the equal protection of the laws.[1]

[1] Missouri, K. & T. R. Co. *v.* Cade, 233 U. S. 642 [1914]. *See also* Missouri, K. & T. R. Co. *v.* Harris, 234 U. S. 412 [1914].

Similarly, a statute providing that, upon rendering judgment against an insurance company upon a policy of insurance of real property against total loss, the court shall allow the plaintiff a reasonable sum as an attorney's fee, is not a denial of the equal protection of the laws, either for classifying losses on real estate separately from losses on other property, or for allowing the fee in case of a total loss of real estate insured, and not permitting recovery of such fee when the property insured has been only partially destroyed.[1]

[1] Farmers' and M. Ins. Co. *v.* Dobney, 189 U. S. 305 [1903].

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A statute which directs that life and health insurance companies who default in payments of their policies shall pay 12 percent damages, together with reasonable attorney's fees, does not deny the equal protection of the laws in failing to impose the same conditions on fire, marine, and inland insurance companies, and on mutual benefit and relief organizations doing business through lodge and mutual relief benevolent associations.[1]

[1] Fidelity Mut. Life Asso. *v.* Mettler, 185 U. S. 308, 325 [1902]. *See also* Manhattan L. Ins. Co. *v.* Cohen, 234 U. S. 123 [1914].

A statute allowing a successful plaintiff in a mandamus proceeding the right to recover reasonable attorney's fees does not deny the equal protection of the laws.[1]

[1] Missouri P. R. Co. *v.* Larabee, 234 U. S. 459 [1914].

CRIMINAL PROSECUTIONS.

In General.

Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected, for the same offense, to any greater or different punishment.[1]

[1] Pace *v.* Alabama, 106 U. S. 583 [1883]. *See also* Leeper *v.* Texas, 139 U. S. 462 [1891].

Refusal to Amend Record.

The refusal of a State appellate court to amend, at a subsequent term, a record so as to show that the accused was not present in person or in counsel in that court at the time it affirmed the judgment of the trial court and fixed the time for carrying that judgment into execution, is not a denial of the equal protection of the laws when the law of that State, as declared by its highest court, is that amendments of record of a court in derogation of a final judgment are not permitted in that State after the expiration of the term at which the judgment was rendered.[1]

[1] Fielden *v.* Illinois, 143 U. S. 452 [1892].

Right to Appeal.

There is no denial of the equal protection of the laws because in one district the State is allowed an appeal and such an appeal is not allowed in another district of the same State.[1]

[1] Mallett *v.* North Carolina, 181 U. S. 589, 597 [1901]. *See also* Bowman *v.* Lewis, 101 U. S. 22, 30 [1880].

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Assuming that this clause could apply to the United States, an act of Congress which gives to the United States an appeal to the Supreme Court from a judgment sustaining a demurrer to an indictment and gives an appeal to a defendant to the circuit court of appeals only at the end of the trial, does not deny such defendant the equal protection of the laws.[1]

[1] United States *v.* Heinze, 218 U. S. 532 [1910].

Sentence.

When by a State law, at the time of the trial and sentence of an accused person, the court in which he was tried and sentenced was a court *de jure* and the judge who tried and sentenced was at least a judge *de facto*, and the sentence itself was valid, such sentence is not a denial of the equal protection of the laws.[1]

[1] Manning *v.* Weeks, 139 U. S. 504, 506 [1891].

An indeterminate sentence and parole act does not deny equal protection of the laws to a person who has been twice convicted of a felony, because of the provision "that no prisoner who has been twice previously convicted of a felony shall be eligible to parole under the provisions of this act." [1]

[1] Ughbanks *v.* Armstrong, 208 U. S. 481 [1908].

A sentence of 14 years for the crime of perjury cannot be held to be so grossly excessive as to be prohibited by this amendment, notwithstanding that in the case of other felonies denounced by the laws of the State, many of them might be deemed offenses of greater gravity and of more injurious consequences than perjury; and that the average maximum penalty is 5 years' imprisonment.[1]

[1] Collins *v.* Johnston, 237 U. S. 502, 510 [1915].

Similarly, sentences imposed on a conviction of a common-law offense, more severe than ever before inflicted in the State for a like offense, and giving two of the codefendants longer terms than the third, do not amount to a denial of the equal protection of the laws.[1]

[1] Howard *v.* Fleming, 191 U. S. 126, 135 [1913].

A statute providing that "every person undergoing a life sentence in a State prison of this State, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death," does not deny the equal protection of the laws as providing an exceptionable punishment for life termers.[1]

[1] Finley *v.* California, 222 U. S. 28 [1911].

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Amdt. 14. Sec. 2. Apportionment of representation.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

In General.

The effect of this section in relation to the Negroes was indicated in Elk *v.* Wilkins.[1] "Slavery having been abolished, and the persons formerly held as slaves made citizens, this clause fixing the apportionment of Representatives has abrogated so much of the corresponding clause of the original Constitution as counted only three-fifths of such persons."

[1] 112 U. S. 94, 102 [1884].

The expression "excluding Indians not taxed" in this section was considered by the Court, in United States *v.* Kagama,[1] not to shed much light on the power of Congress over the Indians in their existence as tribes, distinct from the ordinary citizens of a State or Territory. In Elk *v.* Wilkins,[2] which dealt with the immediate result of the amendment upon the question of the citizenship of Indians, the effect of section 2 was considered as follows: "But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis of representation, in which all other persons are now included, is wholly inconsistent with their being considered citizens."

[1] 118 U. S. 375, 378 [1886].

[2] 112 U. S. 94, 102 [1884]. Compare in this connection the Reapportionment Act of June 18, 1929 (U. S. C. 2: 2a). Although 5 years later than the act (U. S. C. 8: 3) declaring that "all noncitizen Indians born within the territorial limits of the United States, be, and they are hereby, declared to be citizens of the United States," the act of 1929 provides for apportionment of Representatives on the basis of the "whole number of persons in each State, excluding Indians not taxed."

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Reduction of State's Representation.

Congress has never exercised the power conferred upon it by this section of reducing the representation of a State in the House of Representatives, but there can be no question of its power or its right to do so. Of its duty to do so, it alone is the judge. The amendment places the responsibility of enforcing its provisions upon that body (Watson on the Constitution, vol. II, p. 1653).

"In various States of the Union property, educational, and other qualifications upon the right to vote have been established. These limitations upon adult male suffrage have not, however, led to any attempt by Congress to apply the reduction of representation clause of the Fourteenth Amendment" (Willoughby, Const., 2d ed., p. 626).

Right to Vote.

The right to vote intended to be protected refers to the right to vote as established by the laws and Constitution of the State.[1]

[1] McPherson *v.* Blacker, 146 U. S. 1 [1892].

Amdt. 14. Sec. 3. Disqualification of officers.

SECTION 3. No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

In General.

Persons in office by lawful appointment or election before the promulgation of this amendment, were not removed therefrom by the direct and immediate effect of the prohibition in this section.[1] The term "engaged in insurrection", as here used, implied a voluntary effort to assist the insurrection and bring it to a successful conclusion. It would not, therefore, apply to a person who being about to be conscripted, furnished a substitute, if under fear of great bodily harm, and from a want of sympathy with the insurrectionary movement—these were questions for the jury. Nor would it apply to one merely accepting the office of justice of the peace, unless it were shown that under his commission he in fact did aid the insurrection.[2]

[1] Griffin's Case, 11 Fed. Cas. No. 5815 [1869].

[2] United States *v.* Powell, 27 Fed. Cas. No. 16079 [1871]—Judge Bond charging the jury.

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The right to remove disabilities imposed by this section was exercised by Congress at different times on behalf of enumerated individuals—notably by act of December 14, 1869 (16 Stat. 607). In 1872, the disabilities were removed, by a blanket act, from all persons "except Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States" (17 Stat. 142). Twenty-six years later (30 Stat. 432), Congress enacted briefly that "the disability imposed by section 3 * * * heretofore incurred is hereby removed."

Amdt. 14. Sec. 4. Public debt; claims for loss of slaves.

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 slaves; but all such debts, obligations and claims shall be held illegal and void.

Public Debt.

"While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the Government issued during the Civil War, its language indicates a broader connotation. We regard it as confirmatory of a fundamental principle, which applies as well to the Government bonds in question, and to others duly authorized by the Congress, as to those issued before the amendment was adopted. Nor can we perceive any reason for not considering the expression 'the validity of the public debt' as embracing whatever concerns the integrity of the public obligations."[1]

[1] Perry *v.* United States, 294 U. S. 330, 354 [1935], holding that the joint resolution of June 5, 1933 (48 Stat. 113), insofar as it attempted to override the gold clause in a United States Government bond, "went beyond the congressional power."

Loss of Slaves.

In White *v.* Hart [1] and Osborn *v.* Nicholson [2] the Court upheld the right to enforce in Federal courts private contracts the consideration of which was slaves, but which were valid when and where made. Chief Justice Chase, in dissenting, was of opinion that the present clause of section 4, Fourteenth Amendment, could be "vindicated" only on the principles that such contracts were without support except

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in positive law and that such positive laws of the States had been annulled by the Thirteenth Amendment.

[1] 13 Wall. 646 [1872].
[2] 13 Wall. 654 [1872].

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

Amdt. 14. Sec. 5. Enforcement.

In General.

"All of the [Civil War] amendments derive much of their force from this * * * provision. It is not said the *judicial power* of the General Government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the Government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged." [1]

[1] Ex parte Virginia, 100 U. S. 339, 345 [1880].

The power thus granted to Congress was described in the civil rights cases [1] as follows: " * * * The last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it." So, in considering specifically the equal protection clause, the Court had early stated that the only obligation resting upon the United States "is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty." [2]

[1] 109 U. S. 3, 11 [1883].
[2] United States *v.* Cruikshank, 92 U. S. 542, 555 [1876].

Congress by virtue of this section may enforce the prohibitions of the amendment "whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion." [1] Thus, section 641 of the Revised Statutes, which provided for removal of cases from State to Federal courts, when defendant was denied or could not enforce in the State courts any right secured by any law providing for the equal civil rights of citizens of the United States, was upheld as a means of enforcing the amendment. "This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws." [2] The act was held not to apply to a removal, where

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jury commissioners, acting without authority of State constitution or law, excluded Negroes from a jury, on account of race.[3]

[1] Virginia *v.* Rives, 100 U. S. 313, 318 [1880].

[2] Strauder *v.* West Virginia, 100 U. S. 303 [1880].

[3] Neal *v.* Delaware, 103 U. S. 370 [1880], principle affirmed in Gibson *v.* Mississippi, 162 U. S. 565 [1896].

Legislation under authority of this section "must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured." [1] It must, however, be adapted to the evil the amendment was aimed at, and "cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication." It is limited to "corrective legislation." [2] So, an act (R. S. 5519) which was not limited to take effect only in case a State should abridge the privileges of United States citizens, etc., but applied no matter how well the State might have performed its duty, and would subject to punishment private individuals who conspired to deprive any one of the equal protection of the laws, was held unconstitutional. Such legislation finds no warrant for its enactment in this section empowering Congress to enforce the Fourteenth Amendment by appropriate legislation.[3]

[1] Ex parte Virginia, 100 U. S. 339, 347 [1880], holding constitutional sec. 4 of the act of March 1, 1875 (18 Stat. 336), which penalized any person "charged with any duty" in connection with selection of jurors, who excluded any citizen, otherwise qualified, on account of race, color, or previous condition of servitude.

[2] Civil Rights Cases, 109 U. S. 3, 13 [1883], holding unconstitutional secs. 1 and 2 of the Civil Rights Act of 1875, which purported to guarantee to "all persons within the jurisdiction of the United States" equal privileges at inns, theaters, etc., with a penalty for violation. *See also* Wilkerson *v.* Rahrer, 140 U. S. 545, 555 [1891].

[3] United States *v.* Harris, 106 U. S. 629 [1883]. *See also* Baldwin *v.* Franks, 120 U. S. 678, 685 [1887].

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AMENDMENT 15

RIGHT OF CITIZENS TO VOTE

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AMENDMENT 15

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Amdt. 15. Sec. 1. Suffrage not to be abridged for race, color, etc.

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

Amdt. 15 Sec. 2. Power of Congress.

In General.

The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been.[1]

[1] United States v. Cruikshank, 92 U. S. 542, 543 [1876].

This amendment brings the right of United States citizens to vote within the protection of Congress; it invests citizens of the United States with the right of exemption from discrimination in the exercise of the elective franchise on account of their race, color, or previous condition of servitude.[1]

[1] United States v. Reese, 92 U. S. 214 [1876], in which this amendment was held not to support the act of Congress of May 31, 1870, laying a penalty on State election officers for refusal to receive vote of "any citizen" who had duly offered to qualify as a voter, as applied to a local election.

A tribal Indian, not being a citizen of the United States under the Fourteenth Amendment of the Constitution, was not deprived of any rights secured by this amendment by being refused an opportunity to register as a qualified voter.[1]

[1] Elk v. Wilkins, 112 U. S. 94 [1884].

When the Constitution conferred citizenship [i. e., in the Fourteenth Amendment], it did not necessarily confer the right of suffrage; the right of suffrage is not coextensive with citizenship, and this amendment was not designed to confer the right upon anyone. It left the power to determine the qualifications of voters with the several States. Thus, a State may or may not confer suffrage upon women.[1]

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Amdt. 15.—Right of Citizens to Vote

The establishment of a literacy test for exercising the suffrage is an exercise by the State of a lawful power vested in it not subject to the supervision of the Federal courts.[2]

[1] Minor *v.* Happersett, 21 Wall. 162, 178 [1875]. *See also* Amendment 19.
[2] Guinn *v.* United States, 238 U. S. 347 [1915], where the provision was held invalid on the ground that the Grandfather Clause in the same section was not separable, and itself violated this amendment.

Effect of Amendment on State Constitution.

The amendment operates to nullify a provision in a State constitution restricting the right of suffrage to the white race,[1] or to persons qualified as electors before 1866 and their descendants [the so-called Grandfather Clauses].[2]

[1] Neal *v.* Delaware, 103 U. S. 370, 389 [1881]; Ex parte Yarbrough, 110 U. S. 651, 665 [1884].
[2] Guinn *v.* United States, 238 U. S. 347 [1915]; Myers *v.* Anderson, 238 U. S. 368 [1915].

Section 244 of the constitution of Mississippi, making ability to read any section of the constitution, or to understand it when read, a necessary qualification to a legal voter, and section 264 requiring grand jurors to be duly qualified electors, do not on their face discriminate between the white and Negro races. In the absence of a showing that their actual administration was evil, such provisions will not be held to contravene the Fifteenth Amendment.[1]

[1] Williams *v.* Mississippi, 170 U. S. 213, 220 [1898].

Effect of Amendment on State Statute.

A Texas statute specifically excluding Negroes from participating in a Democratic primary election within the State is plainly unconstitutional under the Fourteenth Amendment, rendering it unnecessary to consider the effect of the Fifteenth Amendment.[1] Further, when an act of the legislature authorized the party Executive Committee to determine the qualifications of its members, it was held to constitute a delegation of the State's power; and action of the Executive Committee taken thereunder discriminating invidiously between white citizens and black was therefore unconstitutional in view of this amendment.[2] But where, without statutory authority, the State Democratic convention restricted membership in the party to white persons, it was held not to be State action inhibited by the Fifteenth Amendment, although nomination by the Democratic party was in Texas equivalent to election; and although the national organization had not declared a similar policy of exclusion of Negroes.[3]

[1] Nixon *v.* Herndon, 273 U. S. 536 [1927].
[2] Nixon *v.* Condon, 286 U. S. 73, 89 [1932].
[3] Grovey *v.* Townsend, 295 U. S. 45, 48 [1935].

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Amdt. 15.—Right of Citizens to Vote

Enforcement.

The power of Congress to legislate at all upon the subject of voting at State elections rests upon this amendment, and can be exercised only when a qualified voter is denied the right to vote.[1]

[1] United States *v.* Reese, 92 U. S. 214 [1876]. *See also* McPherson *v.* Blacker, 146 U. S. 1, 37 [1892]; Karem *v.* United States, 121 Fed. 250 [1903]; United States *v.* Miller, 107 Fed. 913, 915 [1901].

This amendment relates solely to action "by the United States or by any State", and does not contemplate wrongful individual acts. A Federal statute (R. S. 5507) which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by this amendment on Congress, and an indictment which does not charge discrimination on account either of race, color, or previous condition of servitude is likewise destitute of support by such amendment.[1]

[1] James *v.* Bowman, 190 U. S. 127, 136, 139 [1903].

The legislation which Congress is authorized to adopt is corrective legislation, that is, such as may be necessary and proper for counteracting such laws or constitutional provisions as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking.[1]

[1] James *v.* Bowman, 190 U. S. 127, 137 [1903]; United States *v.* Amsden, 6 Fed. 819 [1881].

A bill in equity will not lie to compel a board of registrars to enroll upon the voting lists the name of the petitioner, a Negro, and of all other qualified members of his race who had applied for registration and were refused, where the effect of ordering such a registration would be to make the court a party to the allegedly fraudulent registration scheme; and where in any event, since the alleged wrong is an intention of the whole body of the white population, the court could have no possible effective means of enforcing any such order.[1]

[1] Giles *v.* Harris, 189 U. S. 475, 482 [1903]. *See also* Mills *v.* Green 159 U. S. 651 [1895].

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AMENDMENT 16

INCOME TAX

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AMENDMENT 16

Amdt. 16. Taxes on incomes.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Purpose of Amendment.

This amendment permits Congress to levy income taxes without the necessity of apportionment among the States according to population. Prior to its adoption, Congress had power to levy income taxes without apportionment, provided they were indirect. But, in Pollock *v.* Farmers' Loan & T. Co.[1] the Supreme Court had held that a tax on income from property was direct, and subject to apportionment under article I, section 2, clause 3. Therefore, the purpose of this amendment (adopted in 1913) is to remove the necessity of apportioning such income taxes as are direct. The amendment does not extend the power of Congress to tax income which, prior to 1913, it had no power to tax.[2] The amendment, like other laws authorizing or imposing taxes, is not to be extended beyond the meaning clearly indicated by its words.[3]

[1] 157 U. S. 429 [1895]; 158 U. S. 601 [1895].

[2] Brushaber *v.* Union P. R. Co., 240 U. S. 1 [1916]; Stanton *v.* Baltic Min. Co., 240 U. S. 103 [1916]; Tyee Realty Co. *v.* Anderson, 240 U. S. 115 [1916]; Peck (Wm. E.) & Co. *v.* Lowe, 247 U. S. 165 [1918]; Evans *v.* Gore, 253 U. S. 245 [1920]; Edwards *v.* Cuba R. Co., 268 U. S. 628 [1925]; Bowers *v.* Kerbaugh-Empire Co., 271 U. S. 170 [1926].

[3] Edwards *v.* Cuba R. Co., 268 U. S. 628 [1925].

Meaning of "Income."

Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through the sale or conversion of capital assets.[1]

[1] Eisner *v.* Macomber, 252 U. S. 189 [1920]; Bowers *v.* Kerbaugh-Empire Co., 271 U. S. 170 [1926].

Substance and not form should control in the application of the Sixteenth Amendment and the income tax laws enacted under it.[1] A common stock dividend declared in favor of common stockholders is not taxable income. It is a mere exchange of form and not the realiza-

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Amdt. 16.—Income tax

tion of income. Such a dividend is capital, and a statute attempting to treat it as income for taxation is unconstitutional.[2] But the constitutional exemption of stock dividends does not extend to distributions to shareholders of stock received by a corporation in reorganization without surrender of the old shares.[3] Dividends in common voting shares received by the holder of cumulative preferred shares [4] and preferred stock received by the holder of common stock,[5] although exempt under the statute, are income. The receipt of rights to subscribe for new shares—assuming their intrinsic value to be in excess of the issuing price—constitutes no gain, profit or income under the Sixteenth Amendment.[6]

[1] Eisner *v.* Macomber, 252 U. S. 189 [1920]; United States *v.* Phellis, 257 U. S. 156 [1921]; Burk-Waggoner Oil Asso. *v.* Hopkins, 269 U. S. 110 [1925]; Bowers *v.* Kerbaugh-Empire Co. 271 U. S. 170 [1926].

[2] Eisner *v.* Macomber, 252 U. S. 189 [1920]. *See also* Towne *v.* Eisner, 245 U. S. 418 [1918]; Koshland *v.* Helvering, 298 U. S. 441 [1936]; Helvering *v.* Gowran, 302 U. S. 238 [1937].

[3] United States *v.* Phellis, 257 U. S. 156 [1921]; Rockefeller *v.* United States, 257 U. S. 176 [1921].

[4] Koshland *v.* Helvering, 298 U. S. 441 [1936].

[5] Helvering *v.* Gowran, 302 U. S. 238 [1937].

[6] Miles *v.* Safe Deposit & T. Co., 259 U. S. 247 [1922].

A distinction between subsidy and income is drawn in several cases. In the first,[1] the Cuban Government made grants to an American railroad company to promote the construction of railroads in Cuba. The court found that the funds were to be used for capital expenditures and, hence, were not income. In two other cases,[2] the Court held to be income sums granted by the United States Government to make up a minimum of operating income guaranteed by the Government for the 6 months next following the relinquishment of Federal control of the railroads. The fact that the sums were not contributions to the railroads' capital distinguished these cases from that of the Cuba Railroad Company.

[1] Edwards *v.* Cuba Railroad Co., 268 U. S. 628 [1925].

[2] Texas & P. R. Co. *v.* United States, 286 U. S. 285 [1932]; Continental Tie & Lumber Co. *v.* United States, 286 U. S. 290 [1932].

A distinction between a bequest and income under a bequest is drawn in Irwin *v.* Gavit.[1] The court held that where plaintiff was to receive the proceeds of part of a trust fund under a bequest during the minority of another (the minor being 5 years of age), he received income within the meaning of the Sixteenth Amendment.

[1] 268 U. S. 161 [1932].

The rental value of a building used by the owner does not constitute income within the meaning of the Sixteenth Amendment. However, a life-insurance company may be required by Congress to include in its return the rental value of office space occupied by it in

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Amdt. 16.—Income tax

its own building as a prerequisite to the deduction of depreciation, upkeep cost, etc. Congress has power to condition, limit or deny deductions from gross income in order to arrive at the net income that it chooses to tax.[1]

[1] Helvering v. Independent L. Ins. Co., 292 U. S. 371 [1934].

Realization of Income.

An income tax, being upon realized gain, may constitutionally be imposed upon the entire amount of the gain realized within the taxable period, even though some of it represents enhanced value in an earlier period before the adoption of the taxing act. Thus, where a stock fire-insurance company sold property at a profit in 1928, it was liable for a tax under the act of that year on the entire gain since 1913, and this was true notwithstanding that some of the revenue acts in the interim exempted capital gains of such companies.[1] Likewise, where stock was purchased at one value, and was given to another by the purchaser after it had increased in value, and the donee later sold it at a still higher figure, it was within the power of Congress to treat the entire increase in value as income of the donee.[2]

[1] McLaughlin v. Alliance Ins. Co., 286 U. S. 244 [1932].
[2] Taft v. Bowers, 278 U. S. 470 [1929].

Income within the meaning of the Sixteenth Amendment is the fruit that is born of capital, not the potency of fruition. Thus, Congress has power to tax income which accrued after the adoption of the Sixteenth Amendment through the liquidation and settlement of a claim which was inchoate, but remained uncertain and contested, before the effective date of the Amendment.[1] Similarly, where a corporation entered into a contract with the United States and incurred losses, 1913 to 1916, but recovered a judgment on the contract, which was satisfied in 1920, this was held to be income in 1920.[2] It is also within the power of Congress to tax, without apportionment, dividends received in the ordinary course by a shareholder from a corporation, even though extraordinary in amount and derived from a surplus of corporate assets existing before the amendment.[3] The Court has held that royalties received by the lessor of coal land in 1920–1926 under leases executed before the date of the Sixteenth Amendment were not converted capital taxable only by apportionment, but were taxable income.[4]

[1] United States v. Safety Car Heating & Lighting Co., 297 U. S. 88 [1936].
[2] Burnet v. Sanford & B. Co., 282 U. S. 359 [1931].
[3] Lynch v. Hornby, 247 U. S. 339 [1918].
[4] Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308 [1932].

Gain attributable to and accrued on an endowment insurance policy before the effective date of the Sixteenth Amendment is exempt

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Amdt. 16.—Income tax

from a later income tax,[1] as also bond premiums received prior thereto, the premium income having become capital.[2]

[1] Lucas *v.* Alexander, 279 U. S. 573 [1929].

[2] Old Colony R. Co. *v.* Commissioner of Internal Revenue, 284 U. S. 552 [1932].

The mere diminution of loss is not gain, profit, nor income. Thus, where a note payable in German marks was given for loans obtained before 1913 and losses thereafter were incurred in the borrower's operations, no income was realized in 1921 by repayment in depreciated marks, since the result of the whole transaction was a loss.[1]

[1] Bowers *v.* Kerbaugh-Empire Co., 271 U. S. 170 [1926].

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AMENDMENT 17

POPULAR ELECTION OF SENATORS

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AMENDMENT 17

Amdt. 17. Cl. 1. Election of Senators by direct vote.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Amdt. 17. Cl. 2. Writs of election to fill vacancies.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

Amdt. 17. Cl. 3. When amendment becomes effective.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

In General.

In discussing the argument that ratification by the "legislature", as the expression was used in the proposal for adoption of the Eighteenth Amendment, might be extended to include the substitute method of a referendum, the Court adverted to the Seventeenth Amendment as follows: "That Congress and the States understood that this election by the people was entirely distinct from legislative action is shown by the provision of the amendment given the legislature of any State the power to authorize the Executive to make temporary appointments until the people shall fill the vacancies by election. It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment."[1]

[1] Hawke v. Smith, No. 1, 253 U. S. 221, 228 [1920].

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Amdt. 17.—Popular Election of Senators

The amendment neither announced nor required a new meaning of election and the word now has the same general significance as it did when the Constitution came into existence—final choice of an officer by the duly qualified electors.[1]

[1] Newberry *v.* United States, 256 U. S. 232, 250 [1921]. This case, however, involved a criminal statute (the Corrupt Practices Act) earlier than the amendment, and the Court stated that its validity "must be tested by powers possessed by Congress at the time of its enactment. An after-acquired power cannot *ex proprio vigore*, validate a statute void when enacted." Moreover, Justice McKenna specifically reserved the question of the effect of the 17th Amendment, Chief Justice White dissented from the opinion and Justices Pitney, Clarke, and Brandeis held the statute valid, though concurring in the result of the case; and the case therefore is perhaps not conclusive on the point quoted.

In United States *v.* Aczel,[1] it was said that the right to vote for United States Senators is not derived merely from the constitution and laws of the State in which they are chosen but has its foundation in the Constitution of the United States. And if a man has a right to vote, he has a right to have his vote received and counted by the proper election officers; otherwise, the right to vote is but an empty right.

[1] 219 Fed. 917 [1915].

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AMENDMENT 18

PROHIBITION OF INTOXICATING LIQUORS

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AMENDMENT 18

Amdt. 18. Sec. 1. Prohibition of intoxicating liquors.

[SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Amdt. 18. Sec. 2. Concurrent power to enforce.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Amdt. 18. Sec. 3. Time limit on ratification.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.] *

Validity of Adoption.

"The adoption by both houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution sufficiently shows that the proposal was deemed necessary by all who voted for it. * * * The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent. * * * [The prohibition of intoxicating liquor for beverage purposes embodied in the Eighteenth Amendment] is within the power to amend reserved by article V of the Constitution. That

* This amendment was repealed by the 21st Article of Amendment, and titles I and II of the National Prohibition Act were subsequently specifically repealed by act of August 27, 1935 (49 Stat. 872). Federal prohibition laws effective in various Districts and Territories were repealed as follows: District of Columbia—April 5, 1933 (48 Stat. 28, sec. 12), and January 24, 1934 (48 Stat. 319); Puerto Rico and Virgin Islands—March 2, 1934 (48 Stat. 361); Hawaii—March 26, 1934 (48 Stat. 467); and Panama Canal Zone—June 19, 1934 (48 Stat. 1116).

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amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument." [1]

[1] Rhode Island v. Palmer (National Prohibition Cases), 253 U. S. 350, 386 [1920].

The Eighteenth Amendment was lawfully proposed by Congress, and made a part of the Constitution on ratification by the State legislatures. It is not required by article V of the Constitution that amendments detracting from the liberty of the citizen—as distinguished from changes in the character of Federal means or machinery—be referred to conventions.[1]

[1] United States v. Sprague, 282 U. S. 716 [1931].

The provision of the Ohio constitution extending the referendum to ratifications by the legislature of proposed amendments is inconsistent with article V of the Constitution of the United States which gives Congress the choice of securing ratification by State legislatures or State conventions.[1]

[1] Hawke v. Smith (No. 1), 253 U. S. 221 [1920], reversing judgment by State court sustaining a demurrer in a suit to enjoin the Secretary of State from proceeding to submit the ratification of the 18th Amendment to the electors.

Effective Dates.

In Dillon v. Gloss,[1] the Court held that Congress had power in proposing an amendment to fix a reasonable time for ratification, and 7 years, the period fixed by Congress in this instance, was held reasonable. Further, the Eighteenth Amendment became part of the Constitution on January 16, 1919, when ratification by the States was consummated, and not on the date when ratification was proclaimed by the Secretary of State (i. e., January 29, 1919). Since the amendment was in terms to be effective "after 1 year from the ratification", it follows that it went into effect January 16, 1920. However, it became effective as a law on ratification and empowered Congress thereupon to legislate in anticipation for the enforcement of the prohibition when the year should expire.[2]

[1] 256 U. S. 368 [1921].
[2] Druggan v. Anderson, 269 U. S. 36 [1925].

The Supreme Court took judicial notice of the fact that the ratification of the Twenty-first Amendment of the Constitution of the United States, which repealed the Eighteenth Amendment, was consummated on December 5, 1933, and held that "the National Prohibition Act, to the extent that its provisions rested upon the grant of authority to the Congress by the Eighteenth Amendment, immediately fell with the withdrawal by the people of the essential constitutional support." [1] Congress, under the taxing power, may tax

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Amdt. 18.—Prohibition

intoxicating liquors notwithstanding their production is prohibited;[2] and this basic tax on distilled spirits continued enforcible after the repeal of the amendment.[3] But a provision in the Revenue Act of 1926 imposing a "special excise tax" on persons dealing in liquor contrary to State law, if regarded as a provision for enforcing the Eighteenth Amendment, fell automatically with its repeal.[4] Liability on a bond, conditioned upon return of a vessel (seized for transportation of intoxicating liquors) on the day of the criminal trial, was not extinguished by the intermediate repeal of this amendment, where it appeared that breach had been committed prior to repeal.[5]

[1] United States *v.* Chambers, 291 U. S. 217 [1934], affirming a judgment dismissing an indictment under the Prohibition Act, pending on date of repeal of the 18th Amendment. *See also* Massey *v.* United States, 291 U. S. 608 [1934].

[2] United States *v.* Yuginovich, 256 U. S. 450, 462 [1921]; United States *v.* Stafoff, 260 U. S. 477 [1923].

[3] United States *v.* Rizzo, 297 U. S. 530 [1936].

[4] United States *v.* Constantine, 296 U. S. 287 [1935]. *See also* United States *v.* Kesterson, 296 U. S. 299 [1935].

[5] United States *v.* Mack, 295 U. S. 480 [1935].

Transportation and Importation.

These words are used in their ordinary sense; transportation comprehends "any real carrying about or from one place to another." [1]

[1] Cunard S. S. Co. *v.* Mellon, 262 U. S. 100, 121–122 [1923].

This amendment indicated no purpose to confiscate liquors lawfully owned when it became effective, and intended for lawful use. A lessee of a room in a safe deposit warehouse was entitled to transport to his home liquor acquired before the effective date of the amendment.[1] But, the owner of whiskey stored in a Government bonded warehouse could not secure its release, upon payment of the tax, for transportation to his dwelling for consumption there as a beverage.[2]

[1] Street *v.* Lincoln Safe Deposit Co., 254 U. S. 88 [1920].

[2] Corneli *v.* Moore, 257 U. S. 491 [1922].

Territorial Application.

"Territory" as here used means "the regional areas—of land and adjacent waters—over which the United States claims and exercises dominion and control as a sovereign power. * * * It includes the land areas under its dominion and control, the ports, harbors, bays, and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league."[1]

[1] Cunard S. S. Co. *v.* Mellon, 262 U. S. 100, 122 [1923], holding that the carrying of intoxicating liquors as sea stores, for beverage purposes, through the territorial waters or into the ports and harbors of the United States by foreign or domestic merchant ships was forbidden by this amendment and the National Prohibition Act.

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The transportation in bond of intoxicating liquors across the United States from Canada to Mexico, or the transshipment of such liquor from one British ship to another while within a port of the United States, was prohibited by this amendment and the legislation thereunder.[1]

[1] Grogan v. Walker & Sons, 259 U. S. 80 [1922].

Enforcement of Amendment.

CONCURRENT POWER.

"The words 'concurrent power' [in sec. 2 of the amendment] do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs."[1]

[1] Rhode Island v. Palmer (National Prohibition Cases), 253 U. S. 350, 387 [1920].

A person committing an act with respect to intoxicating liquors which was denounced as a crime by both National and State sovereignties was subject to punishment under the law of each sovereignty, and this was not contrary to the double jeopardy provision of the Fifth Amendment.[1]

[1] United States v. Lanza, 260 U. S. 377 [1922]; Brede v. Powers, 263 U. S. 4 [1923]; Wyman v. United States, 263 U. S. 14 [1923].

POWER OF CONGRESS.

The effect of the Eighteenth Amendment was to confer on Congress the same powers to deal with manufacture, sale, and transportation of intoxicating liquors in intrastate commerce as it formerly possessed with respect to liquor in interstate commerce.[1]

[1] United States v. Cohen, 268 Fed. 426 [1920].

The National Prohibition Act, title 2, section 35, did not authorize the collector of internal revenue to enforce by distraint, as a tax, the penalty therein imposed on persons selling liquor unlawfully.[1]

[1] Lipke v. Lederer, 259 U. S. 557 [1922]; Regal Drug Corp. v. Wardell, 260 U. S. 386 [1922].

POWER OF STATES.

There was nothing in the amendment which indicated an intention to repeal or supersede the legislation of the several States, whenever the enforcement of such legislation would aid in carrying into effect the provisions of the amendment.[1]

[1] State v. Hartley, 106 S. C. 766 [1921].

The States of Rhode Island and New Jersey could not enjoin officers of the Federal Government from enforcing criminal laws

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enacted by Congress, because the first section of this amendment was operative throughout the entire Territorial limits of the United States, bound Congress, all State and Territorial legislative bodies, all Federal courts, Federal officers and individuals within those limits, and of its own force invalidated every State constitutional provision, and every organic law or legislative act—whether of Congress, of a State legislature, or of a Territorial assembly—which authorized or sanctioned what the section prohibited.[1]

[1] Rhode Island *v.* Palmer (National Prohibition Cases), 253 U. S. 350, 386 [1920].

Neither the Eighteenth Amendment nor the Volstead Act granted the right to sell intoxicating liquors within a State; certainly it lent no color to the suggestion that a pharmacist was thereby endowed with a right to dispense liquor, for which he could claim the protection of the Fourteenth Amendment.[1]

[1] Hixon *v.* Oakes, 265 U. S. 254, 256 [1924].

A State within its police power might enact measures, as needful for the protection of its people, prohibiting possession or delivery of intoxicants fit for beverage purposes under the guise of innocent preparations not within the National Prohibition Act.[1]

[1] McCormick & Co. *v.* Brown, 286 U. S. 131 [1932].

It was never competent for a State, in a matter respecting the use of liquor, to enlarge upon rights limited by congressional action. It might legislate more rigorously than Congress, in furtherance of more complete prohibition; but, in view of the supremacy of Congress in the field it could not legislate more liberally. The fact that different, particularly more drastic, penalties were prescribed by the inferior sovereignty, did not result in their invalidity.[1]

[1] Ex parte Crookshank, 269 Fed. 985 [1921].

In Hawes *v.* Georgia,[1] it was held that a State law providing that a person prosecuted for permitting apparatus for distilling intoxicating liquors to be upon real estate actually occupied by him should be *prima facie* presumed to have known of its presence, was not invalid.

[1] 258 U. S. 1 [1922].

A Pennsylvania statute, prohibiting sales without license, was not contrary to the Eighteenth Amendment or the Volstead Act.[1]

[1] Vigliotti *v.* Pennsylvania, 258 U. S. 403 [1922].

APPROPRIATE LEGISLATION.

The term "appropriate legislation", as used in section 2, necessarily meant such legislation as would tend to make that constitutional provision completely operative and effective.[1]

[1] Rose *v.* United States, 274 Fed. 248 [1921].

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Amdt. 18.—Prohibition

The power of the Federal Government hereunder to enforce the prohibition of the manufacture, etc., of intoxicating liquor carries with it the power to enact any legislative measures reasonably adapted to promote the purpose. Regulation of the sale of denatured alcohol is such a measure.[1] So also is the provision preventing physicians from prescribing intoxicating malt liquors [2] or more than a specified amount of spirituous liquor [3] for medicinal purposes.

[1] Selzman *v.* United States, 268 U. S. 466 [1925].
[2] Everard's Breweries *v.* Day, 265 U. S. 545 [1924].
[3] Lambert *v.* Yellowley, 272 U. S. 581 [1926].

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AMENDMENT 19

EQUAL SUFFRAGE

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AMENDMENT 19.—EQUAL SUFFRAGE

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EQUAL SUFFRAGE

AMENDMENT 19

Amdt. 19. Cl. 1. Equal suffrage.

The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Amdt. 19. Cl. 2. Power of Congress.

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

Validity of Adoption.

The State of Maryland failed to ratify this amendment. Shortly after its adoption a suit was brought by qualified voters of Maryland to require the Maryland Board of Registry to strike the names of women from the register of voters upon the grounds that the State constitution limited the suffrage to men and that this amendment to the Federal Constitution was not validly adopted. The argument was made that the power of amendment conferred by the Federal Constitution does not extend to this amendment because of its character—that so great an addition to the electorate, if made without the State's consent, destroys its autonomy as a political body. But the court stated: "This amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the Fifteenth is valid, although rejected by six States, including Maryland, has been recognized and acted on for half a century. *See* United States *v.* Reese, 92 U. S. 214 [1876]; Neal *v.* Delaware, 103 U. S. 370 [1881]; Guinn *v.* United States, 238 U. S. 347 [1915]; Myers *v.* Anderson, 238 U. S. 368 [1915]. The suggestion that the Fifteenth was incorporated in the Constitution, not in accordance with law, but practically as a war measure, which has been validated by acquiescence, cannot be entertained." [1]

[1] Leser *v.* Garnett, 258 U. S. 130, 136 [1922].

Fairchild *v.* Hughes [1] was a proceeding commenced on July 7, 1920, to prevent proclamation of adoption and to have the amendment declared void, but the court held that a private citizen is not entitled "to institute in the Federal courts a suit to secure by indirec-

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Amdt. 19.—Right of Citizens to Vote

tion a determination whether a statute, if passed, or a constitutional amendment about to be adopted, will be valid."

[1] 258 U. S. 126 [1922].

The ratification of this amendment by the legislature could not be referred to the electors of a State; the Ohio constitution in requiring such a referendum was inconsistent with the Constitution of the United States, article V, prescribing the alternative methods of ratification, by the legislatures or by conventions.[1]

[1] Hawke *v.* Smith, 253 U. S. 231 [1920].

The fact that the Nineteenth Amendment touched the rights of citizens, but was nevertheless adopted by the State legislatures, was given weight by the court against the argument that an amendment similarly affecting personal rights (the Eighteenth) was not validly adopted because not ratified by conventions.[1]

[1] United States *v.* Sprague, 282 U. S. 716 [1931].

Effect of Amendment on Voting Qualifications.

This amendment, while popularly referred to as the "woman suffrage amendment," declares that the right of "citizens"—either men or women—to vote shall not be denied or abridged on account of "sex." In Breedlove *v.* Suttles,[1] a male citizen of Georgia contended that the State poll tax levied on men, but not on women who did not register for voting, violated the Nineteenth Amendment. The payment of the poll tax was a prerequisite to registration. But men were obliged to pay the tax whether they registered or not, while women who did not register were not required to pay said tax. The Court, after stating that the Nineteenth Amendment "applies to men and women alike and by its own force supersedes inconsistent measures, whether Federal or State," [2] said that the Georgia law neither denied nor abridged the right to vote on account of sex. "It is fanciful to suggest that the Georgia law is a mere disguise under which to deny or abridge the right of men to vote on account of their sex. The challenged enactment is not repugnant to the Nineteenth Amendment." [3]

[1] 230 U. S. 277 [1937].
[2] *Cf.* Leser *v.* Garnett, 258 U. S. 130, 135 [1922].
[3] Breedlove *v.* Suttles, 302 U. S. 277 [1937].

This amendment does not confer upon women the right to vote. It does not purport to do so. It only prohibits discrimination against them on account of their sex in legislation prescribing the qualifications of electors, a very different thing from conferring the right to vote, which is left to legislative enactment, restrained only by the inhibition against the prescribed discrimination.[1] Thus, by its own force and effect, it strikes from the Alabama constitution and laws the word "male", when used in connection with the right and quali-

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Amdt. 19.—Right of Citizens to Vote

fication to vote, and also strikes therefrom the use of the masculine pronoun, so as to make the same include and applicable to both sexes.[2] Also, a Kentucky statute which imposed on women voters a literacy test not required of men was held unconstitutional;[3] and a Missouri act which required that women given limited suffrage should have separate ballots for presidential electors became inoperative with the adoption of this amendment.[4]

[1] State (S. C.) *v.* Mittle, 120 S. C. 526 [1922], writ of error dismissed, 260 U. S. 705 [1922].

[2] Graves *v.* Eubank, 205 Ala. 174 [1921]. *See also* Leser *v.* Garnett, 258 U. S. 130 [1922]; In re Opinion of the Justices, 240 Mass. 601 [1922]; In re Opinion of the Justices, 119 Me. 603 [1921]; State (Florida) ex. rel. Barnett *v.* Gray (1932), 107 Fla. 73 [1932].

[3] Prewitt *v.* Wilson, 242 Ky. 231 [1932].

[4] In re Graves, 325 Mo. 888 [1930].

A State legislature cannot prescribe such methods of conducting elections as to disfranchise constitutionally qualified electors, and a system where the ballot was in a form compelling voters to vote for one male and one female representative on the State committee of a political party prevented the electors from voting for candidates of their choice, and therefore violated State and Federal Constitutions.[1]

[1] In re Cavellier, 159 Misc. (N. Y.), 212 [1936].

Amendment as Qualifying Women to Hold Office.

In Opinion of Justices,[1] it was held that, in view of this amendment, which in effect amended article 2, section 1, of the Maine constitution regarding the qualifications of voters, the Governor of that State could appoint women as justices of the peace.

[1] 119 Me. 603 [1921].

Where "elective office holders" must under the law be duly qualified electors, women are placed on the same basis as men with regard to their eligibility for election to office.[1]

[1] In re Opinion of the Justices, 240 Mass. 601 [1922]; In re Opinion of the Justices, 83 N. H. 589 [1927].

Effect on Eligibility of Women for Jury Service.

This amendment, in terms, refers only to the right of women to vote; it does not *ipso facto* render women eligible to serve as jurors,[1] nor operate in terms or by implication to qualify women as jurors. It requires legislation to do that.[2] Accordingly, a State statute providing that "No woman shall be drawn for jury service unless she shall have previously filed with the clerk of the district court a written declaration of her desire to be subject to such service" is not invalid as being in violation of this amendment;[3] nor is one which absolutely excludes women from jury duty.[4] But where under the statutes of a State qualified electors possessing other specified requisite qualifica-

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Amdt. 19.—Right of Citizens of Vote

tions, are competent to serve as jurors, women are eligible for jury service, since this amendment makes them qualified electors.[5]

[1] State (Iowa) *v.* Walker, 192 Iowa 823 [1921]; People (Ill.) ex. rel. Fife *v.* Barnett, 319 Ill. 403 [1926].

[2] State (N. J.) *v.* James, 96 N. J. Law 132 [1921], wherein it was held that a male defendant could not raise the objection that women were not drawn for jury service; State (La.) *v.* Dreher, 166 La. 924 [1928], wherein it was held that a woman defendant had no right to a trial by a mixed jury of men and women, her right being merely to reject, not to select, jurors.

[3] State (La.) *v.* Bray, 153 La. 103 [1923].

[4] Powers *v.* State (Ga.), 172 Ga. 1 [1931]. *See also* Commonwealth (Mass.) *v.* Welosky, 276 Mass. 398 [1931], certiorari denied, 284 U. S. 684 [1932].

[5] State (Iowa) *v.* Hickman, 195 Iowa 765 [1923].

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AMENDMENT 20

COMMENCEMENT OF THE TERMS OF THE PRESIDENT, VICE PRESIDENT, AND MEMBERS OF CONGRESS, ETC.

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COMMENCEMENT OF THE TERMS OF THE PRESIDENT, VICE PRESIDENT, AND MEMBERS OF CONGRESS, ETC.

AMENDMENT 20

Amdt. 20. Sec. 1. Commencement of terms of Pres., Vice Pres., Senators, and Representatives.

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Amdt. 20. Sec. 2. Meeting of Congress.

SEC. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Amdt. 20. Sec. 3. Death or disqualification of President elect.

SEC. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Amdt. 20. Sec. 4. Congress to provide for case wherein death occurs among those from whom House chooses a President.

SEC. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

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Amdt. 20.—Terms of President, etc.

Amdt. 20. Sec. 5. Date of effect.

SEC. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Amdt. 20. Sec. 6. Time limit on ratification.

SEC. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

In General.

The Senate Committee on the Judiciary in Senate Report No. 26, Seventy-second Congress, suggested several reasons for the proposed Twentieth Amendment. They said in part:

* * * When our Constitution was adopted there was some reason for such a long intervention of time between the election and the actual commencement of work by the new Congress. * * * Under present conditions [of communication and transportation] the result of elections is known all over the country within a few hours after the polls close, and the Capital City is within a few days' travel of the remotest portions of the country.

* * * Another effect of the amendment would be to abolish the so-called short session of Congress. * * * Every other year, under our Constitution, the terms of Members of the House and one-third of the Members of the Senate expire on the 4th day of March. * * * Experience has shown that this brings about a very undesirable legislative condition. It is a physical impossibility during such a short session for Congress to give attention to much general legislation for the reason that it requires practically all of the time to dispose of the regular appropriation bills. * * * The result is a congested condition that brings about either no legislation or illy considered legislation.

* * * If it should happen that in the general election in November in presidential years no candidate for President had received a majority of all the electoral votes, the election of a President would then be thrown into the House of Representatives and the membership of the House of Representatives called upon to elect a President would be the old Congress and not the new one just elected by the people. It might easily happen that the Members of the House of Representatives, upon whom devolved the solemn duty of electing a Chief Magistrate for 4 years, had themselves been repudiated at the election that had just occurred, and the country would be confronted with the fact that a repudiated House, defeated by the people themselves at the general election, would still have the power to elect a President who would be in control of the country for the next 4 years.

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Amdt. 20.—Terms of President, etc.

It is quite apparent that such a power ought not to exist, and that the people having expressed themselves at the ballot box should through the Representatives then selected, be able to select the President for the ensuing term.

* * * The question is sometimes asked, Why is an amendment to the Constitution necessary to bring about this desirable change? The Constitution [before this amendment] does not provide the date when the terms of Senators and Representatives shall begin. It does fix the term of Senators at 6 years and of Members of the House of Representatives at 2 years. The commencement of the terms of the first President and Vice President and of Senators and Representatives composing the First Congress was fixed by an act of [the Continental] Congress adopted September 13, 1788, and that act provided "that the first Wednesday in March next be the time for commencing proceedings under the Constitution." It happened that the first Wednesday in March was the 4th day of March, and hence the terms of the President and Vice President and Members of Congress begin on the 4th day of March. Since the Constitution provides that the term of Senators shall be 6 years and the term of Members of the House of Representatives 2 years, it follows that this change cannot be made without changing the terms of office of Senators and Representatives, which would in effect be a change of the Constitution. By another act (the act of March 1, 1792) Congress provided that the terms of President and Vice President should commence on the 4th day of March after their election. It seems clear, therefore, that an amendment to the Constitution is necessary to give relief from existing conditions.

As thus stated, the exact term of the President and Vice President was fixed by the Constitution (art. II, sec. 1, clause 1) at 4 years, and became actually effective, by resolution of the Continental Congress, on the 4th of March 1789. Since this amendment was declared adopted on February 6, 1933, section 1 in effect shortened, by the interval between January 20 and March 4, 1937, the terms of the President and Vice President elected in 1932.

Similarly, it shortened, by the intervals between January 3 and March 4, the terms of Senators elected for terms ending March 4, 1935, 1937, and 1939; and thus temporarily modified Amendment 17, fixing the terms of Senators at 6 years. Likewise, it shortened the terms of Representatives elected to the Seventy-third Congress, by the interval between January 3 and March 4, 1935; and temporarily modified article I, section 2, clause 1, fixing the terms of Representatives at 2 years.

Section 1 further modifies Amendment 12 in its reference to March 4 as the date by which the House must exercise its choice of a President.

Section 2 supersedes clause 2 of section 4 of article I. The setting of an exact hour for meeting constitutes a recognition of the long prac-

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Amdt. 20.—Terms of President, etc.

tice of Congress, which in 1867 was for the first time (14 Stat. 378) enacted into permanent law, only to be repealed in 1871 (17 Stat. 12). See Hinds' Precedents of the House of Representatives, volume I, section 11.

When the 3d day of January fell on Sunday (in 1937), Congress did by law appoint a different day for its assemblage (49 Stat. 1826, ch. 713).

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AMENDMENT 21

REPEAL OF EIGHTEENTH AMENDMENT

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REPEAL OF EIGHTEENTH AMENDMENT

AMENDMENT 21

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Amdt. 21. Sec. 1. Repeal of prohibition.

SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Amdt. 21. Sec. 2. Transportation into States prohibited.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amdt. 21. Sec. 3. Time limit on ratification.

Scope of Amendment.

In United States *v.* Chambers,[1] the Supreme Court took judicial notice of the fact that the ratification of the Twenty-first Amendment of the Constitution of the United States, which repealed the Eighteenth Amendment, was consummated on December 5, 1933, and held that "the National Prohibition Act, to the extent that its provisions rested upon the grant of authority to the Congress by the Eighteenth Amendment, immediately fell with the withdrawal by the people of the essential constitutional support." Thus, prosecutions, including proceedings on appeal, continued or begun after the ratification of the Twenty-first Amendment, for violations of the National Prohibition Act, cannot be continued by the Federal courts for lack of jurisdiction to entertain further proceedings. All criminal penalties and forfeitures on which final judgment had not been rendered fell, and indictments were dismissed in cases where it appeared from the record that no final judgment was rendered therein against the particular petitioners prior to the ratification of this amendment.[2] This consequence is not altered by the fact that the crimes in question were alleged to have been committed while the National Prohibition Act was in effect.

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Amdt. 21.—Repeal of Prohibition

The Twenty-first Amendment contained no saving clause as to prosecutions for offenses theretofore committed, and neither the Congress nor the courts can give the Eighteenth Amendment continued vitality.

[1] 291 U. S. 217, 222–224 [1934].
[2] Massey *v.* United States, 291 U. S. 608 [1934].

This amendment, not having retroactive application, did not change the character of acts which were crimes when committed, with valid final judgment of conviction pronounced, nor did it pardon those who committed them. Hence judgment could be enforced without authority from the National Prohibition Act or Eighteenth Amendment. But this amendment made such acts noncriminal for the future.[1]

[1] Ellerbee *v.* Aderhold, 5 F. Supp. 1022 [1934].

On the other hand, contractual liabilities connected with a criminal act continued to be enforcible with undiminished obligation. Thus, an indemnity bond, to insure delivery of a vessel to the marshal on trial day, is a contract to be enforced according to its terms; that liability became complete upon the breach of the express condition for the return of the delinquent vessel, and the liability thus perfected was not extinguished or diminished by the loss of penal sanctions.[1]

[1] United States *v.* Mack, 295 U. S. 480, 483 [1935].

A tax on forfeited alcohol, sought to be recovered by the United States, is not a penalty imposed for violation of the National Prohibition Act; and hence is collectible, even though the Eighteenth Amendment has been repealed. "A lien attaches to alcohol [irrespective of its legal or illegal origin, domestic manufacture or importation] 'as soon as it is in existence as such' and continues until the tax is paid." All distilled spirits are subject to the basic Federal tax.[1]

[1] United States *v.* Rizzo, 297 U. S. 530, 533 [1936].

Effect on the Commerce Clause.

The second section of the Twenty-first Amendment (prohibiting importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the law thereof) removes intoxicating liquor from the protection of the commerce and equal protection clauses of the Constitution. Beer in the original package, unbroken and unopened, manufactured in and brought from another State is subject to prohibition, license, or tax by the State of destination.[1] The measure of control which the States may exercise is determined by the States themselves. If the importation of intoxicating liquor is acceptable to a State, it retains its status as the legitimate subject of interstate commerce;

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Amdt. 21.—Repeal of Prohibition

but if it is forbidden importation by the State, the laws of the United States likewise forbid it.[2]

[1] State Board of Equalization *v.* Young's Market, 299 U. S. 59 [1936].
[2] Premier-Pabst Sales Co. *v.* Grosscup, 12 F. Supp. 970 [1935], affirmed 298 U. S. 226 [1936].

Section 2 of this amendment permits a State legislature to regulate interstate commerce in intoxicants and to forbid the transportation or importation of intoxicating liquors into the State by a common carrier, by its inhabitants for their own use,[1] or by nonresidents for sale therein.[2] Also, a State may admit evidence of possession of liquor legally bought in another State as evidence of unlawful intent to violate its statute, and yet not transgress the commerce clause.[3]

[1] People *v.* Ryan, 289 N. Y. S. 141 [1936].
[2] Premier-Pabst Sales Corporation *v.* Grosscup, 298 U. S. 226 [1936].
[3] State *v.* Arluno, 268 N. W. 179 [1936].

It is a valid exercise of the police power of a State to make a place where liquor is illegally sold a "common nuisance" and it does not violate the commerce clause of the Federal Constitution.[1]

[1] Riggins *v.* District Court of Salt Lake County, 89 Utah 183 [1935].

A Missouri statute prohibiting a foreign liquor dealer from selling liquor to a retail dealer within the State and requiring it to sell to a wholesale dealer or through a wholesale dealer to a retail dealer was held not an unconstitutional burden on the interstate commerce and equal protection clauses; a State might under the Webb-Kenyon Act (27 U. S. C. sec. 122) in exercise of the police power have prohibited the manufacture and sale of intoxicating liquor or regulated and supervised manufacture and sale thereof in such manner as it conceived to be necessary and proper.[1]

[1] General Sales & Liquor Company *v.* Becker, 14 F. Supp. 348 [1936].

A Montana statute prohibiting private sales of intoxicating liquor and providing for distribution thereof by the State was held not to be an unconstitutional interference with the power of Congress to regulate interstate commerce, in view of the Twenty-first Amendment.[1]

[1] State *v.* Andre, 101 Mont. 366 [1936

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ACTS OF CONGRESS
HELD UNCONSTITUTIONAL IN WHOLE OR IN PART
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ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES

1. Act of September 24, 1789 (1 Stat. 81, sec. 13, in part).

Provision that "* * * [the Supreme Court] shall have power to issue * * * writs of mandamus, in cases warranted by the principles and usages of law, to any * * * persons holding office, under authority of the United States" as applied to the issue of mandamus to the Secretary of State requiring him to deliver to plaintiff a commission (duly signed by the President) as justice of the peace in the District of Columbia, *held* an attempt to enlarge the original jurisdiction of the Supreme Court, fixed by article III, section 2.

Marbury *v.* Madison, 1 Cr. 137 (February 24, 1803).

2. Act of February 20, 1812 (2 Stat. 677, ch. 22).

Provisions authorizing land officers to examine into "validity of claims to land * * * which are derived from confirmations made * * * by the governors of the Northwest * * * territory", *held* not to authorize annulment of title confirmed by Governor St. Clair in 1799, nor to validate a subsequent sale and patent by the United States. (*See* Fifth Amendment.)

Reichart *v.* Felps, 6 Wallace 160 (March 16, 1868).

3. Act of March 6, 1820 (3 Stat. 548, sec. 8, proviso).

The Missouri Compromise, prohibiting slavery within the Louisiana Territory north of 36° 30′, except Missouri, *held* not warranted as a regulation of Territory belonging to the United States under article IV, section 3, clause 2 (and *see* Fifth Amendment).

Dred Scott *v.* Sandford, 19 Howard 393 (March 6, 1857).

4. Act of February 25, 1862 (12 Stat. 345, sec. 1); July 11, 1862 (12 Stat. 532, sec. 1); March 3, 1863 (12 Stat. 711, sec. 3), each in part only.

"Legal tender clauses", making noninterest-bearing United States notes legal tender in payment of "all debts, public and private", so far as applied to debts contracted before passage of the act, *held* not within express or implied powers of Congress under article I, section 8, and inconsistent with article I, section 10, and Fifth Amendment.

Hepburn *v.* Griswold, 8 Wallace 603 (February 7, 1870); overruled in Knox *v.* Lee (Legal Tender cases), 12 Wallace 457 (May 1, 1871).

5. Act of March 3, 1863 (12 Stat. 756, ch. 81, sec. 5).

"So much of the fifth section * * * as provides for the removal of a judgment in a State court, and in which the cause was tried by

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a jury to the circuit court of the United States for a retrial on the facts and law, is not in pursuance of the Constitution, and is void" under the Seventh Amendment.

The Justices *v.* Murray, 9 Wallace 274 (March 14, 1870).

6. Act of March 3, 1863 (12 Stat. 766, ch. 92, sec. 5).

Provision for an appeal from the Court of Claims to the Supreme Court—there being, at the time, a further provision (sec. 14) requiring an estimate by the Secretary of the Treasury before payment of final judgments, *held* to contravene the judicial finality intended by the Constitution, article III.

Gordon *v.* United States, 2 Wallace 561 (March 10, 1865). (Case was dismissed without opinion; the grounds upon which this decision was made were stated in a posthumous opinion by Chief Justice Taney printed in the appendix to volume 117 of the U. S. Reports at p. 697.)

7. Act of June 30, 1864 (13 Stat. 311, ch. 174, sec. 13).

Provision that "any prize cause now pending in any circuit court shall, on the application of all parties in interest * * * be transferred by that court to the Supreme Court * * *", as applied in a case where no action had been taken in the Circuit Court on the appeal from the District Court, *held* to propose an appeal procedure not within article III, section 2.

The "Alicia", 7 Wallace 571 (January 25, 1869).

8. Act of January 24, 1865 (13 Stat. 424, ch. 20).

Requirement of a test oath (disavowing actions in hostility to the United States) before admission to appear as attorney in a Federal court by virtue of any previous admission, *held* invalid as applied to an attorney who had been pardoned by the President for all offenses during the Rebellion—as *ex post facto* (art. I, sec. 9, clause 3) and an interference with the pardoning power (art. II, sec. 2, clause 1).

Ex parte Garland, 4 Wallace 333 (January 14, 1867).

9. Act of July 13, 1866 (14 Stat. 138), amending act of June 30, 1864 (13 Stat. 284, ch. 173, sec. 122).

Tax on indebtedness of railroads, "* * * to whatsoever party or person the same may be payable", as applied to railroad bonds held by a municipal corporation under authority of the State, *held* an infringement of reserved State sovereignty.

United States *v.* Baltimore & O. R. Co., 17 Wallace 322 (April 3, 1873).

10. Act of March 2, 1867 (14 Stat. 477, ch. 169, sec. 13), amending act of June 30, 1864 (13 Stat. 281, sec. 116).

Tax on income of "* * * every person residing in the United States * * * whether derived from * * * salaries * * * or from any source whatever * * *", as applied to income of State

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judges, *held* an interference with reserved powers of State. (*See* Tenth Amendment.)

The Collector *v.* Day, 11 Wallace 113 (April 3, 1871).

11. Act of March 2, 1867 (14 Stat. 484, ch. 169, sec. 29).

General prohibition on sale of naphtha, etc., for illuminating purposes, if inflammable at less temperature than 110° F., *held* invalid "except so far as the section named operates within the United States, but without the limits of any State," as being a mere police regulation.

United States *v.* Dewitt, 9 Wallace 41 (February 21, 1870).

12. Act of May 31, 1870 (16 Stat. 140, ch. 114, secs. 3, 4).

Provisions penalizing (1) refusal of local election officials to permit voting by persons offering to qualify under State laws, applicable to any citizens; and (2) hindering of any person from qualifying or voting, *held* invalid under Fifteenth Amendment.

United States *v.* Reese et al., 92 U. S. 214 (March 27, 1876).

13. Act of July 12, 1870 (16 Stat. 235, ch. 251).

Provision making Presidential pardons inadmissible in evidence in Court of Claims, prohibiting their use by that court in deciding claims or appeals, and requiring dismissal of appeals by the Supreme Court in cases where proof of loyalty had been made otherwise than as prescribed by law, *held* an interference with judicial power under article III, section 1, and with the pardoning power under article II, section 2, clause 1.

United States *v.* Klein, 13 Wallace 128 (January 29, 1872).

14. Act of June 22, 1874 (18 Stat. 187, sec. 5).

Provision authorizing Federal courts to require production of documents in proceedings, other than criminal, under the revenue laws (the allegations expected to be proved thereby to be taken as proved, on failure to produce such documents), *held* as applied to a suit for forfeiture under the customs laws, to constitute unreasonable search in violation of the Fourth Amendment.

Boyd *v.* United States, 116 U. S. 616 (February 1, 1886).

15. Revised Statutes 1977 (act of May 31, 1870, 16 Stat. 144).

Provision that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens * * *," *held* invalid under the Thirteenth Amendment.

Hodges *v.* United States, 203 U. S. 1 (May 28, 1906).

16. Revised Statutes 4937–4947 (act of July 8, 1870, 16 Stat. 210), and act of August 14, 1876 (19 Stat. 141).

Original trademark law, applying to marks "for exclusive use within the United States," and a penal act designed solely for the protection

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of rights defined in the earlier measure, *held* not supportable by article I, section 8, clause 8 (copyright clause), nor article I, section 8, clause 3 (interstate commerce).

Trade-Mark Cases, 100 U. S. 82 (November 17, 1879).

17. Revised Statutes 5132, subdivision 9 (act of March 2, 1867, 14 Stat. 539).

Provision penalizing "any person respecting whom bankruptcy proceedings are commenced * * * who, within 3 months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud * * *," *held* a police regulation not within the bankruptcy power (art. I, sec. 8, clause 4).

United States *v.* Fox, 95 U. S. 670 (January 7, 1878).

18. Revised Statutes 5507 (act of May 31, 1870, 16 Stat. 141, sec. 4).

Provision penalizing "every person who prevents, hinders, controls, or intimidates another from exercising * * * the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery * * *," *held* not authorized by the said Fifteenth Amendment.

James *v.* Bowman, 190 U. S. 127 (May 4, 1903).

19. Revised Statutes 5519 (act of April 20, 1871, 17 Stat. 13, ch. 22, sec. 2).

Section providing punishment in case "two or more persons in any State * * * conspire * * * for the purpose of depriving * * * any person * * * of the equal protection of the laws * * * or for the purpose of preventing or hindering the constituted authorities of any State * * * from giving or securing to all persons within such State * * * the equal protection of the laws * * *," *held* invalid for punishment of conspiracy within a State—as not supported by the Thirteenth to Fifteenth Amendments.

United States *v.* Harris, 106 U. S. 629 (January 22, 1883).

In Baldwin *v.* Franks, 120 U. S. 678 (March 7, 1887), an attempt was made to distinguish the Harris case, and apply it to conspiracy against aliens, though within a State, and *held*, the provision was not separable in such case.

20. Revised Statutes of the District of Columbia section 1064 (act of June 17, 1870, 16 Stat. 154, ch. 133, sec. 3).

Provision that "prosecutions in the police court [of the District of Columbia] shall be by information under oath, without indictment by grand jury or trial by petit jury," as applied to punishment for conspiracy, *held* to contravene article III, section 2, clause 3, requiring jury trial of all crimes.

Callan *v.* Wilson, 127 U. S. 540 (May 14, 1888).

21. Act of March 1, 1875 (18 Stat. 336, secs. 1, 2).

Provision "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommo-

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dations * * * of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude"—subject to penalty, *held* not to be supported by the Thirteenth or Fourteenth Amendments.

Civil Rights Cases, 109 U. S. 3 (October 15, 1883), as to operation within States.

Butts *v.* Merchants and Miners Transportation Co., 230 U. S. 126 (June 16, 1913) as to operation outside the States.

22. Act of March 3, 1875 (18 Stat. 479, ch. 144, sec. 2).

Provision that "if the party [i. e., a person stealing property from the United States] has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against [the] receiver that the property of the United States therein described has been embezzled, stolen, or purloined," *held* to contravene the Sixth Amendment.

Kirby *v.* United States, 174 U. S. 47 (April 11, 1899).

23. Act of July 12, 1876 (19 Stat. 80, sec. 6, in part).

Provision that "postmasters of the first, second, and third classes * * * may be removed by the President by and with the advice and consent of the Senate," *held* to infringe the executive power under article II, section 1, clause 1.

Myers *v.* United States, 272 U. S. 52 (October 25, 1926).

24. Act of August 14, 1876 (19 Stat. 141, trademark act), *see* Revised Statutes 4937.

25. Act of August 11, 1888 (25 Stat. 411).

Clause, in a provision for the purchase or condemnation of a certain lock and dam in the Monongahela River, that "* * * in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated * * *," *held* to contravene the Fifth Amendment.

Monongahela Navigation Co. *v.* United States, 148 U. S. 312 (March 27, 1893).

26. Act of May 5, 1892 (27 Stat. 25, ch. 60, sec. 4).

Provision of a Chinese exclusion act, that Chinese persons "convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period not exceeding 1 year and thereafter removed from the United States * * *" (such conviction and judgment being had before a justice, judge, or commissioner upon a summary hearing), *held* to contravene the Fifth and Sixth Amendments.

Wong Wing *v.* United States, 163 U. S. 228 (May 18, 1896).

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27. Joint Resolution of August 4, 1894 (28 Stat. 1018, No. 41).

Provision authorizing the Secretary of the Interior to approve a second lease of certain land by an Indian chief in Minnesota (granted to lessor's ancestor by art. 9 of a treaty with the Chippewa Indians), *held* an interference with judicial interpretation of treaties under article III, section 2, clause 1 (and repugnant to the Fifth Amendment).

Jones v. Meehan, 175 U. S. 1 (October 30, 1899).

28. Act of August 27, 1894 (28 Stat. 553–560, secs. 27–37).

Income tax provisions of the tariff act of 1894. "The tax imposed by sections 27 and 37, inclusive * * * so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation [art. I, sec. 2, clause 3], all those sections, constituting one entire scheme of taxation, are necessarily invalid" (158 U. S. 601, 637).

Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429 (April 8, 1895) and rehearing, 158 U. S. 601 (May 20, 1895).

29. Act of January 30, 1897 (29 Stat. 506, ch. 109).

Prohibition on sale of liquor "* * * to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government * * *," *held* a police regulation infringing State powers, and not warranted by the commerce clause, article I, section 8, clause 3.

Matter of Heff, 197 U. S. 488 (April 10, 1905) overruled in United States v. Nice, 241 U. S. 591 (1916).

30. Act of June 1, 1898 (30 Stat. 428).

Section 10, penalizing "any employer subject to the provisions of this act" who should "threaten any employee with loss of employment * * * because of his membership in * * * a labor corporation, association, or organization" (the act being applicable "to any common carrier * * * engaged in the transportation of passengers or property * * * from one State * * * to another State * * *," etc.), *held* an infringement of the Fifth Amendment, not supported by the commerce clause.

Adair v. United States, 208 U. S. 161 (January 27, 1908).

31. Act of June 13, 1898 (30 Stat. 451, 459).

Stamp tax on foreign bills of lading, *held* a tax on exports in violation of article I, section 9.

Fairbank v. United States, 181 U. S. 283 (April 15, 1901).

32. Same (30 Stat. 451, 460).

Tax on charter parties, as applied to shipments exclusively from ports in United States to foreign ports, *held* a tax on exports in violation of article I, section 9.

United States v. Hvoslef, 237 U. S. 1 (March 22, 1915).

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33. Same (30 Stat. 451, 461).

Tax on policies of marine insurance, as applied to insurance during voyage to foreign ports, *held* a tax on exports in violation of article I, section 9.

Thames and Mersey Marine Insurance Co. *v.* United States, 237 U. S. 19 (April 5, 1915).

34. Act of June 6, 1900 (31 Stat. 359, sec. 171).

Section of the Alaska Code providing for a six-person jury in trials for misdemeanors, *held* repugnant to the Sixth Amendment, requiring "jury" trial of crimes.

Rassmussen *v.* United States, 197 U. S. 516 (April 10, 1905).

35. Act of March 3, 1901 (31 Stat. 1341, sec. 935).

Section of the District of Columbia Code granting the same right of appeal, in criminal cases, to the United States or the District of Columbia as to the defendant, but providing that a verdict was not to be set aside for error found in rulings during trial, *held* an attempt to take an advisory opinion, contrary to article III, section 2.

United States *v.* Evans, 213 U. S. 297 (April 19, 1909).

36. Act of June 11, 1906 (34 Stat. 232, ch. 3073).

Act providing that "every common carrier engaged in trade or commerce in the District of Columbia * * * or between the several States * * * shall be liable to any of its employees * * * for all damages which may result from the negligence of any of its officers * * * or by reason of any defect * * * due to its negligence in its cars, engines * * * roadbed", etc., *held* not supportable under article 1, section 8, clause 3 as applied to employees engaged in moving trains in interstate commerce.

Employers' Liability Cases, 207 U. S. 463 (January 6, 1908). [The act was upheld as to the District of Columbia in Hyde *v.* Southern R. Co., 31 App. D. C. 466 [1908]; and as to Territories, in El Paso and Northeastern R. Co. *v.* Gutierrez, 215 U. S. 87 [1909].]

37. Act of June 16, 1906 (34 Stat. 269, sec. 2).

Provision of Oklahoma Enabling Act restricting relocation of the State capital prior to 1913, *held* not supportable by article IV, section 3, authorizing admission of new States.

Coyle *v.* Oklahoma (Smith), 221 U. S. 559 (May 29, 1911).

38. Act of February 20, 1907 (34 Stat. 899, sec. 3).

Provision in the Immigration Act of 1907 penalizing "whoever * * * shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution * * * any alien woman or girl, within 3 years after she shall have entered the United States," *held* an exercise of police power not within the control of Congress over immigration (whether drawn from the commerce clause or based on inherent sovereignty).

Keller *v.* United States, 213 U. S. 138 (April 5, 1909).

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39. Act of March 1, 1907 (34 Stat. 1028).

Provisions authorizing certain Indians "to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since * * * 1902, insofar as said acts * * * attempt to increase or extend the restrictions upon alienation * * * of allotments of lands of Cherokee citizens * * * ," and giving a right of appeal to the Supreme Court, *held* an attempt to enlarge the judicial power restricted by article III, section 2, to cases and controversies.

Muskrat *v.* United States and Brown and Gritts *v.* United States, 219 U. S. 346 (January 23, 1911).

40. Act of May 27, 1908 (35 Stat. 313, sec. 4).

Provision making locally taxable "all land [of Indians of the Five Civilized Tribes] from which restrictions have been or shall be removed," *held* a violation of the Fifth Amendment, in view of the Atoka Agreement, embodied in the Curtis Act of June 28, 1898, providing tax-exemption for allotted lands while title in original allottee, not exceeding 21 years.

Choate *v.* Trapp, 224 U. S. 665 (May 13, 1912).

41. Act of August 19, 1911 (37 Stat. 28).

A proviso in section 8 of the Federal Corrupt Practices Act fixing a maximum authorized expenditure by a candidate for Senator "in any campaign for his nomination and election," as applied to a primary election, *held* not supported by article I, section 4, giving Congress power to regulate the manner of holding elections for Senators and Representatives.

Newberry *v.* United States, 256 U. S. 232 (May 2, 1921).

42. Act of June 18, 1912 (37 Stat. 136, sec. 8).

Part of section 8 giving the Juvenile Court of the District of Columbia (proceeding upon information) concurrent jurisdiction of desertion cases (which were, by law, misdemeanors punishable by fine or imprisonment in the workhouse at hard labor for 1 year), *held* invalid under the Fifth Amendment, which gives right to presentment by a grand jury in case of infamous crimes.

United States *v.* Moreland, 258 U. S. 433 (April 17, 1922).

43. Act of March 4, 1913 (37 Stat. 988, part of par. 64).

Provision of the District of Columbia Public Utility Commission Act authorizing appeal to the United States Supreme Court from decrees of the District of Columbia Court of Appeals modifying valuation decisions of the Utilities Commission, *held* an attempt to extend the appellate jurisdiction of the Supreme Court to cases not strictly judicial within the meaning of article III, section 2.

Keller *v.* Potomac Electric Power Co. et al., 261 U. S. 428 (April 9, 1923).

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44. Act of September 1, 1916 (39 Stat. 675, ch. 432, entire).

The original Child Labor Law, providing "that no producer * * * shall ship * * * in interstate commerce * * * any article or commodity the product of any mill * * * in which within 30 days prior to the removal of such product therefrom children under the age of 14 years have been employed or permitted to work more than 8 hours in any day, or more than 6 days in any week * * * ," *held* not within the commerce power of Congress.

Hammer *v.* Dagenhart, 247 U. S. 251 (June 3, 1918).

45. Act of September 8, 1916 (39 Stat. 757, sec. 2 (a) in part).

Provision of the income-tax law of 1916, that a "stock dividend shall be considered income, to the amount of its cash value," *held* invalid (in spite of the Sixteenth Amendment) as an attempt to tax something not actually income, without regard to apportionment under article I, section 2, clause 3.

Eisner *v.* Macomber, 252 U. S. 189 (March 8, 1920).

46. Act of October 3, 1917 (40 Stat. 302, secs. 4, 303, secs. 201 and 333, sec. 1206 (amending 39 Stat. 765, sec. 10)); and

Act of February 24, 1919 (40 Stat. 1075, secs. 230 and 1088, sec. 301).

Income and excess-profits taxes on income of "every corporation," as applied to income of an oil corporation from leases of land granted by the United States to a State, for the support of common schools, etc., *held* an interference with State governmental functions. (*See* Tenth Amendment.)

Burnet *v.* Coronado Oil & Gas Co., 285 U. S. 393 (April 11, 1932).

47. Same (40 Stat. 316, sec. 600 (f)).

The tax "upon all tennis rackets, golf clubs, baseball bats * * * balls of all kinds, including baseballs * * * sold by the manufacturer, producer, or importer * * *" as applied to articles sold by a manufacturer to a commission merchant for exportation, *held* a tax on exports within the prohibition of article I, section 9.

Spalding & Bros. *v.* Edwards, 262 U. S. 66 (April 23, 1923).

48. Act of October 6, 1917 (40 Stat. 395, ch. 97, in part).

The amendment of sections 24 and 256 of the Judicial Code (which prescribe the jurisdiction of district courts) "saving * * * to claimants the rights and remedies under the workmen's compensation law of any State," *held* an attempt to transfer legislative power to the States—the Constitution, by article III, section 2, and article I, section 8, having adopted rules of general maritime law.

Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149 (May 17, 1920).

49. Act of September 19, 1918 (40 Stat. 960, ch. 174).

Specifically, that part of the Minimum Wage Law of the District of Columbia which authorized the Wage Board "to ascertain and declare

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* * * (a) Standards of minimum wages for women in any occupation within the District of Columbia, and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals * * *," *held* to interfere with freedom of contract under the Fifth Amendment.

Adkins et al. *v.* Children's Hospital and Adkins et al. *v.* Lyons, 261 U. S. 525 (April 9, 1923)—overruled in West Coast Hotel Co. *v.* Parrish, 300 U. S. 379 (March 29, 1937).

50. Act of February 24, 1919 (40 Stat. 1065, ch. 18, sec. 213, in part).

That part of section 213 of the Revenue Act of 1918 which provided that "* * * for the purposes of this title * * * the term 'gross income' * * * includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of * * * judges of the Supreme and inferior courts of the United States * * * the compensation received as such) * * *" as applied to a judge in office when the act was passed, *held* a violation of the guaranty of judges' salaries, in article III, section 1.

Evans *v.* Gore, 253 U. S. 245 (June 1, 1920).
Miles *v.* Graham (268 U. S. 501, June 1, 1925), held it invalid as applied to a judge taking office subsequent to the date of the act.

51. Act of February 24, 1919 (40 Stat. 1097, sec. 402 (c)).

That part of the estate tax providing that "gross estate" of a decedent should include value of all property "to the extent of any interest therein of which the decedent has at any time made a transfer or with respect to which he had at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a *bona fide* sale * * *" as applied to a transfer of property made prior to the act and intended to take effect "in possession or enjoyment" at death of grantor, but not in fact testamentary or designed to evade taxation, *held* confiscatory, contrary to Fifth Amendment.

Nichols, Collector, *v.* Coolidge et al., Executors, 274 U. S. 531 (May 31, 1927).

52. Act of February 24, 1919, title XII (40 Stat. 1138, entire title).

The Child Labor Tax Act, providing that "every person * * * operating * * * any * * * factory [etc.] * * * in which children under the age of 14 years have been employed or permitted to work * * * shall pay * * * in addition to all other taxes imposed by law, an excise tax equivalent to 10 percent of the entire net profits received * * * for such year from the sale * * * of the product of such * * * factory * * *."

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held beyond the taxing power under article I, section 8, clause 1, and an infringement of State authority.

Bailey *v.* Drexel Furniture Co. (Child Labor Tax Case), 259 U. S. 20 (May 15, 1922).

53. Act of October 22, 1919 (41 Stat. 298, sec. 2), amending act of August 10, 1917 (40 Stat. 277, sec. 4).

Section 4 of the Lever Act, providing in part "that it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries * * *" and fixing a penalty, *held* invalid to support an indictment for charging an unreasonable price on sale—as not setting up an ascertainable standard of guilt within the requirement of the Sixth Amendment.

United States *v.* Cohen Grocery Co., 255 U. S. 81 (February 28, 1921).

54. Same.

That provision of section 4 making it unlawful "to conspire, combine, agree, or arrange with any other person to * * * exact excessive prices for any necessaries" and fixing a penalty, *held* invalid to support an indictment, on the reasoning of the Cohen case.

Weeds, Inc., *v.* United States, 255 U. S. 109 (February 28, 1921).

55. Act of August 24, 1921 (42 Stat. 187, ch. 86, Future Trading Act).

(*a*) Section 4 (and interwoven regulations) providing a "tax of 20 cents a bushel on every bushel involved therein, upon each contract of sale of grain for future delivery, except * * * where such contracts are made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a 'contract market' * * *," *held* not within the taxing power under article I, section 8.

Hill *v.* Wallace, 259 U. S. 44 (May 15, 1922).

(*b*) Section 3, providing "That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each * * * option for a contract either of purchase or sale of grain * * * ", *held* invalid on the same reasoning.

Trusler *v.* Crooks, 269 U. S. 475 (Jan. 11, 1926).

56. Act of November 23, 1921 (42 Stat. 261, sec. 245, part).

Provision of Revenue Act of 1921 abating the deduction (4 percent of mean reserves) allowed from taxable income of life-insurance companies in general by the amount of interest on their tax-exempts, and so according no relative advantage to the owners of the tax-exempt securities, *held* to destroy a guaranteed exemption. (*See* Fifth Amendment.)

National Life Insurance Co. *v.* United States, 277 U. S. 508 (June 4, 1928).

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57. Act of June 10, 1922 (42 Stat. 634, ch. 216).

A second attempt to amend sections 24 and 256 of the Judicial Code, relating to jurisdiction of district courts, by saving "to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State * * * " *held* invalid on authority of Knickerbocker Ice Co. *v.* Stewart.

Industrial Accident Commission of California *v.* Rolph et al., and Washington *v.* Dawson & Co., 264 U. S. 219 (February 25, 1924).

58. Act of June 2, 1924 (43 Stat. 313).

The gift tax provisions of the Revenue Act of 1924, *held* invalid under the Fifth Amendment as applied to *bona fide* gifts made before passage of the act.

Untermeyer *v.* Anderson, 276 U. S. 440 (April 9, 1928).

59. Revenue Act of June 2, 1924 (43 Stat. 322, sec. 600, in part).

Excise tax on certain articles "sold or leased by the manufacturer", measured by sale price [specifically, "(2) * * * motor cycles * * * 5 per centum"]—as applied to sale of motorcycle to a municipality for police use, *held* an infringement of State immunity under the principle of Collector *v.* Day.

Indian Motocycle Co. *v.* United States, 283 U. S. 570 (May 25, 1931).

60. Act of February 26, 1926 (44 Stat. 9, ch. 27, in part).

(*a*). Section 302 in part (44 Stat. 70).

Second sentence, defining, for purposes of the estate tax, the term "made in contemplation of death" as including the value, over $5,000, of property transferred by a decedent, by trust, etc., without full consideration in money or money's worth, "within 2 years prior to his death but after the enactment of this act", although "not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death", *held* as applied to a transfer completed wholly between the living, spoliation without due process of law under the Fifth Amendment.

Heiner *v.* Donnan, 285 U. S. 312 (March 21, 1932).

(*b*). Section 701 in part (44 Stat. 95).

Provision imposing a special excise tax of $1,000 on liquor dealers in States where such business is illegal, *held* a penalty, without constitutional support following repeal of the Eighteenth Amendment.

United States *v.* Constantine, 296 U. S. 287 (December 9, 1935).

61. Act of March 20, 1933 (48 Stat. 11, sec. 17, in part).

Clause in the Economy Act of 1933 providing "* * * all laws granting or pertaining to yearly renewable term insurance are hereby repealed", *held* invalid to abrogate an outstanding contract of insurance, which is a vested right protected by the Fifth Amendment.

Lynch *v.* United States, 292 U. S. 571 (June 4, 1934).

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62. Act of May 12, 1933 (48 Stat. 31).

Agricultural Adjustment Act providing for processing taxes on agricultural commodities and benefit payments therefrom to farmers, *held* not within the taxing power under article I, section 8, clause 1.

United States *v.* Wm. M. Butler et al., Receivers of Hoosac Mills Corp., 297 U. S. 1 (January 6, 1936).

63. Joint Resolution of June 5, 1933 (48 Stat. 113, sec. 1).

Abrogation of gold clause in Government obligations, *held* a repudiation of the pledge implicit in the power to borrow money (art. I, sec. 8, clause 2), and within the prohibition of the Fourteenth Amendment, against questioning the validity of the public debt. [The majority of the Court, however, held plaintiff not entitled to recover under the circumstances.]

Perry *v.* U. S., 294 U. S. 330 (February 18, 1935).

64. Act of June 16, 1933 (48 Stat. 195, ch. 90, the National Industrial Recovery Act).

A. Title I, except section 9.

Provisions relating to codes of fair competition, authorized to be approved by the President in his discretion "to effectuate the policy" of the act, *held* invalid as a grant of legislative power (*see* art. I, sec. 1) and not within the commerce power.

Schechter Poultry Corp. *v.* United States, 295 U. S. 495 (May 27, 1935)

B. Section 9 (c).

Clause of the oil regulation section authorizing the President "to prohibit the transportation in interstate * * * commerce of petroleum * * * produced or withdrawn from storage in excess of the amount permitted * * * by any State law * * * " and prescribing a penalty for violation of orders issued thereunder, *held* invalid as a grant of legislative power.

Panama Refining Co. et al. *v.* Ryan et al. and Amazon Petroleum Corp., et al. *v.* Ryan et al., 293 U. S. 388 (January 7, 1935).

65. Act of June 16, 1933 (48 Stat. 307, sec. 13).

Temporary reduction of 15 percent in retired pay of "judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished)", as applied to circuit or district judges retired from active service, but still subject to perform judicial duties under the act of March 1, 1929 (45 Stat. 1422), *held* a violation of the guaranty of judges' salaries under article III, section 1.

Booth *v.* United States (together with Amidon *v.* United States), 291 U. S. 339 (February 5, 1934).

66. Act of April 27, 1934 (48 Stat. 646, sec. 6), amending section 5 (i) of Home Owners' Loan Act of 1933.

Provision for conversion of State building and loan associations into Federal associations, upon vote of 51 percent of the votes cast at a

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meeting of stockholders called to consider such action, *held* an encroachment on reserved powers of State.

Hopkins Federal Savings & Loan Association *v.* Cleary, 296 U. S. 315 (December 9, 1935).

67. Act of May 24, 1934 (48 Stat. 798, ch. 345).

Provision for readjustment of municipal indebtedness, *held* invalid, though "adequately related" to the bankruptcy power, as an interference with State sovereignty.

Ashton *v.* Cameron County Water Improvement District No. 1, 298 U. S. 513 (May 25, 1936).

68. Act of June 27, 1934 (48 Stat. 1283, ch. 868 entire).

The Railroad Retirement Act, establishing a detailed compulsory retirement system for employees of carriers subject to the Interstate Commerce Act, *held*, not a regulation of commerce within the meaning of article I, section 8, clause 3.

Railroad Retirement Board *v.* Alton R. R. et al., 295 U. S. 330 (May 6, 1935).

69. Act of June 28, 1934 (48 Stat. 1289, ch. 869).

The Frazier-Lemke Act, adding subsection (s) to section 75 of the Bankruptcy Act, designed to preserve to mortgagors the ownership and enjoyment of their farm property and providing specifically, in paragraph 7, that a bankrupt left in possession has the option at any time within 5 years of buying at the appraised value—subject meanwhile to no monetary obligation other than payment of reasonable rental, *held* a violation of property rights, under the Fifth Amendment.

Louisville Joint Stock Land Bank *v.* Radford, 295 U. S. 555 (May 27, 1935).

70. Act of August 24, 1935 (49 Stat. 750, ch. 641, title I).

Agricultural Adjustment Act amendments, *held* not within the taxing power.

Rickert Rice Mills *v.* Fontenot, 297 U. S. 110 (January 13, 1936).

71. Act of August 30, 1935 (49 Stat. 991, ch. 824).

Bituminous Coal Conservation Act of 1935, *held* to impose not a tax within article I, section 8, but a penalty not sustained by the commerce clause.

Carter *v.* Carter Coal Co., 298 U. S. 238 (May 18, 1936)

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