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THE CONSTITUTION

AND WHAT IT MEANS TODAY

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THE CONSTITUTION

and what it means today



By Edward S. Corwin

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TO

Adelaide and Bill

PREFACE

The first edition of this book appeared in 1920. It contained a little over one half as many pages and about one quarter as many words of commentation as the present edition. Since neither cases nor other authorities were cited, there was, naturally, no table of cases, whereas the table in this edition has nearly 650 entries; and there was no index. But compared even with the immediately preceding seventh edition, the present edition is considerably more comprehensive both as to variety of subjects treated and as to materials used. The method of treatment which was adopted several editions back is, however, still adhered to. I have endeavored, especially in connection with the more important topics, to accompany explanation of currently prevailing doctrine and practice with a brief summing up of the historical development thereof. The serviceability of history to make the present more understandable has been remarked upon by writers from the time of Aristotle.

During the past decade the Constitution has been subjected to the impact of two major crises. The first of these was the necessity which confronted it in 1937 of affording the New Deal lodgment within the constitutional fold. As was pointed out in the previous edition of this work, the official guardians of the fundamental law met this necessity by returning to Chief Justice Marshall's sweeping conception of national supremacy, thereby discarding the century-old theory that the reserved powers of the States comprised an independent limitation on national power. In this connection the reader's attention is specially directed to the case of United States *v.* Darby, decided in 1941.

The second great crisis was our participation in World War II and the events leading up to it. In wartime, however, interpretation of the Constitution falls much more

largely to the political branches of the government than to the judiciary. In this edition, accordingly, considerable attention has been given to executive and legislative acts illustrative of the war power and suggestive of its effect both on private rights and constitutional structure. At the same time several other topics which recent events have brought into prominence have been accorded greater space than hitherto, such as Nationality, Conscription, Executive Agreements, and so on.

At the close of my preface to the previous edition of this work I wrote: "Constitutional law has always a central interest to guard. Today it appears to be that of organized labor." This was said apropos of the Court's virtual repeal of the Sherman Act so far as the activities of labor unions are concerned and of its bringing picketing under the rubric "liberty." Pursuing this same course of decision further, the Court has today replaced the older doctrine of *laissez faire* of which business management was the beneficiary with one equally challenging to public authority of which organized labor is the beneficiary. As Justice Jackson put the matter in a recent dissenting opinion: "With this decision [in Hunt *v.* Crumboch, decided June 18 last] the labor movement has come to full circle. . . . This Court now sustains the claim of a union to the right to deny participation in the economic world to an employer simply because the union dislikes him. This Court permits to employees the same arbitrary dominance over the economic sphere which they control that labor so long, so bitterly and so rightly asserted should belong to no man." These are harsh words for a Justice of the Supreme Court to address to his brethren, but that is far from saying that the majority of the Court on that occasion did not deserve the reproach.

Certain other features of the Court's work in constitutional interpretation in the interval since the publica-

tion of the seventh edition invite a more mixed appraisal. The Court has continued to champion racial and religious minorities. Its efforts in the latter behalf, usually evoked by the activities of Jehovah's Witnesses, have often divided the Justices sharply, have produced numerous right-about-fronts on their part, and have frequently failed to justify an obvious departure from common sense and common law.

For its defense, on the other hand, of the principles of fair trial, fair play, and equality before the law in behalf especially of persons of color, little but praise should be awarded. In its holdings in such cases as Screws *v.* United States, decided May 7 last, and Steele *v.* Louisville and Nashville R. Co., decided December 18, 1944, the Court appears in its best light and its great powers find their real vindication in terms of democratic ideals. In view of what was said above about the Court's inordinate pro-labor leaning it is only just to add that in the last mentioned of the above cases it was held that a collective bargaining agreement against negro firemen was violative of the Railway Labor Act. The application which the case makes of the principle of "equal protection of the laws" as a canon of interpretation of statutes may have an important future.

I feel that in closing this Preface I should pay some attention to current criticism of the Court by the Bar, particularly as I have at hand an excellent example of it in a recent address by the President of the American Bar Association, Mr. David A. Simmons. Referring at one point to the fact that the late Chief Justice Edward Douglass White, in the course of his twenty-seven years on the Supreme Court, wrote seven hundred majority opinions, ten concurring opinions, and only twenty-three dissents, Mr. Simmons continues: "He was a great judge who recognized that the first principle in the supremacy of law was certainty.

"He found it necessary to dissent in less than 5 per cent of his opinions. Lawyers could advise their clients as to applicable rules of law with reasonable certainty.

"Today we do not find the law in this happy situation. In 1943 in the Supreme Court of the United States dissents were filed against 44 per cent of the opinions of the court; in 1944 there were dissenting opinions in 63 per cent of the cases, and during the last term of the court there were almost as many dissents or qualified concurrences as there were majority opinions.

"Is the applicable rule of law really so difficult to ascertain? Or is each judge seeking to extract from the atmosphere about him, or from his own personal sense of justice—social or otherwise—his own notion of equity, which he writes into the law?" (*New York Times*, December 18, 1945.)

A partial answer to this criticism is rather obvious. "The applicable rule of law" *is* frequently difficult to ascertain, that is to say, the rule that can be applied with the best prospect of serving the public interest and hence of surviving. Furthermore, some special consideration is undoubtedly due the present Court especially in the field of constitutional interpretation, in view of the fact that it has been constrained within the recent past to abandon certain guiding principles that were no longer "applicable," and has not yet been able in every instance to take its bearings from the new point of view. Even so, Mr. Simmons and those who share his views are not thus completely answered. Whether a contribution to the development of the law or not, it is certainly none to public morale when the Supreme Court of the United States splits seven ways for Sunday. For people are apt to argue that if the Supreme Court, a supposedly learned and dis interested body, cannot agree within the field of its special competence, how can we ever hope that capital and labor will agree, to say nothing of the nations of the

world agreeing. Inasmuch as the country has to live with the Court, the demonstration by it that it can live with itself fairly comfortably must always be reassuring and edifying.

I wish to express my appreciation to Gladys Fornell of the staff of the Princeton University Press for her careful and intelligent editing of my copy and to Dorothy Pardee and Jack Peltason for their invaluable assistance in compiling the Table of Cases and the Index.

EDWARD S. CORWIN

Princeton University
January 1, 1946

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"IN *the Constitution of the United States—the most wonderful instrument ever drawn by the hand of man—there is a comprehension and precision that is unparalleled; and I can truly say that after spending my life in studying it, I still daily find in it some new excellence.*"—JUSTICE JOHNSON. In Elkinson *v.* Deliesseline, 8 Federal Cases 593 (1823)

"THE *subject is the execution of those great powers on which the welfare of a nation essentially depends. . . . This provision is made in a Constitution intended to endure for ages to come and, consequently, to be adapted to the various crisis of human affairs.*"—CHIEF JUSTICE MARSHALL. In McCulloch *v.* Maryland, 4 Wheaton 316 (1918)

"IT [*the Constitution*] *speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this Court and make it the mere reflex of the popular opinion or passion of the day.*"—CHIEF JUSTICE TANEY. In the Dred Scott Case, 19 Howard 393 (1857)

"WE *read its* [*the Constitution's*] *words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.*"—CHIEF JUSTICE STONE. In United States *v.* Classic, 313 U.S. 299 (1941).

"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.*"—CHIEF JUSTICE MARSHALL. In Osborn *v.* U.S. Bank, 9 Wheaton 738 (1824)

"WE *are under a Constitution, but the Constitution is what the judges say it is . . .*"—FORMER CHIEF JUSTICE HUGHES when Governor of New York

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"WHEN *an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.*"—JUSTICE ROBERTS. In United States *v.* Butler, 297 U.S. 1 (1936)

"WHILE *unconstitutional exercise of power by the executive and legislative branches of the Government is subject to judicial restraint, the only check on our own exercise of power is our own sense of self-restraint.*"—JUSTICE STONE (dissenting), *ibid.*

"THE *glory and ornament of our system which distinguishes it from every other government on the face of the earth is that there is a great and mighty power hovering over the Constitution of the land to which has been delegated the awful responsibility of restraining all the coordinate departments of government within the walls of the governmental fabric which our fathers built for our protection and immunity.*"—CHIEF JUSTICE EDWARD DOUGLASS WHITE when Senator from Louisiana. In *Congressional Record*, 52nd Cong., 2nd Sess., p. 6516 (1894)

"JUDICIAL *review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply cherished constitutional rights.*"—JUSTICE FRANKFURTER. In Minersville School Dist. *v.* Gobitis, 310 U.S. 586 (1940)

THE PREAMBLE

WE, THE PEOPLE OF THE UNITED STATES, IN ORDER TO FORM A MORE PERFECT UNION, ESTABLISH JUSTICE, INSURE DOMESTIC TRANQUILLITY, PROVIDE FOR THE COMMON DEFENSE, 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 Preamble, strictly speaking, is not a part of the Constitution, but "walks before" it. By itself alone it can afford no basis for a claim either of governmental power or of private right.[1] It serves, nevertheless, two very important ends: first, it indicates the source from which the Constitution comes, from which it derives its claim to obedience, namely, the people of the United States; secondly, it states the great objects which the Constitution and the Government established by it are expected to promote: national unity, justice, peace at home and abroad, liberty, and the general welfare.

"We, th
People"

"We, the people of the United States," in other words, We, the citizens of the United States, whether voters or non-voters.[2] In theory the former represent and speak for the latter; actually from the very beginning of our na-

[1] Jacobson *v.* Mass. 197 U.S. 11 (1905).

[2] "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty." C. J. Taney, in Dred Scott *v.* Sanford, 19 How. at p. 404 (1857). On the relationship between citizenship and voting, see C. J. Chase in Minor *v.* Happerset, 21 Wall. 162 (1874).

tional history, the constant tendency has been to extend the voting privilege more and more widely, until today, with the establishment of woman's suffrage, by the addition of the Nineteenth Amendment to the Constitution (see p. 209), the terms voter and citizen have become practically interchangeable as applied to the adult American.

"Do ordain and establish," not *did* ordain and establish. As a *document* the Constitution came from the generation of 1787; as a *law* it derives its force and effect from the present generation of American citizens, and hence should be interpreted in the light of present conditions and with a view to meeting present problems.[3]

The term "United States" is used in the Constitution in various senses (see pp. 137 and 173). In the Preamble it signifies, as was just implied, the States which compose the Union, and whose voting citizens directly or indirectly choose the government at Washington and participate in amending the Constitution.[4]

The Framework of Government

Articles I, II, and III set up the framework of the National Government in accordance with the doctrine of the Separation of Powers, which teaches that there are three, and only three, functions of government, the "legislative," the "executive" and the "judicial," and that these three functions should be exercised by distinct bodies of men in order to prevent an undue concentration of power. Latterly the importance of this doctrine as a working principle of government under the Constitution has been much diminished by the growth of Presidential leadership in legislation, by the increasing resort by Congress to the practice of delegating what amounts to legislative power to the President and other administrative agencies, and by the mergence in the latter of all

[3] See the words of Chief Justice Marshall, quoted on pages 65-66.

[4] The most comprehensive discussion of this subject is that by counsel and the Court in Downes *v.* Bidwell, the chief of the famous Insular Cases of 1901. See 182 U.S. 244.

three powers of government, according to earlier definitions thereof. (See pp. 108-110.)[5]

ARTICLE I

Article I defines the legislative powers of the United States, which it vests in Congress.

SECTION I

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

Kinds of Law under the Constitution

This seems to mean that no other branch of the Government except Congress may make laws; but as a matter of fact, by Article VI, ¶2, treaties which are made "under the authority of the United States" have for some purposes the force of laws, and the same is true of "executive agreements" which are entered into by the President by virtue of his diplomatic powers, and do not transgress the Constitution, acts of Congress, or treaties.[1] Also, of course, judicial decisions make law since later decisions may be, by the principle of *stare decisis*, based upon them. Indeed, the Supreme Court, by its decisions interpreting the Constitution, constantly alters the practical effect and application thereof. As Woodrow Wilson put it, the Supreme Court is "a kind of Constitutional Convention in continuous session." Likewise, regulations laid down by the President, heads of departments, or ad-

[5] So broad a principle as the doctrine of the Separation of Powers has naturally received at times rather conflicting interpretations, occasionally from the same judges. Cf. in this connection C. J. Taft's opinion for the Court in *Ex parte* Grossman 267 U.S. at pp. 119-120 (1925), with the same Justice's opinion in Myers *v.* U.S., 272 U.S. at p. 116 (1926).

[1] B. Altman & Co. *v.* U.S., 224 U.S. 583 (1912); United States *v.* Belmont, 301 U.S. 324 (1937); United States *v.* Pink, 315 U.S. 203 (1942).

ministrative bodies, like the Interstate Commerce Commission, the Securities and Exchange Commission, and so on, are laws and will be treated by the courts as such when they are made in the exercise of authority validly "delegated" by Congress.

SECTION II

The House of Representatives

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

"Electors" are voters. The right here conferred is extended by Amendment XVII to the choice of Senators. While the enjoyment of this right is confined by these provisions to persons who are able to meet the requirements prescribed by the States for voting, provided these do not transgress the Constitution (e.g. Amendments XV and XIX), yet the right itself comes, not from the States, but from the Constitution, and so is a "privilege and immunity" of national citizenship, about the exercise of which Congress may throw the protection of its legislation and which, under Section I of the Fourteenth Amendment, no State may "abridge."[1] Is the limitation of the right to vote to persons who have paid a poll tax such an abridgment because of its restrictive operation on the right to vote for members of Congress? Some people contend that it is, but in the single case challenging the validity of the poll tax requirement the Court unanimously sustained it as a constitutional qualification for voting in State elections, a holding which logically settles the question of the requirement's validity for voting in Congressional elections.[2] (Cf. p. 138).

[1] *Ex parte* Yarbrough, 110 U.S. 651 (1884); United States *v.* Classic, 313 U.S. 299 (1941).

[2] Breedlove *v.* Suttles, 302 U.S. 277 (1937). The opponents of the poll tax make a good deal of a dictum by J. Jackson in his concurring opinion

¶2. No person shall be a Representative who shall not have attained 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.

It was early established in the case of Henry Clay, who was elected to the Senate before he was thirty years of age, that it is sufficient if a Senator possesses the qualifications of that office when he takes his seat; and the corresponding rule has always been applied to Representatives as well.

An "inhabitant" is a resident. Custom alone has established the rule that a Representative must be a resident of the *district* from which he is chosen.

¶3. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of *New Hampshire* shall be entitled to choose three, *Massachusetts* eight, *Rhode Island and Providence Plantations* one, *Connecticut* five, *New York* six, *New Jersey* four, *Pennsylvania* eight, *Delaware* one, *Maryland* six, *Virginia*

in Edwards *v.* Calif., 314 U.S. at p. 185 (1941). They are also apt to contend that voting in a Congressional election is a "federal function" the performance of which a State may not tax, but even conceding the "function" theory, the Constitution still confines it in the case of Congressional elections to those who are entitled to vote in State elections.

ten, *North Carolina* five, *South Carolina* five, and *Georgia* three.

This paragraph embodies one of the famous compromises of the Constitution. The term "three-fifths of all other persons" meant three-fifths of all slaves. Amendment XIII has rendered this clause obsolete and Amendment XIV, Section II, has superseded it.

The Basis of Apportionment

The basis of representation following the census of 1910 was one Representative for substantially 212,000 inhabitants. Following the census of 1920 Congress ignored its constitutional duty to make a reapportionment, but reapportionment on the basis of the census of 1930 was provided for beforehand, by the Act of June 18, 1929. Under this act, unless and until it is repealed or amended, the size of the House is restricted to 435 members, who are allotted among the States by the same method as was employed in the apportionment of 1911, the so-called "method of major fractions." The problem —obviously one for the statistical expert—is to find a number, or "electoral quotient," to divide into the population of each State which will give the predetermined total of Representatives—435—when, for each remainder in a State which is in excess of one-half of such number or "electoral quotient," an additional representative is allotted.[3]

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

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

[3] For an excellent brief discussion of the problem, see R. E. Cushman, *American National Government*, 389-394 (New York, 1931); for a comprehensive critical and historical account, see L. F. Schmeckebier, *Congressional Apportionment* (The Brookings Institution, Washington, 1941).

The powers of the Speaker have varied greatly at different times. They depend altogether upon the rules of the House.

The subject of impeachment is dealt with at the end of the next section.

SECTION III

The Senate

¶1. The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

This paragraph has been superseded by Amendment XVII.

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

This paragraph explains how it came about that one-third of the Senators retire every two years, as well as why the Senate is a continuing body.[1] While there have been 79 Congresses to date, there has been only one Senate, and this will apparently be the case till the crack of doom.

The final clause of this paragraph also has been superseded by Amendment XVII.

¶3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a

[1] McGrain *v.* Daugherty, 273 U.S. 135 (1927).

citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

Following the precedent set in the case of Henry Clay, mentioned above, it is not necessary for a person to possess these qualifications when he is chosen Senator; it is sufficient if he has them when he takes the oath of office and enters upon his official duties.[2]

¶4. The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

This is the source of the so-called "casting vote" of the Vice-President, which has been decisive on more than one critical occasion. It was, for instance, by the casting vote of Vice-President John Adams in 1789 that the President was first conceded the power to remove important executive officers of the United States without consulting the Senate, with whose "advice and consent" they are appointed.[3] All other powers of the Vice-President as presiding officer depend upon the rules of the Senate, or his own initiative. In early days they were considerably broader than today.

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

(See Article II, Section I, ¶6.)

Impeachments

¶6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no

[2] See disposition of Senator Rush D. Holt's case, Senate proceedings, *Congressional Record*, April 18 and June 19 and 20, 1935.

[3] *Life and Works of John Adams*, I, 448-450 (Boston, 1856).

person shall be convicted without the concurrence of two-thirds of the members present.

Impeachments are charges of misconduct in office, and are comparable to presentments or indictments by grand jury. They are voted by the House of Representatives by a majority vote, that is, a majority of a quorum (see Section V, ¶1).

The persons subject to impeachment are "civil officers of the United States" (see Article II, Section IV), which term does not include members of the House or the Senate (see Article I, Section VI, ¶2), who, however, are subject to discipline and expulsion by their respective houses (see Section V, ¶2).

The charge of misconduct must amount to a charge of "treason, bribery, or other high crimes and misdemeanors" (see Article II, Section IV); but the term "high crimes and misdemeanors" is used in a broad sense, being equivalent presumably to lack of that "good behavior" which is specifically required of judges (see Article III, Section I). It is for the House of Representatives to judge in the first instance and for the Senate to judge finally whether alleged misconduct on the part of a civil officer of the United States falls within the terms "high crimes and misdemeanors," and from this decision there is no appeal.

In 1803 District Judge Pickering was removed from office by the process of impeachment on account of drunkenness and other unseemly conduct on the bench. The defense of insanity was urged in his behalf, but unsuccessfully. One hundred and ten years later Judge Archbald of the Commerce Court was similarly removed for soliciting for himself and friends valuable favors from railroad companies, some of which were at the time litigants in his court; and in 1936 Judge Ritter of the Florida District Court was removed for conduct in con-

nection with a receivership case which raised serious question of his integrity, although on the specific charges against him he was acquitted.[4]

When trying an impeachment the Senate sits as a court, but has full power in determining its procedure and is not required to disqualify its members for alleged prejudice or interest. However, "when the President of the United States is tried, the Chief Justice shall preside," the idea being no doubt to obviate the possibility of bias and unfairness on the part of the Vice-President, who would succeed the President if the latter was removed.

"Two-thirds of the members present" probably implies two-thirds of a quorum at least (see Section V, ¶1).

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

There have been several convictions upon impeachment in the course of our national history. Sometimes judgment has extended simply to removal from office, sometimes to disqualification for further office-holding under the National Government.

Since conviction upon impeachment does not constitute "jeopardy of life or limb" (see Amendment V), a person ousted from office by process of impeachment may still be reached by the ordinary penalties of the law for his offense, if it was of a penal character.[5]

[4] W. S. Carpenter, *Judicial Tenure in the United States*, 145-152 (New Haven, 1918); Senate proceedings in *Congressional Record*, April 16, 1936.

[5] *Foster on the Constitution*, I, 505*ff*. (Boston, 1895). This work, of which only the first volume was ever published, contains a valuable, although somewhat out-of-date, discussion of the entire subject of impeachment under the Constitution.

On account of the cumbersomeness of the impeachment proceeding and the amount of time it is apt to consume, it has been proposed that a special court should be created to try cases of alleged misbehavior in office, especially of inferior judges of the United States. There can be little doubt that Congress has power to establish such a court and to authorize such proceedings.[6]

SECTION IV

Congressional Regulation of Elections

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

To a great extent State legislation under this paragraph has been today superseded by that of Congress. Unless the State constitution specifies some other date—and Maine is the only State still falling within this exception—elections for members of the House take place on the Tuesday following the first Monday of November of the even years. Ordinarily the voting unit is a district choosing one Representative by a plurality of the votes cast, which votes must be by written or printed ballot, or by voting machine where this method is authorized by State law. But if a State legislature fails at any time to redistrict the State in accordance with the latest reapportionment of Representatives to it, then some or all of these will be chosen by the State "at large."[1]

[6] Burke Shartel, "Federal Judges," etc., 28 *Michigan Law Review*, 870-907; speech of Senator Wm. G. McAdoo, *Congressional Record*, April 23, 1936, pp. 6214-6220 (unofficial paging).

[1] U.S. Code, tit. 2, c. 1. A bill introduced into the House by the Hon. Hatton Sumners of Texas, February 28, 1940, would have changed the date of election of Senators and Representatives and of appointment of Presidential Electors to the Tuesday following the first Monday in October. Some such change seems to be required by the going into effect of Amendment XX, but so far the only action Congress has taken is to put forward the meeting of the Presidential Electors in their respective States and the counting of their votes by Congress.

Primaries as "Elections"

May Congress, by way of regulating "the manner of holding elections," limit the expenditures of candidates for nomination or election to Congress? In the Newberry Case,[2] which concerned a candidate for the Senate, four members of the Supreme Court took the view that the above quoted words referred only to the last formal act whereby the voter registers his choice, and so answered this question, "no"; but a fifth Justice, who with these constituted the majority of the Court on this occasion, expressly confined his opinion to the state of Congress's power before the adoption of the Seventeenth Amendment, when the election of Senators, being by the State legislatures, was much more evidently separable from the preliminary stages of candidacy than it is today. In United States *v.* Classic[3] the Court ruled in 1941 that certain Louisiana election officials who were charged with tampering with ballots cast in a primary election for Representative had been properly indicted under the United States Criminal Code for conspiring to deprive citizens of the United States of a right secured to them by the Constitution, namely, the right to participate in the choice of Representatives in Congress. This was held to include not only the right of the elector "to cast a ballot and to have it counted at the general election whether for the successful candidate or not," but also his right to have his vote counted in the primary in cases where the State law has made the primary "an integral part of the procedure of choice," or where "the primary effectively controls the choice." Three Justices dissented on a question of statutory interpretation, but took pains to voice their belief that Congress may regulate primaries at which candidates for the Senate and House are selected, a position which is further bolstered by a recent holding that the Fifteenth Amendment protects the

[2] Newberry *v.* U.S., 256 U.S. 232 (1921).
[3] 313 U.S. 299.

right to vote in party primaries.[4] Years earlier, moreover, the Court had asserted that the National Government must, simply by virtue of its republican character, possess "power to protect the elections on which its existence depends from violence and corruption," a sentiment which it reiterated and emphasized in 1934 with the Newberry Case before it.[5] So far as Newberry *v.* United States was ever law of the land, it has ceased to be so.

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

This provision has been superseded by Amendment XX —the so-called Norris "Lame Duck" Amendment.

SECTION V

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

Powers of the Houses Over Membe

The power conferred by this paragraph carries with it authority to take all necessary steps to secure information which may form the basis of intelligent action, including the right to summon witnesses and compel them to answer;[1] as well as the right to delegate such powers to a committee. And whenever either house doubts the qualifications of one claiming membership it may, during investigation, suspend him or even refuse to swear him in.

Nor do the "qualifications" here referred to consist solely of the qualifications prescribed in Sections II and

[4] Smith *v.* Allwright, 321 U.S. 649 (1944).
[5] *Ex parte* Yarbrough, 110 U.S. 651 (1884); Burroughs *v.* U.S., 290 U.S. 534 (1934).
[1] Barry *v.* U.S., 279 U.S. 597 (1829).

III above for Representatives and Senators, respectively. "Congress," it has been said, "may impose disqualifications for reasons that appeal to the common judgment of mankind." In 1900 the House of Representatives excluded a Representative from Utah as "a notorious, demoralizing and audacious violator of State and Federal laws relating to polygamy and its attendant crimes";[2] while in 1928 the Senate refused to seat a Senator-elect from Illinois on the ground that his acceptance of certain sums in promotion of his candidacy had been "contrary to sound policy, harmful to the dignity of the Senate, dangerous to the perpetuity of free government," and had tainted his credentials "with fraud and corruption."[3]

The circumstance that refusal by the Senate to seat one claiming membership must cause a State to lose its equality of representation in that body for a time is a fact of no importance constitutionally, equality of representation being guaranteed merely as against the power to amend the Constitution.[4]

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

This paragraph describes the power of each house over its members once they have been "seated," that is, have been recognized as duly qualified members.

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

[2] J. A. Woodburn, *The American Republic and Its Government*, 247 (New York, 1903).

[3] *Congressional Record*, December 1927-January 1928. The resolution quoted from was adopted January 19, 1928. On the privileges and procedure of the House generally, and supporting precedents, see Hinds' *Precedents of the House of Representatives*, etc. (8 vols., Washington, 1907-1908).

[4] Barry v. U.S., 279 U.S. 597 (1929).

ayes 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.

The obvious purpose of this paragraph is to make it possible for the people to watch the official conduct of their Representatives and Senators. It may be, and frequently is, circumvented by the "house" resolving itself into "committee of the whole," to whose proceedings the provision is not regarded as applying.

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

Legislative Contempts

In addition to the powers enumerated above, each house also possesses certain "inherent" powers which are implied in the fact that it is a deliberative body or which were inherited, *via* the early State legislatures, from the Parliament of Great Britain. Each house may pass resolutions, either separately or "concurrently" with the other house, with a view to expressing its opinion on any subject whatsoever, and may create committees to deal with the matters which come before it. Also, each house has certain powers of a judicial character over outsiders. If a stranger rudely interrupts or physically obstructs the proceedings of one of the houses, he may be arrested and brought before the bar of the house involved and punished by the vote of its members "for contempt"; but if the punishment takes the form of imprisonment it terminates with the session of the house imposing it. Also,

The Investigatory Power

each house has full power to authorize investigations by committees looking to possible action within the scope of its powers or of those of Congress as a whole, which committees have the right to examine witnesses and take testimony; and if such witnesses prove recalcitrant, they too may be punished "for contempt," though in this case

the punishment is nowadays imposed, under an Act of Congress passed in 1857, by the Supreme Court of the District of Columbia, for "misdemeanor." But it is not within the power of either house to pry into the purely personal affairs of private individuals. Whether in any particular investigation it is attempting to do this rests with the Supreme Court to say.[5] (See also p. 106, note 2.)

SECTION VI

Privileges and Immunities of Members

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

While "treason, felony, and breach of the peace" cover violations of State as well as national laws, the immunity from arrest here conferred does not include immunity from service of summons in a civil suit.[1] Indeed, since abolition of imprisonment for debt the immunity has lost most of its importance.

The provision concerning "speech or debate" not only removes every restriction upon freedom of utterance on the floor of the houses by members thereof except that supplied by their own rules of order, but applies also to reports and resolutions which, though in writing, may be reproduced in speech; and, "in short, to things generally done in a session of the House by one of its members in relation to the business before it."[2] For their utterances

[5] On this topic cf. Anderson *v.* Dunn, 6 Wheat. 204 (1821); Kilbourn *v.* Thompson, 103 U.S. 168 (1880); *in re* Chapman, 166 U.S. 661 (1897); Marshall *v.* Gordon, 243 U.S. 521 (1917); McGrain *v.* Daugherty, 273 U.S. 135 (1927); Jurney *v.* McCracken, 294 U.S. 125 (1935).

[1] Long *v.* Ansell, 293 U.S. 76 (1934).

[2] Kilbourn *v.* Thompson, 103 U.S. at pp. 203-204 (1880), citing and

elsewhere than in their respective houses members of Congress are, of course, subject to the same legal restraints as other people.

Disabilities of Members

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

Despite this paragraph Presidents have frequently appointed members of the houses as commissioners to act in a diplomatic capacity; but as such posts, whether created by act of Congress or not, carried no emoluments and were only temporary, they were not, it would seem, "offices" in the sense of the Constitution.[8]

The first clause became a subject of discussion in 1937, when Justice Black was appointed to the Supreme Court in face of the fact that Congress had recently improved the financial position of Justices retiring at seventy and the term for which Mr. Black had been elected to the Senate from Alabama in 1932 had still some time to run. The appointment was defended by the argument that inasmuch as Mr. Black was only fifty-one years old at the time and so would be ineligible for the "increased emolument" for nineteen years, it was not *as to him* an increased emolument. Similarly, when in 1909 Senator Knox of Pennsylvania wished to become Secretary of State in President Taft's Cabinet, the salary of which office had been recently increased, Congress accommodatingly repealed the increase for the period which still remained of Mr. Knox's Senatorial term. In other words,

quoting from C. J. Parsons' famous opinion in Coffin *v.* Coffin, 4 Mass. 1 (1808).

[8] United States *v.* Hartwell, 6 Wall. 385 (1867). Cf. *Willoughby on the Constitution*, I, 605-607 (New York, 1929).

a Senator or Representative—and especially a Senator—may, "during the time for which he was elected, be appointed to any civil office under the authority of the United States, . . . the emoluments whereof shall have been increased during such time," *provided only* that the increase in emolument is not available to the appointee "during such time."

Cabinet versus Presidential System

The second clause derives from an act of Parliament passed in 1701, which sought to reduce the royal influence by excluding all "placemen" from the House of Commons. The act, however, so cut the Commons off from direct knowledge of the business of government that it was largely repealed within a few years; and so the way was paved for the British "Cabinet System," wherein the executive power of the realm is placed in the hands of the leaders of the controlling party in the House of Commons. Conversely, the revival of the provision in the Constitution, in conformity with the doctrine of the Separation of Powers, lies at the basis of the American "Presidential System," in which the business of legislation and that of administration proceed largely in *formal*, though not *actual*, independence of each other. (See, however, Article II, Section II, ¶1, and Section III.)

SECTION VII

¶1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

The House has frequently contended that this provision covers appropriation as well as taxation measures, and also bills for repealing revenue acts.[1] Although in practice most appropriation, as well as *all* taxation, measures do originate in the House, the provision is otherwise negligible, inasmuch as the Senate may "amend" any bill

[1] R. E. Cushman, *American National Government*, 478-481.

from the House by substituting an entirely new measure under the enacting clause.

The Veto Power

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

A bill which has been duly passed by the two houses may become law in any one of three ways: first, with the approval of the President, which it has been generally assumed must be given within ten calendar days, Sundays excepted, after the presentation of the bill to him—not after its passage; secondly, without the President's approval, if he does not return it with his signature within ten calendar days, Sundays excepted, after such presentation; thirdly, despite his disapproval, if it is repassed by "two-thirds of each house," that is, two-thirds of a quorum of each house[2] (see Section V, ¶1).

Bills which have been passed within ten days of the

[2] Missouri Pac. Ry. Co. *v.* Kan., 248 U.S. 276 (1919).

end of a session may be kept from becoming law by a "pocket veto," that is, by the President's failing to return them till an adjournment of Congress has intervened; nor does it make any difference that the adjournment was not a final one for the Congress which passed the bill, but a merely *ad interim* one between sessions.[3] Likewise, the President may effectively sign a bill at any time within ten calendar days of its presentation to him, Sundays excepted, even though Congress has adjourned in the meantime, whether finally or for the session;[4] and, on the other hand, he may return a bill with his objections to the house of its origin, *via* an appropriate officer thereof, while it is in recess in accordance with ¶4 of Section V above.[5]

The fact that the President has ten days from their *presentation* rather than their *passage* within which to sign bills became a matter of great importance when President Wilson went abroad in 1919 to participate in the making of the Treaty of Versailles. Indeed, by a curious combination of circumstances plus a little contriving, the late President Roosevelt was enabled on one occasion to sign a bill no less than twenty-three days after the adjournment of Congress.[6]

Before President Jackson's time it was generally held that the President ought to reserve his veto power for measures which he deemed to be unconstitutional. Today the President exercises this power for any reason that seems good to him.[7]

¶3. Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may

[3] Okanogan Indians *v.* U.S., 279 U.S. 655 (1920).
[4] Edwards *v.* U.S., 286 U.S. 482 (1932).
[5] Wright *v.* U.S., 302 U.S. 583 (1938).
[6] See the present writer's *The President, Office and Powers*, 429 (New York University, New York; 2nd ed., 1941).
[7] For further details concerning the President's veto, see *The President, Office and Powers*, 282-283.

> 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.

"Necessary" here means necessary to give an "order," etc., the force of *law*. Accordingly "votes" taken in either house preliminary to the final passage of legislation need not be submitted to the President, nor resolutions passed by either house separately or by both houses "concurrently" with a view simply to expressing an opinion or to devising a common program of parliamentary action or to directing the expenditure of money appropriated to the use of the two houses. Within recent years, moreover, the "concurrent resolution" has been shaped to a new and highly important use that may ultimately have great consequences. It has been employed as a means of claiming for the houses the power to control or recover powers delegated by Congress to the President. Thus the Reorganization Act of April 3, 1939, delegated power to the President to regroup certain executive agencies and functions subject to the condition that his orders to that end might be vetoed within sixty days by a concurrent resolution. Similarly, the Lease-Lend Act of March 11, 1941, provided that after June 30, 1943, or following the earlier passage of a concurrent resolution by the two houses declaring certain powers conferred by the Act to be no longer necessary to promote the defense of the United States, neither the President nor any other department or agency of government should exercise such powers. That Congress may qualify in this way its delegations of powers which it might withhold altogether would seem to be obvious.[8]

The Concurrent Resolution

[8] On the "concurrent resolution" see *The President, Office and Powers*

Also, it has been settled by practice, which was early ratified by judicial decision, that resolutions of Congress proposing amendments to the Constitution do not have to be submitted to the President[9] (see Article V).

SECTION VIII

The National Legislative Power

This is the most important section of the Constitution since it describes, for the most part, the field within which Congress may exercise its legislative power, which is also the field to which the President and the National Courts are in great part confined.

Congress's legislative powers may be classified as follows: First, its "enumerated" powers, that is, those which are defined rather specifically in ¶s 1 to 17, following; secondly, certain other powers which also are specifically or impliedly delegated in other parts of the Constitution (see Section IV, above; also Articles II, III, IV, and V, *passim*, and Amendments XIII to XX); thirdly, its power conferred by ¶18, below, the so-called "coefficient clause" of the Constitution, to pass all laws "necessary and proper" to carry into execution any of the powers of the National Government, or of any department or officer thereof; fourthly, certain "inherent" powers, that is, powers which belong to it simply because it is the national legislature.

In studying each of the first seventeen paragraphs of this section, one should always bear in mind ¶18, for this clause furnishes each of the "enumerated" powers of Congress with its second dimension, so to speak.

The Taxing Power

¶1. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the

at pages 95, 125, 292, 430-431; also Senate Report 1,335, 54th Congress, 2nd Session. For the legislation mentioned see 53 Stat., ch. 36; and U.S. Code (Ed. 1940, Supp. 14), tit. 22, §§411-413.

[9] Hollingsworth *v.* Va., 3 Dall. 378 (1798).

United States; but all duties, imposts and excises shall be uniform throughout the United States.

Constitutional Tax Exemption

Complete power of taxation is conferred upon Congress by this paragraph, as well as the largest measure of discretion in the selection of purposes for which the national revenues shall be expended. This complete power "to lay and collect taxes" is, however, later curtailed by the provision that no tax shall be levied on exports (see Section IX, ¶5). Also, it was ruled by the Supreme Court, shortly after the Civil War, that on principle Congress could not tax the instrumentalities of State government, and that the salary of a State judge, though in his pocket, was to be regarded as such an instrumentality;[1] and the benefits of this doctrine were subsequently extended to the holders of State and municipal bonds,[2] who were thereby exempted to the extent that their income was derived from such securities from paying income taxes to the National Government. It was at first widely believed that the Sixteenth Amendment had removed the grounds of this discrimination, so far as income taxes were concerned,[3] but the Court eventually ruled otherwise.[4] Indeed, at one time it appeared to be bent on seeing how far it could carry the principle of exemption, going to the length of holding that a manufacturer of motorcycles was not subject to the federal excise tax on sales thereof with respect to sales to a municipality.[5] The Court has recently abandoned this position quite completely. In Graves *v.* New York, decided early in 1939, Collector *v.* Day and New

[1] Collector *v.* Day, 11 Wall. 113 (1870).

[2] Pollock *v.* Farmers Loan and Trust Co., 157 U.S. 429 and 158 U.S. 601 (1895).

[3] See the evidence compiled in the present writer's "Constitutional Tax Exemption," *Supplement to the National Municipal Review*, XIII, No. 1 (January 1924).

[4] Brushaber *v.* Un. Pac. R.R. Co., 240 U.S. 1 (1916); Evans *v.* Gore, 253 U.S. 245 (1920).

[5] Indian Motorcycle Co. *v.* U.S., 283 U.S. 570 (1931).

York *v.* Graves (decided early in 1937) were pronounced "over-ruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities";[6] and it appears highly probable that the same rule would be applied, should Congress choose to invoke it, to the non-discriminatory taxation of income from State and municipal bonds. The power of Congress, however, to exempt national instrumentalities from State taxation, by virtue of the "necessary and proper" clause, still stands[7] (see pp. 143-144). Furthermore, when a State embarks upon an enterprise which if carried on by individuals would be taxable, like selling liquor or mineral waters, or holding football exhibitions, such activities—once, but no longer, termed "non-governmental"—and the State's receipts from them are subject to a non-discriminatory imposition of applicable national taxes.[8]

Again, Congress must levy its taxes in one of two ways: all "duties, imposts and excises" must be "uniform throughout the United States," that is, the rule of liability to the tax must take no account of geography;[9] while on the other hand, the burden of "direct taxes" must be imposed upon the States in proportion to population (see Section II, ¶3, and Section IX, ¶4).

"Duties" are customs duties. If a certain article imported from abroad is taxed five per cent at New York it must be taxed at the same rate at San Francisco, etc.

"Excises" are taxes upon the production, sale, or use of articles; also taxes upon certain privileges and procedures of a business nature. Congress has for years taxed

[6] Graves *v.* N.Y., 306 U.S. 466 (1939).

[7] Pittman *v.* HOLC, 308 U.S. 21 (1939); United States *v.* Stewart, 311 U.S. 60 (1940).

[8] South Carolina *v.* U.S., 199 U.S. 437 (1905); Allen *v.* Regents, 304 U.S. 439 (1938); New York and Saratoga Springs Com's'n *v.* U.S., decided January 14, 1946.

[9] Florida *v.* Mellon, 273 U.S. 12 (1927).

the privilege of doing business as a corporation, and the Social Security Act of 1935 levies a tax on payrolls.[10]

"Imposts" is a general term comprehending both duties and excises.

Direct Taxes

From the time of the Carriage Tax Case,[11] decided in 1796, to the Income Tax Cases of 1895,[12] the Court proceeded on the theory that the "direct tax" clauses should be confined to land taxes and capitation taxes and should not be extended to taxes which were not easily apportionable on the basis of population. But in 1895, convinced by Mr. Joseph H. Choate that the country was about to go Socialistic, a narrowly divided Bench, one Justice changing his mind at the last moment, ruled that a tax on incomes derived from property was a "direct tax" and one, therefore, that must be apportioned according to population; also, that incomes derived from State and municipal bonds might not be taxed at all by the National Government. This decision, which put most of the taxable wealth of the country out of the reach of the National Government, led in 1913 to the adoption of the Sixteenth Amendment.

Nor has the Court, since 1895, invoked its definition of "direct tax" except once, in order to overturn a national tax measure, and that was in the Stock Dividend Case of 1920[13] (see p. 206). At other times it has been satisfied to sustain challenged taxes on historical grounds as "excises," saying in this connection that "a page of history is worth a volume of logic."[14] Today inheritance

[10] Flint *v.* Stone Tracy Co., 220 U.S. 107 (1911); Stewart Mach. Co. *v.* Davis, 301 U.S. 548 (1937).

[11] Hylton *v.* U.S., 3 Dall. 171 (1796).

[12] Pollock *v.* Farmers Loan and Trust Co., 157 U.S. 429 and 158 U.S. 601 (1895).

[13] Eisner *v.* Macomber, 252 U.S. 189 (1920). As to the present status of this decision, see Helvering *v.* Griffiths, 318 U.S. 371 (1943).

[14] New York Trust Co. *v.* Eisner, 256 U.S. 345 (1921).

taxes are so classified, as are also estate taxes and taxes on gifts, with the result that it is sufficient if they are "uniform throughout the United States" in the geographical sense.[15]

Regulation by Taxation

While the raising of revenue is the primary purpose of taxation it does not have to be its only purpose, as the history of the protective tariff suffices to demonstrate. And in the field of excise taxation, if Congress is entitled to regulate a matter, it may do so by taxing it.[16] Also, by laying down certain regulations for keeping the traffic in narcotic drugs open and above-board and thereby easily taxable, Congress has in effect brought this traffic under national control.[17] Furthermore, there are some businesses which Congress may tax so heavily as to drive them out of existence, one example being the production of white sulphur matches, another the sale of oleomargarine colored to look like butter, another the dealing in sawed-off shotguns.[18] On the other hand, the Court some years ago held void a special tax on the profits of concerns employing child labor, on the ground that the act was not a *bona fide* attempt to raise revenue, but represented an effort by Congress to bring within its control matters reserved to the States;[19] and more recently it set aside a special tax on liquor dealers conducting business in violation of State law, as being a "penalty" and "an invasion of the police power inherent in the States."[20] That such attempts to "psychoanalyze" Congress, as Jus-

[15] *Ibid.*; Knowlton *v.* Moore, 178 U.S. 41 (1900); Bromley *v.* McCaughn, 280 U.S. 124 (1929).

[16] Veazie Bank *v.* Fenno, 8 Wall. 533 (1869); Mulford *v.* Nat Smith, 307 U.S. 38 (1939).

[17] United States *v.* Doremus, 249 U.S. 86 (1919); Nigro *v.* U.S., 276 U.S. 332 (1928).

[18] McCray *v.* U.S., 195 U.S. 27 (1904); Sonzinsky *v.* U.S., 300 U.S. 506 (1937).

[19] Bailey *v.* Drexel Furniture Co., 259 U.S. 20 (1922).

[20] United States *v.* Constantine, 296 U.S. 287 (1936).

tice Cardozo derisively characterized them in the case last cited, would be repeated today, seems at least doubtful.[21]

The Spending Power

The money which it raises by taxation Congress may expend "to pay the debts and provide for the common defense and general welfare of the United States." The important term here is "general welfare of the United States." Madison contended that Congress was empowered by it to tax and spend only to the extent necessary to carry into execution the *other* powers granted by the Constitution to the United States. Hamilton contended that the phrase should be read literally, and that the taxing-spending power was *in addition* to the other powers.[22] Time has vindicated Hamilton. Not only has Congress from the first frequently acted on his view, but recently the Court went out of its way to endorse it. This was in the case of United States *v.* Butler,[23] in which, nevertheless, the Court overturned the AAA on the ground that in requiring agriculturists to sign contracts agreeing to curtail production as a condition to their receiving certain payments under it, the act "coerced" said agriculturists in an attempt to "regulate" a matter, namely production, which was reserved to the States. Three Justices dissented on the ground that Congress was entitled when spending the national revenues for "the general welfare" to see to it that the country got its money's worth of "general welfare," and that the condemned contracts were "necessary and proper" to that end. Certainly it is a common practice for private persons, in spending their money, to require that those who are to receive it should agree to do something in return, and it is not clear why

[21] See especially Mulford *v.* Nat Smith, 307 U.S. 38 (1939); and United States *v.* Darby, 312 U.S. 100 (1941).

[22] On the general subject see the present writer's article on "The Spending Power of Congress," 36 *Harvard Law Review*, 548-582 (March 1923); also Charles Warren, *Congress as Santa Claus* (Charlottesville, Va.; 1932).

[23] United States *v.* Butler, 297 U.S. 1 (1936).

the National Government should not have the same right when spending its funds for the general welfare.

Social Security

Recent cases, moreover, uphold the power of the National Government to spend money in support of unemployment insurance, to provide old-age pensions, and to loan money to municipalities to enable them to erect their own electric plants.[24]

The view has been advanced at times that the clause "provide for the . . . general welfare of the United States" is much more than a mere grant of power to tax and spend for the general welfare, and authorizes Congress to legislate generally for that purpose.[25] This view, however, which would render the succeeding enumeration of powers largely tautological, has never so far been directly countenanced by the Court. (But cf. pp. 79-80.)

Lastly, the taxing power is limited by the "due process of law" clause of the Fifth Amendment (see pp. 165 and 166), and hence may not be exerted for the enrichment of selected classes or individuals. But as the history of tariff legislation again demonstrates, this has not heretofore been a very stringent limitation. Nor does the clause rule out retroactive taxation as such.[26] Whether it would rule out an attempt to tax husbands and wives on their joint income is discussed later (see pp. 206-207). The answer is probably, no.

¶2. To borrow money on the credit of the United States;

The Borrowing Power

Logically this power would seem to be limited to borrowing money to provide for "the common defense and general welfare of the United States." In practice it is limited only by "the credit of the United States." But

[24] Steward Mach. Co. *v.* Davis, 301 U.S. 548 (1937); Helvering *v.* Davis, 301 U.S. 619 (1937); Alabama Power Co. *v.* Ickes, 302 U.S. 364 (1938).

[25] *36 Harvard Law Review*, 550-552; J. F. Lawson, *The General Welfare Clause* (Washington, 1926).

[26] United States *v.* Hudson, 299 U.S. 498 (1937); Welch *v.* Henry, 305 U.S. 134 (1938).

Congress may not, by any of its powers, alter the terms of outstanding obligations of the United States without providing for compensation to the holders of such obligations for "actual loss";[27] but this, unfortunately, does not signify that, by pursuing inflationary fiscal policies, it may not render such obligations practically worthless without being required to compensate the holders thereof for their loss, which is held to be "incidental" or "consequential" merely, and not a "taking" of property in the sense of Amendment V.[28] May Congress authorize "forced loans" under this clause? Not if history counts for anything. Such a "loan" would not be a loan at all, the element of negotiation being absent from the transaction; it would be either a supplementary income tax, or if it took more than "income," would be a capital levy which, to be constitutional, would have to be apportioned among the States.

Other Fiscal Powers

The above clauses and clauses 5 and 6 following comprise what may be called the fiscal powers of the National Government. By virtue of these, taken along with the "necessary and proper" clause below, Congress has the power to charter national banks, to put their functions beyond the reach of the taxing power of the States, to alter the metal content and value of the coinage of the United States, to issue paper money and confer upon it the quality of legal tender for debts, to invalidate private contracts of debt which call for payment in something other than legal tender, to tax the notes of issue of State banks out of existence, to confer on national banks the powers of trust companies, to establish a "Federal Re-

[27] Perry *v.* U.S., 294 U.S. 330 (1935). See also Lynch *v.* U.S., 292 U.S. 571 (1934).

[28] Knox *v.* Lee, 12 Wall. 457 (1871); Norman *v.* Balt. & O. R.R. Co., 294 U.S. 330 (1935). See also Omnia Com'l Co. *v.* U.S., 261 U.S. 502 (1923).

serve System," a "Farm Loan Bank," etc.[29] (See further ¶5 of this Section.)

The Commerce Clause

¶3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

"Commerce" is *traffic*, that is, the buying and selling of commodities, and includes as an important incident the *transportation* of such commodities from seller to buyer. But the term has also been defined much more broadly. Thus in the famous case of Gibbons *v.* Ogden,[30] which was decided in 1824, Chief Justice Marshall said: "Commerce undoubtedly is traffic, but it is something more—it is intercourse"; and on the basis of this definition the Supreme Court has held that the mere passage of people from one State to another, as well as the sending of intelligence by telegraph—stock quotations, for instance—from one State to another, is "commerce among the States." Likewise radio broadcasting is "commerce" within this definition, and hence subject to regulation by Congress; as are also the activities of a holding company and its subsidiaries in control and direction of gas and electric companies which are scattered through several States and make continuous use of the mails and the instrumentalities of interstate commerce; also, by a recent holding, transactions in insurance which involve two or more States.[31]

[29] McCulloch *v.* Md., 4 Wheat. 316 (1819); Knox *v.* Lee, 12 Wall. 457 (1871); Veazie Bank *v.* Fenno, 8 Wall. 533 (1869); Smith *v.* Kansas City T. and T. Co., 255 U.S. 180 (1921); Norman *v.* Balt. and O. R.R. Co., 294 U.S. 330 (1935); Holyoke Water Co. *v.* Am. Writing Paper Co., 300 U.S. 324 (1937); Smyth *v.* U.S., 302 U.S. 329 (1937).

[30] 9 Wheat. 1 (1824).

[31] Pensacola Tel. Co. *v.* Western Un. Tel. Co., 96 U.S. 1 (1877); Western Un. Tel. Co. *v.* Pendleton, 122 U.S. 347 (1887); Covington Bridge Co. *v.* Ky., 154 U.S. 204 (1894); International Text Book Co. *v.* Pigg, 217 U.S. 91 (1910); Western Un. Tel. Co. *v.* Foster, 247 U.S. 105 (1918); Federal Radio Com's'n *v.* Nelson Bros., 289 U.S. 266 (1933); Electric Bond and Share Co. *v.* SEC, 303 U.S. 419 (1938); United States *v.* South-Eastern Underwriters Assoc., 322 U.S. 533 (1944).

"Among the States," that is, to employ Chief Justice Marshall's words, "that commerce which concerns more States than one," and not "the exclusively internal commerce of a State"; or to use more modern phraseology, *interstate* in contrast to *intrastate* or *local* commerce.

The power "to regulate" is the power to govern, that is, the power to restrain, to prohibit, to protect, to encourage, to promote, in the furtherance of any public purpose whatsoever, *provided* the constitutional rights of persons be not transgressed. The restrictive aspects of this power have, nevertheless, within recent times been subject, so far as *interstate* commerce is concerned, to an indefinite veto power of the Court, but one which it appears today to have discarded. (See pp. 37-38.)

Commerce as Transportation

As a matter of fact, until the New Deal, Congress had exercised its powers over interstate commerce, for the most part, only over interstate *transportation*, and especially transportation by rail. Since the power to regulate is the power to promote, Congress may build railways and bridges, or charter corporations and authorize them to build railways and bridges; and it may vest such corporations with the power of eminent domain and render their franchises immune from State taxation.[32] For the like reason the Court, in the Adamson Act Case of 1916,[33] recognized that Congress had very wide discretion in dealing with an emergency which threatened to stop interstate transportation. When, however, Congress sought in 1933 to invoke the same principle in behalf of commerce in the sense of *traffic*, in the enactment of the NIRA, the Court declined to give any weight to the emergency justification.[34] Recent decisions eliminate this distinction between Congress's power over "commerce"

[32] California *v.* Cent. Pac. R.R. Co., 127 U.S. 1 (1888); Luxton *v.* No. River B. Co., 153 U.S. 525 (1894).
[33] Wilson *v.* New, 243 U.S. 332 (1916).
[34] Schechter Bros. Corp. *v.* U.S., 295 U.S. 495 (1935).

in the sense of *transportation* and the sense of *traffic.* (See pp. 38-41.)

Constitutional Requisites of Rate Regulation

Again, Congress may regulate the rates of transportation from one State to another, or authorize its agent, the Interstate Commerce Commission, to do so.[35] But the rates set must yield a "fair return" to the carrier on the "value" of its property, the theory being that since this property is being used in the service of the public, to compel its public use without just compensation would amount to confiscation.[36] (See the "private property" clause of Amendment V.)

But just how is such "value" to be ascertained? For some years two formulas have competed for the Court's favor. One, "reproduction less depreciation," implies that "fair value" should be deemed the equivalent of what it would cost to reproduce the road at current prices, minus an allowance for the road's depreciation. The other, the "historical cost" or "original prudent investment" formula, suggests that the company is entitled to get a fair return on what it has actually put into the road in dollars and cents, less again allowance for deterioration. The former theory, till recently favored by the Court, is considerate of the casual investor's interest in an era of rising prices, but by the same token supplies so shifting a basis for rate-making as to be administratively impracticable.[37] The latter theory, which in the main appears to represent the Court's present position, escapes this disadvantage, and is also a logical corollary of the legal doctrine upon which rate regulation funda-

[35] For a remarkable argument against the power of Congress to regulate rates, based on extreme laissez-faire principles, see the speech of Senator William M. Evarts of New York in the course of the debate on the bill to establish the Interstate Commerce Commission. *Congressional Record*, XVIII, Pt. I, pp. 603-604 (49th Congress, 2nd Session, January 13, 1887).

[36] Smyth *v.* Ames, 169 U.S. 466 (1898).

[37] See briefs and opinions in St. Louis and O'Fallon R. Co. *v.* U.S. (1930) and cases there cited.

mentally rests, namely, that the property of a common carrier, or other public utility, is "impressed with a public use" and its business "affected with a public interest" *from the very outset*, and that investors are forewarned of this fact.[38] (See pp. 39 and 187.)

In the Shreveport Case,[39] decided in 1914, the Court ruled that "wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other," Congress is entitled to regulate both classes of transactions. In other words, whenever circumstances make it "necessary and proper" for Congress to regulate *local* transportation in order to make its control of *interstate* transportation really effective, it may do so—a principle to which the Transportation Act of 1920 gave new application and extension.[40] Similarly, Congress, in protecting interstate telephone messages, may prohibit the disclosure of intercepted intrastate messages;[41] and in sustaining the Fair Labor Standards Act of 1938 the Court has recently reached even more striking results, as is pointed out below.[42]

Instruments and Agents of Transportation

Furthermore, Congress may regulate the *instruments* and *agents* of interstate transportation; and hence may protect them from injury from any source, whether *interstate* or *local* in character. Thus, when cars engaged in

[38] See Driscoll *v.* Edison Light and P. Co., 307 U.S. 104 (1939); Federal Power Com's'n *v.* Natural Gas Pipeline Co., 315 U.S. 575 (1942); Federal Power Com's'n *v.* Hope Natural Gas Co., 320 U.S. 591 (1944); Colorado Interstate Gas Co. *v.* FPC, decided April 2, 1945.

[39] 234 U.S. 342.

[40] U.S. Code, tit. 49, §13 (4); Wisconsin *v.* C. B. & Q. R.R. Co., 257 U.S. 563 (1920). But a determination of the I.C.C. superseding a local rate set by a State commission may be set aside by the Supreme Court as being in excess of the I.C.C.'s power under the Act of 1920. Illinois Com. Com's'n *v.* Thomson, 318 U.S. 675 (1943); Alabama *v.* U.S., decided June 11, 1945.

[41] Weiss *v.* U.S., 308 U.S. 321 (1939).

[42] United States *v.* Darby, 312 U.S. 100 (1941), sustaining the Fr Labor Standards Act of 1938 (U.S. Code, tit. 29, §§201-219).

local transportation are hauled as part of a train along with cars which are engaged in interstate transportation, the former as well as the latter must be provided with the safety appliances which are required by the Federal Safety Appliance Act, otherwise they might impede or endanger the interstate transportation.[43] And it is on an extension of this principle that the Federal Employers' Liability Act of 1908 rests, which modified the rules of the common law of the States for determining the liability of railways engaged in interstate commerce to those of their employees who are injured while employed in connection with such commerce.[44]

When, however, Congress, in 1934, passed an act requiring railway carriers to contribute to a pension fund for superannuated employees, the Court, five Justices to four, held the act void both as violative of the "due process" clause of the Fifth Amendment and as not falling within the power to regulate interstate commerce.[45] The measure, said Justice Roberts, had "no relation to the promotion of efficiency . . . by separating the unfit from the industry." Chief Justice Hughes, on the other hand, speaking for the minority, denied that Congress's power to regulate commerce and to pass "all laws necessary and proper" to that end (see pp. 65-66), was limited merely to securing efficiency. "The fundamental consideration which supports this type of legislation," said he, "is that industry should take care of its human wastage, whether that is due to accident or age"; and it followed that Congress could require interstate carriers to live up to this obligation. By legislation adopted in 1935, 1937, and 1938 the railroads and their employees are taxed to create a fund in the Treasury from which the employees

[43] Southern Ry. Co. *v.* U.S., 222 U.S. 20 (1911).

[44] U.S. Code, tit. 45, c. 2; Second Employers' Liability Cases, 223 U.S. 1 (1912).

[45] Railroad Retirement Bd. *et al. v.* Alton R.R. Co., 295 U.S. 330 (1935).

are paid annuities, pensions, death benefits, and unemployment insurance in accordance with the provisions of these acts. The constitutionality of these measures has not been challenged judicially.[46]

Navigation and Super-Power

Navigation, too, is a branch of transportation and so of commerce, and the power to regulate it includes the power to protect navigable streams from obstruction and to improve their navigability, as by the erection of dams.[47] Furthermore, as was held in the recent case of United States *v.* Appalachian Electric Power Co., this power does not stop with the needs of *navigation*, but embraces also flood control, watershed development, and the production of electric power by the erection of dams in "navigable streams." Nor is the term "navigable streams" any longer confined by the Court, as once it was, to streams which are "navigable in their natural condition," but also includes, under the holding just mentioned, those which may be rendered navigable by "reasonable improvements."[48] And any electrical power developed at such a dam is "property belonging to the United States" (see Article IV, Section III, ¶2), in disposing of which, it was held in the TVA Case[49] the United States may, in order to reach a distant market, purchase transmission lines from a private company. Indeed, the Court will not intervene to prevent the Government from attempting to create a market for its electrical power by staking potential customers, as by authorizing loans to municipalities to enable them to go into the business of furnishing their residents power which they would purchase from the United States.[50]

[46] U.S. Code, tit. 45, §§228a-228r.; 261-273; 351-367.

[47] United States *v.* Chandler-Dunbar Co., 229 U.S. 53 (1913), and cases there reviewed.

[48] United States *v.* Appalachian Electric P. Co., 311 U.S. 377 (1940).

[49] Ashwander *v.* TVA, 297 U.S. 288 (1935).

[50] Alabama Power Co. *v.* Ickes, 302 U.S. 464 (1938).

Commerce as Traffic

But, as was indicated above, the primitive subject-matter of Congress's power of regulation is *traffic*, that is, the purchase and sale of commodities among the States. This is indicated by the etymology of the word: L. *cum merce*, "with merchandise." The first important piece of legislation to govern interstate commerce in this sense was the Sherman Anti-Trust Act of 1890,[51] the opening section of which declares "illegal" "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations." The main purpose of the act was to check the development of industrial trusts; but in the first important case to arise under it, the Sugar Trust Case of 1895,[52] the Court held that its provisions could not be constitutionally applied to a combination which was admitted to manufacture ninety-eight per cent of the refined sugar used in the United States, inasmuch as manufacture and commerce were distinct and the control of the former belonged solely to the States. Any effect of a contract with respect to manufacturing or production upon commerce among the States, the Court asserted, "would be an indirect result, however inevitable and whatever its extent," and hence would be beyond the power of Congress. Only the States, therefore, could deal with industrial monopolies.

The Sherman Anti-Trust Act

The effect of this holding was to put the Anti-Trust Act to sleep for a decade, during which period most of the great industrial trusts of today got their start. But in the Swift Case,[53] ten years later, the Court largely abandoned this mode of approach for the view that where the facts show "an established course of business" which involves "a current of commerce" among the States in a certain commodity, Congress is entitled to govern the

[51] U.S. Code, tit. 15, c. 1.
[52] United States *v.* E. C. Knight Co., 156 U.S. 1 (1895).
[53] Swift and Co. *v.* U.S., 196 U.S. 375 (1905).

local incidents of such current. Thus the Anti-Trust Act was formerly held to reach labor combinations interruptive of commerce among the States,[54] and while the Court has recently largely retracted this construction of the act, it did not do so on constitutional grounds.[55] And meantime, in sustaining in 1922 the Packers and Stockyards Act[56] of the previous year the Court, speaking by Chief Justice Taft, had asserted broadly: "Whatever amounts to a more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This Court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effects upon it are clearly non-existent."[57]

To return for a moment to the Sherman Act—a recent decision, supported however by only a bare majority of the seven Justices participating in it, holds that it applies to fire insurance transactions carried on across State lines, although when the act was passed, and for long afterwards, it was the doctrine of the Court that the business of insurance was not "commerce" in the sense of the Constitution.[58] So while the Court has practically legislated labor activities out of the Act, it has—if its recent holding stands—legislated insurance into it. That,

[54] Bedford Cut Stone Co. *v.* Journeymen, etc., 274 U.S. 37 (1927), and cases there reviewed.

[55] See especially Apex Hosiery Co. *v.* Leader, 310 U.S. 469 (1940); and United States *v.* Hutcheson, 312 U.S. 219 (1941). See also p. 191.

[56] U.S. Code, tit. 7, c. 9.

[57] Stafford *v.* Wallace, 258 U.S. 495 at 521 (1922). The statement is repeated in Board of Trade *v.* Olsen, 262 U.S. 1 at 37 (1923). See also 259 U.S. at 408.

[58] United States *v.* South-Eastern Underwriters Assoc., 322 U.S. 533 (1944). The earlier cases holding the business of insurance not to be "commerce" are reviewed in J. Black's opinion. They are headed by Paul *v.* Va., 8 Wall. 168 (1868).

however, the insurance business is interstate commerce when it is conducted across State lines follows logically from a number of cases.[59] (See also p. 191, note 51.)

The New Deal Constitutional Revolution

In June, 1933, Congress enacted that nine days wonder, the National Industrial Recovery Act ("NIRA"), which, among other things, attempted to govern hours of labor and wages in productive industry, on the theory, in part, that in the circumstances of the then existing emergency they affected commerce among the States. The act, however, was set aside by the Court in the Poultry ("Sick Chicken") Case, largely on the basis of the doctrine of the old Sugar Trust Case. And in the spring of 1936 the same doctrine was reiterated by the Court in setting aside the Guffey Coal Conservation Act of 1935, although the trial court had found that as a matter of fact interstate commerce in soft coal had been repeatedly interrupted for long periods by disputes between owners and workers on questions of hours of labor and of wages.[60]

But this extremely artificial view of things has now been abandoned. In the Jones-Laughlin Case and attendant cases,[61] decided on April 12, 1937, a five-to-four Court, speaking by Chief Justice Hughes, declined longer "to deal with the question of direct and indirect effects in an intellectual vacuum," and held that the question whether incidents of the employer-employee relationship in productive industries affected interstate commerce was one of fact and degree; and on this ground held that the Wagner Labor Relations Act of 1935, which requires employers to permit their employees

[59] See cases cited in notes 30 and 31 above; also Assistant Attorney General Beck's argument for the United States in Champion *v.* Ames ("The Lottery Case"), 188 U.S. at pp. 335-340.

[60] Schechter Bros. *v.* U.S., 295 U.S. 495 (1935); Carter *v.* Carter Coal Co., 298 U.S. 238 (1936).

[61] National Labor Relations Bd. *v.* Jones & L. Steel Corp., 301 U.S. 1 (1937).

freely to organize and to bargain with them collectively, was constitutionally applicable to certain manufacturing companies seeking an interstate market for their products. But the doctrine of the case applies also to "natural" products, to coal mined, to stone quarried, to fruit and vegetables grown;[62] nor is it affected "by the smallness of the volume of the commerce affected in any particular case."[63]

Also Congress—subject no doubt to the "due process" clause of Amendment V—may regulate the prices of commodities sold in interstate commerce, and even the local prices of commodities which affect the interstate prices thereof.[64] Indeed, the power to regulate rates of transportation sometimes carries with it the power to regulate the price of the commodity transported, as in the case of gas and electric power.[65]

Prohibitions of Commerce

It was assumed by the framers of the Constitution that the power to regulate commerce included the power to prohibit it at the will of the regulatory body. Proof of this is afforded by the provision of Article I, Section IX, which forbade Congress to put a stop to the slave trade until 1808; and one of the constitutional amendments which were suggested early in 1861 for the purpose of settling the slavery question would have forbidden Congress to prohibit the interstate slave trade. As to commerce with foreign nations, moreover, this doctrine has been frequently illustrated from an early date, as in the case of tariff and embargo legislation.[66] As to commerce

[62] Santa Cruz Fruit Packing Co. *v.* NLRB, 303 U.S. 453 (1938).
[63] National Labor Relations Bd. *v.* Fainblatt, 306 U.S. 601 (1939).
[64] United States *v.* Rock Royal Coop., 307 U.S. 533 (1939).
[65] See Public Utilities Com's'n *v.* Attleboro Steam and Elec. Co., 273 U.S. 83 (1927); Sunshine Anthracite Coal Co. *v.* Adkins, 310 U.S. 381 (1940); Federal Power Com's'n *v.* Hope Natural Gas Co., 320 U.S. 591 (1944); Colorado Interstate Gas Co. *v.* F.P.C., decided April 2, 1945.
[66] Hampton, Jr. & Co. *v.* U.S., 276 U.S. 394 (1928); University of Illinois *v.* U.S., 289 U.S. 48 (1933); United States *v.* Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

among the States, on the other hand, the doctrine had came to be established after 1900 that Congress was not ordinarily entitled to prohibit such commerce if its doing so would enable it to control matters which were in the past regulated by the States when they were regulated at all.[67]

Yet even during the period just referred to the Court repeatedly recognized that the welfare of interstate commerce as a whole might require that certain portions of it be prohibited, as, for instance, the shipment of high explosives, except under stringent regulations. Indeed, it presently went much farther, and laid down this doctrine: "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from the State of origin. In doing this, it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce."[68] And proceeding on this basis, Congress has prohibited the knowing transportation of lottery tickets from one State to another; of impure or falsely branded foods; of "filled" milk; of women for immoral purposes; of liquor; of stolen automobiles; of stolen goods in general; while by the so-called "Lindbergh Law" of 1932 it has made kidnaping, when the victim is taken across State lines, a crime against the United States; and all these measures have been duly sustained by the Court, or their validity has not been challenged before it.[69]

Cooperative Federalism

Nevertheless, when in 1916 Congress endeavored to

[67] See the present writer's *The Commerce Power versus States Rights*, chs. II and III (Princeton, 1936).

[68] Brooks *v.* U.S., 267 U.S. 432 (1925).

[69] U.S. Code, tit. 18, c. 9; Champion *v.* Ames, 188 U.S. 321 (1903); Hipolite Egg Co. *v.* U.S., 220 U.S. 45 (1911); Hoke *v.* U.S., 227 U.S. 308 (1913); Clark Distilling Co. *v.* W. Md. Ry., 242 U.S. 311 (1917); Brooks *v.* U.S., 267 U.S. 432 (1925); Gooch *v.* U.S., 297 U.S. 124 (1936); United States *v.* Carolene Products Co., 304 U.S. 104 (1938).

The New Deal Revolution Continued

break up a wide-spread traffic in child-made goods, by forbidding the transportation of such goods outside the State where produced, it was informed, in the case of Hammer *v.* Dagenhart,[70] by a closely divided Court, that it was not regulating commerce among the States but was invading "the reserved powers of the States," meaning thereby the power of the States over the employer-employee relationship in productive industry. But as Justice Holmes pointed out in his celebrated dissenting opinion, while a State is free to permit production for its own local market to take place under any conditions whatever, so far as national power is concerned, when it seeks a market outside its boundaries for its products it is no longer within its rights, but enters a field where before the Constitution was adopted it could have been met by the prohibitions of sister States, and where under the Constitution Congress is entitled to govern. What is more, as the decisions stood at that date, *both* Congress and the States were forbidden to prohibit the free flow of the products of child labor from one State to another —the former on the ground that it would be usurping power reserved to the States; the latter on the ground that they would be usurping Congress's power to regulate commerce![71]

Today this gap in governmental authority in this country appears to have been closed. In the notable case of United States *v.* Darby[72] the Court gave a clean bill-of-health to the Fair Labor Standards Act of 1938, which not only prohibits interstate transportation of goods produced by labor whose hours of work and wages do not conform to the standards imposed under the act, but even interdicts the production of such goods "for com-

[70] 247 U.S. 251 (1918).

[71] See the present writer's *The Twilight of the Supreme Court*, 26-37 (New Haven, 1934).

[72] 312 U.S. 100 (1941). See also Whitfield *v.* Ohio, 297 U.S. 431 (1936); Kentucky Whip and Collar Co. *v.* Ill. C.R. Co., 299 U.S. 334 (1937).

merce." The decision, which explicitly overrules Hammer *v.* Dagenhart, invokes both the "commerce" clause and the "necessary and proper" clause. And on the same basis the Court held in the recent case of Wickard *v.* Filburn that Congress might regulate the production of wheat intended wholly for consumption on the farm where the purpose of such regulation was to control the market price of wheat dealt with in interstate commerce.[73] In light of these holdings it seems safe to say that the Court will not intervene today against any prohibition of interstate commerce by Congress which does not in its opinion operate so unfairly against particular persons as to violate the "due process" clause of Amendment V.

It was also in reliance on its power to prohibit interstate commerce and to exert like power over the mails that Congress enacted the Securities Act of 1933 and the Public Utility Holding Company Act ("Wheeler-Rayburn Act") of 1935.[74] The former authorizes the Security and Exchange Commission, which it creates, to lay down regulations designed to keep dealing in securities honest and above-board and closes the channels of interstate commerce and the mails to dealers refusing to register under the act. The latter requires, by sections 4 (a) and 5, the companies which are subject to its provisions to register with the Securities and Exchange Commission and to inform it concerning their business, organization and financial structure, all on pain of being prohibited use of the facilities of interstate commerce and the mails; while by section 11, the so-called "death sentence" clause, the same act closes after a certain date the channels of interstate communication to certain types of public utility companies whose operations, Congress found, were calculated chiefly to exploit the investing and con-

[73] 317 U.S. 111 (1942).
[74] U.S. Code, 1940 Ed., tit. 15, §§77a-77aa, and §§79ff.

suming public. Sections 4 (a) and 5 have been sustained by the Court; the validity of Section 11 seems today to be taken for granted.[75]

The Commerce Clause and the States

Ever since the Civil War the power of Congress to regulate interstate and foreign commerce has been treated by the Court to be, in the main, *exclusive*, with the result that it may not be exercised by the States to any substantial extent, even though Congress has not acted. The clause under discussion is, accordingly, not only a *source* of power to the National Government, but it is also a *restriction* on State power.[76] Interestingly enough, while its importance in the former respect has been increasing recently, as we have just seen, its importance in the latter respect has been diminishing somewhat. Nor is this as paradoxical as might appear at first glance, since both developments have a common basis in the desire of the Court to curtail its own power of judicial review in favor of the political agencies of government in this country. The following results which have been reached by the Court from time to time are intended to be merely illustrative.

Since a State may not tax interstate or foreign com-

[75] Electric Bond and Share Co. *v.* SEC, 303 U.S. 419 (1938); Securities and Exchange Com'n *v.* Chenery Corp., 318 U.S. 80 (1943).

[76] The doctrine laid down in Cooley *v.* Port Wardens, 12 How. 299 (1851), that the States have a "concurrent power" to regulate interstate and foreign commerce as to matters demanding local regulation, so long as Congress has not acted, seems to have become obsolete, except perhaps with respect to bridges, dams and ferries established under State authorization in or over navigable streams. See Escanaba Co. *v.* Chicago, 107 U.S. 678 (1882); Port Richmond, etc. Co. *v.* Board of Chosen Freeholders, 234 U.S. 317 (1914). State legislation affecting foreign and interstate commerce seems generally nowadays to be classified in the Court's formulary as falling either under the police power or the taxing power. Burdick, *The Law of the Constitution*, 245. Cf., however, with the above C. J. Stone's opinion for the Court in California *v.* Thompson, 313 U.S. 109 (1941), where the Cooley Case is made the fulcrum for a decision overturning DiSanto *v.* Pa., 273 U.S. 34 (1927). Both cases involved the power of a State to apply a license statute regulating transportation agents to one negotiating for the transportation of persons to points outside the State.

The State's Taxing Power Affecting Commerce

merce, it may not tax the carrying of goods from one State to another; nor the gross receipts from such carriage; nor the negotiation of sales when the orders are to be filled by goods brought from another State; nor the sale of goods intended for shipment into another State, though it may tax their production.[77] Also, a State may not tax goods imported from abroad so long as these remain in the "original package" in the hands of the importer.[78] A State may, however, tax the instruments of interstate commerce at a fair valuation as so much property within the State and receiving its protection; while goods brought from another State, as well as the sale thereof, are subject to taxation as soon as they "have come to rest," even though they are still in the "original package," provided they are not discriminated against on account of their origin.[79] Furthermore, by a case decided early in 1937 States which have sales taxes may levy equivalent "compensating" taxes upon the use within their territory of articles purchased in other States;[80] and this attitude of concession to local interest finds additional expression in certain more recent cases.[81] Indeed, at least three of the present Justices would apparently like to go further and turn over to Congress the entire business of saying when and how interstate commerce

[77] The cases referred to are: State Freight Tax Case, 15 Wall. 232 (1873); Philadelphia S.S. Co. *v.* Pa., 122 U.S. 326 (1887); Robbins *v.* Shelby Taxing Dist., 120 U.S. 489 (1887); Dahnke-Walker Mill. Co. *v.* Bondurant, 257 U.S. 282 (1921); Oliver Iron Co. *v.* Lord, 262 U.S. 172 (1923), and cases there cited.

[78] This was the famous decision of Chief Justice Marshall in Brown *v.* Md., 12 Wheat. 419 (1827). The benefits of the doctrine were recently extended to imports from the Philippine Islands, title to which did not vest in the importer until after their arrival in the United States. Hooven and Allison Co. *v.* Evatt, decided April 9, 1945.

[79] Galveston, H. & S. A. Ry. Co. *v.* Texas, 210 U.S. 217 (1908); Sonneborn Bros. *v.* Cureton, 262 U.S. 506 (1923), and cases there cited; Ingels *v.* Morf, 300 U.S. 290 (1937).

[80] Henneford *v.* Silas Mason Co., 300 U.S. 577.

[81] See e.g., Ford Motor Co. *v.* Beauchamp, 308 U.S. 331 (1940); and McGoldrick *v.* Berwind-White Co., 309 U.S. 33 (1940). Cf. with the latter Best and Co. *v.* Maxwell, 311 U.S. 454 (1940).

should be subject to local taxation.[82] But, obviously, any such measure would have to be drawn in broad terms and so would need to undergo a good deal of judicial interpretation in the long run. The Court would not be saved much work.

The "Police Power"

States have also their so-called "police power"; that is, the power "to promote the health, safety, morals and general welfare." Laws passed in exercise of this power may often affect commerce incidentally, but if the resultant burden is found by the Court to be on the whole justified by the local interest involved, such laws will be sustained. In other words, the Court's function in the handling of this type of case is that of an arbitral, rather than of a strictly judicial, body.[83] Thus it recently held that a State is entitled to authorize, in the interest of maintaining producers' prices, a scheme imposing restrictions on the sale within the State of a crop ninety-five per cent of which eventually enters interstate and foreign commerce, there being no act of Congress with which the State act was found to conflict.[84] But this holding does not necessarily disturb an earlier one that a State has no right to promote its own "economic welfare" at the expense of the rest of the country, by prohibiting the entrance within its borders or the exit from them of "legitimate articles of commerce," the Constitution having been "framed upon the theory that the people of the several States must sink or swim together,

[82] See Justice Black's opinion for himself and Justices Frankfurter and Douglas, in McCarrol *v.* Dixie Greyhound Lines, Inc., 309 U.S. 179 at 188-189 (1940); also the same Justice's earlier opinion in Adams Manufacturing Co. *v.* Storen, 304 U.S. 307 at 328-333 (1938).

[83] See in this connection C. J. Stone's language for the Court in Parker *v.* Brown, 317 U.S. 341 (1943). The problem of reconciling the commercial and the local interest has frequently arisen in the field of motor transportation. See California *v.* Thompson, 313 U.S. at pp. 115-116 (1940).

[84] Parker *v.* Brown, cited in note above.

and that in the long run prosperity and salvation are in union and not division."[85]

Similarly, a State may require all engineers operating within its borders, even those driving through trains, to be tested for color-blindness; but it may not limit the length of trains.[86] Nor may a State regulate rates of transportation in the case of goods being brought from or carried to points outside the State; and while it may regulate rates for goods bound simply from one point to another within its own borders, yet even such rates are subject to be set aside by national authority if they discriminate against or burden interstate commerce.[87]

When National and State Laws Overlap

Nor is the Court's *quasi*-arbitral function confined to the question whether State legislation has unconstitutionally invaded the field of power which the "commerce" clause is thought to reserve to Congress exclusively. It is also brought into requisition, and with the extension of national power into the industrial field more and more so, in determining whether certain State legislation conflicts with a certain act or acts of Congress. If such is the case, then of course the State legislation must be treated as void so long as the conflicting national legislation remains on the statute book, *provided* it is constitutional. But the Court will not, in its present mood at any rate, be keen to discover such a conflict, but rather the contrary. As the Chief Justice put it in a recent case, "In a dual system of government in which, under the Constitution, the States are sovereign, save only as Congress may constitutionally subtract from their

[85] Baldwin *v.* Seelig, 294 U.S. 511 (1935).

[86] Smith *v.* Ala., 124 U.S. 465 (1888). Southern Pacific Co. *v.* Ariz., decided June 18, 1945. The survey of such cases in Justice Hughes' opinion for the Court in the Minnesota Rate Cases, 230 U.S. at pp. 402-412 (1913), and by C. J. Stone in the just cited Arizona case are very instructive.

[87] Wabash Ry. Co. *v.* Ill., 118 U.S. 557 (1886); the Shreveport Case, 234 U.S. 342 (1914). Of course, State imposed rates, no less than nationally imposed rates, must yield the carrier a "fair return" on the "value" of its property. Smyth *v.* Ames, 169 U.S. 466 (1898). See pp. 32-33 above.

authority, an unexpressed purpose to nullify a State's control over its officers and agents is not lightly to be attributed to Congress."[88]

¶4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

There seems to be no good reason why two such entirely different subjects should be dealt with in the same clause further than that legislation regarding each has to be "uniform."

Naturalization and Citizenship

Some are born citizens; some achieve citizenship; some have citizenship thrust upon them. The first category fall into two groups. First, those who are born in the United States, "subject to the jurisdiction thereof," are pronounced "citizens of the United States and of the State wherein they reside" by the opening clause of Amendment XIV, which derives from the principle of *jus soli* ("the law of the soil") of the English common law, and further back still from the feudal law. As rather improvidently interpreted by the Court in the Wong Kim Ark Case,[89] this clause endows with American citizenship even the children of casual sojourners in the United States, provided they do not have diplomatic status. The second group of "citizens at birth" owe their citizenship to Congressional legislation which applies the *jus sanguinis* ("the law of blood relationship") of the Roman civil law, and embraces with certain qualifications persons born outside the United States and its outlying possessions to parents one or both of whom are citizens of the United States.[90]

[88] Parker *v.* Brown, cited above in note 83, at p. 351. See also Allen-Bradley Local No. 1111 *et al. v.* Wisconsin Employment Rels. Bd., 315 U.S. 740 (1942); Penn Dairies *v.* Milk Control Com's'n, 318 U.S. 261 (1943); Hill *v.* Fla., decided June 11, 1945.

[89] United States *v.* Wong Kim Ark, 169 U.S. 649 (1898).

[90] U.S. Code, tit. 8, §601.

Those who achieve citizenship are persons who were born aliens but who have become "naturalized" in conformance with the laws of Congress. Formerly this privilege was confined to "white persons and persons of African nativity or descent," but was extended by the Act of December 17, 1943, to "descendants of races indigenous to the Western Hemisphere and Chinese persons or persons of Chinese descent."[91] But naturalization is by no means a favor for the asking by those who are racially qualified. Under the Nationality Act of October 14, 1940, which for the most part merely codifies earlier statutes, no person may be naturalized who advocates or belongs to a group which advocates "opposition to all organized government" or who "believes in" or belongs to a group which "believes in," "the overthrow by force or violence of the Government of the United States or of all forms of law," and any person petitioning for naturalization must "before being admitted to citizenship, take an oath in open court . . . to renounce and abjure absolutely . . . all allegiance and fidelity to any foreign prince" or state "of whom or which the petitioner was before a subject or citizen"; "to support and defend the Constitution and laws of the United States against all enemies, foreign and domestic"; and "to bear full faith and allegiance to the same," provisions which require him to be ready and willing to bear arms for the United States.[92] And any naturalized person, who takes this oath with mental reservations or conceals beliefs and affiliations which under the statute disqualify one for naturalization, is subject, upon these facts being conclusively shown in a proper proceeding, to have his certificate of naturalization cancelled for "fraud."[93] In all other respects, how-

[91] *Ibid.*, §703.

[92] U.S. Code, tit. 8, §§705 and 735; United States *v.* Schwimmer, 279 U.S. 644 (1929); United States *v.* Macintosh, 283 U.S. 605 (1931).

[93] U.S. Code, tit. 8, §738, Johannessen *v.* U.S., 225 U.S. 227 (1912). In both Schneiderman *v.* U.S., 320 U.S. 118 (1943) and Baumgartner

ever, the naturalized citizen stands "under the Constitution . . . on an equal footing with the native citizen" save as regards eligibility to the Presidency.[94] He enjoys, therefore, the same freedom of speech and publication, the same right to criticize public men and measures, whether informedly or foolishly, the same right to assemble to petition the government, in short, the same civil rights as do citizens from birth.

Illustrative of persons who have had citizenship thrust upon them are members of an Indian "or other aboriginal tribe" who, by the Act of 1887 and succeeding legislation, are declared "to be citizens of the United States" if they were born within the United States; and "all persons born in Puerto Rico on or after April 11, 1899," who by the Act of March 2, 1917, are "declared to be citizens of the United States."[95]

Congress's Inherent Power Over Citizenship

The interesting question arises whether Congress, when it extends American citizenship to certain categories "at birth," does so by virtue of the constitutional clause here under discussion or by virtue of an "inherent" power ascribable to it in its quality as the national legislature. While the point has never been adjudicated, the dictionary definition of "naturalize" "*to adopt, as a foreigner into a nation or state,*" tends to confirm the latter theory, as does also the fact that in the pioneer Act of 1855, dealing with the matter, Congress "declared" children born abroad of American citizens to be citizens. Even more clearly does Congress's power to deal with the subject of expatriation seem to require some such explanation. At the common law the *jus soli* was accompanied by the principle of indelible allegiance, out of

v. U.S., 322 U.S. 665 (1944) district court decisions ordering cancellation were reversed on the ground that the Government had not discharged the burden of proof resting upon it.

[94] The cases just cited; Osborn *v.* Bk. of U.S., 9 Wheat. 738, at 827 (1824); Luria *v.* U.S., 231 U.S. 9 (1913).

[95] U.S. Code, tit. 8, §§601, 602. See also Boyd *v.* Nebraska, 143 U.S. 135 (1892).

which stemmed, for instance, Great Britain's claim of right in early days to impress naturalized American seamen of British birth; and even as far down as 1868 American courts often implicitly accepted this principle. Our Secretaries of State, on the other hand, usually asserted the doctrine of expatriation in their negotiations with other governments respecting the rights abroad of American citizens by naturalization, and on July 27, 1868, Congress passed a resolution declaring the latter doctrine to be "a fundamental principle of this Government," one not to be questioned by any of its officers in any of their opinions, orders, decisions, etc.[96] Then by an act passed in 1907, although since repealed in this respect, Congress enacted that any woman marrying a foreigner should take the nationality of her husband. To the contention that this provision deprived American citizens of their constitutional right to that status, the Court replied that the maintenance of "the ancient principle of the identity of husband and wife" was a reasonable requirement of international policy, a field in which the National Government was "invested with all the attributes of sovereignty." While Congress, said the Court, may not "arbitrarily impose a renunciation of citizenship," yet marriage with a foreigner was "tantamount to voluntary expatriation."[97] And for like reasons Congress may provide that naturalized citizens shall lose their acquired status under certain conditions by protracted residence abroad, although their minor children born in the United States, not sharing the parent's intention in the eyes of the law, do not share his fate.[98] And in the light of these precedents, legislative and judicial, it would seem to be within Congress's power, whenever

[96] See generally J. B. Moore, *Digest of International Law*, III, 552-581 (Washington, 1906).

[97] Mackenzie *v.* Hare, 239 U.S. at pp. 311-312 (1915); cf. United States *v.* Wong Kim Ark, 169 U.S. at p. 703 (1898).

[98] Perkins *v.* Elg, 307 U.S. 325 (1939).

the public safety might be reasonably deemed to require it, to enact that American citizens of "dual nationality" take an oath of fealty to the United States, repudiating all claims of any other government upon their allegiance, on pain of otherwise being considered to have expatriated themselves.

The Bankruptcy Power

Congress's power in the field of bankruptcy legislation has been a steadily growing power. In the words of Justice Cardozo, summarizing Mr. Warren's volume on the subject: "The history is one of an expanding concept," but of "an expanding concept that has had to fight its way. Almost every change has been hotly denounced in its beginnings as a usurpation of power. Only time or judicial decision has had capacity to silence opposition. At the adoption of the Constitution the English and Colonial bankruptcy laws were limited to traders and to involuntary proceedings. An Act of Congress passed in 1800 added bankers, brokers, factors and underwriters. Doubt was expressed as to the validity of the extension, which established itself, however, with the passing of the years. Other classes were brought in later, through the Bankruptcy Act of 1841 and its successors, until now practically all classes of persons and corporations are included."[99] And whereas bankruptcy legislation was originally framed solely from the point of view of the immediate reimbursement of creditors, it is today designed also as a relief to debtors and as a mode of putting them back on their feet ("voluntary bankruptcy"). Yet the creditor's interest has not been lost sight of, since it is usually better secured, especially in times of financial depression, by conservation of the debtor's resources than by their sale and distribution.

To be sure, a closely divided Court held in 1936 that

[99] Ashton *v.* Cameron County, etc., 298 U.S. at pp. 535-536 (1936); Charles Warren, *Bankruptcy in United States History*, 9 (Boston, 1935).

Congress could not extend the benefits of voluntary bankruptcy proceedings to municipalities and other political subdivisions of the States, since to do so would be to invade the rights of the States even though the act required that they first give their consent to such proceedings; but this decision was speedily superseded by one to the contrary effect, which is now law of the land.[100]

While Congress is not forbidden to impair "the obligation of contracts" (see Article I, Section X, ¶1), in legislating regarding bankruptcies it may not, under the Fifth Amendment, unduly invade the property rights of creditors, which, however, is just what, in the opinion of a unanimous Court, it attempted to do by the Frazier-Lemke Farm Moratorium Act of 1933. A revised act, designed to meet the Court's objections, was in due course challenged and sustained.[101]

¶5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

The Currency Power

The framers of the Constitution apparently assumed a bimetallic currency, and the power to regulate "the value thereof" was probably thought of chiefly as the power to regulate the value of lesser coins in relation to the dollar and the metallic content of the two kinds of dollars with a view to keeping both gold and silver in circulation. As a result of Civil War legislation, however, Congress established its power to authorize paper money with the quality of legal tender in the payment of debts, both past and future; while by the Gold Clause Cases of 1934 it is recognized as possessing the power to lower the metal content of the dollar in order to stimulate prices. In short, "the value thereof" comes to mean "value" in the sense of *purchasing power*. Nor may pri-

100 The case just cited; and United States *v.* Bekins, 304 U.S. 27 (1938).
101 Louisville Joint Stock Land Bank *v.* Radford, 295 U.S. 555 (1935); Wright *v.* Vinton Branch, etc., 300 U.S. 440 (1937).

vate parties, by resort to the "gold clause" device, contract themselves out of the reach of Congress's power thus to lower the purchasing power of the dollar.[102] (See also ¶2, above.)

¶6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

This clause of the Constitution is superfluous. Congress would have had this power without it, under the "coefficient clause." (See ¶18, below.)

¶7. To establish post-offices and post-roads;

The Postal Clause

Congress's powers under this and the commerce clause together would enable it to take over the railroad and telegraph lines, in return for "just compensation." (See Amendment V.)

From its power to establish post-offices the National Government derives its power to carry the mails, and this power comprehends the power to protect the mails and their quick and efficient distribution, as well as the power to prevent the postal facilities from being used for legitimately forbidden purposes, that is, for purposes which the Court thinks it right for Congress to forbid.[103] (See Amendment I.)

¶8. To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

Patents and Copyrights

Congress may exercise the power conferred by this clause by either general or special acts, but the provision has reference only to writings and discoveries which are the

[102] See cases cited in note 29 above; also Phanor J. Eder, "The Gold Clause Cases in the Light of History," 23 *Georgetown Law Journal*, 359-388 and 722-760.

[103] *In re* Rapier, 143 U.S. 110 (1892); Public Clearing House *v.* Coyne, 194 U.S. 497 (1904); Lewis Pub. Co. *v.* Morgan, 229 U.S. 288 (1913); Electric Bond and Share Case, 303 U.S. 419 (1938).

result of intellectual labor and exhibit novelty.[104] Nor is Congress authorized by the clause to grant monopolies in the guise of patents or copyrights, and the rights which the present statutes confer are subject to the Anti-Trust Act.[105] Also, patented articles are subject to the police power and the taxing power of the States, but must not be discriminated against as such;[106] and a State may tax royalties from patents or copyrights as so much income, a decision to the contrary effect in 1928 having been later overruled.[107] The term "writings" has been given an expanded meaning, and covers photographs and photographic films.[108] On the other hand, it was held in the Trade-Mark Cases[109] that a trade-mark is neither a "writing" nor "discovery" within the sense of the clause, with the result that Congress could validly legislate for their protection only as they were instruments of foreign or interstate commerce. Not improbably, however, recently established views of Congress's protective power over commerce and its instruments would today vindicate the kind of act which was overturned in 1879. It should be added that the international agreements or the subject of patents and copyrights to which the United States is party were entered into under authority conferred by Congress under this clause.

¶9. To constitute tribunals inferior to the Supreme Court; (See Article III, Section I.)

[104] Higgins *v.* Keuffel, 140 U.S. 431 (1891); Cuno Engineering Corp. *v.* Automatic Devices Corp., 314 U.S. 84 (1941).

[105] See Motion Picture Patents Co. *v.* Universal Film Mfg. Co., 243 U.S. 502 (1917); Morton Salt Co. *v.* G. S. Suppiger Co., 314 U.S. 488 (1942); United States *v.* Masonite Corp., 316 U.S. 265 (1942).

[106] Patterson *v.* Ky., 97 U.S. 503 (1877); Webber *v.* Va., 103 U.S. 347 (1880). See also Watson *v.* Buck, 313 U.S. 387 (1941).

[107] The cases referred to are Long *v.* Rockwood, 277 U.S. 142 (1928); and Fox Film Co. *v.* Doyal, 286 U.S. 123 (1932).

[108] Burrows-Giles Lithographic Co. *v.* Sarony, 111 U.S. 53 (1884).

[109] 100 U.S. 82 (1879).

¶10. To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;

Congress and International Law

By virtue of this and the following paragraph Congress is made the final authority in determining the rights and duties of the United States under the Law of Nations.

¶11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

This paragraph, together with ¶s 12, 13, 14, 15, 16 and 18 following, and ¶1 of Section II of Article II, comprise what are ordinarily called the "war powers" of the United States.

The War Power

It ought to be remembered that even before the Constitution was adopted the American people had asserted their right to wage war as a unit, and to act in regard to all their foreign relations as a unit. Taking account of that fact the Supreme Court in 1936, speaking by Justice Sutherland, adopted the view, first advanced in 1792, that the National Government does not get its powers in these fields from the Constitution, but possesses them as an *inherent attribute of national sovereignty*, and that what the above-mentioned and other relevant clauses of the Constitution do is simply to regulate in certain particulars the exercise of these powers.[110] In different phraseology, the "war powers" are comprised in one all-inclusive War Power, which may be defined as the power to take any and all measures to wage war successfully unless such measures are clearly forbidden by the Constitution. Thus silence on the part of the Constitution in this field of national action, instead of being a *denial of* the power to act, is an *affirmance* thereof. By the same token

[110] United States *v.* Curtiss-Wright Export Corp., 299 U.S. 304; and see generally the present writer's *Constitution and World Organization*, ch. II (Princeton, 1944). What is said there regarding the plenary nature of the National Government's power in the field of foreign relations applies, naturally, to its War Power.

the War Power is unaffected by the principle of Dual Federalism; against it there are no States' Rights, but to the contrary an active duty on the part of the States to cooperate to the extent of their powers with the National Government in the prosecution of war on the home front.[111]

No doubt it is true, as former Chief Justice Hughes once put it, when "we are in war . . . we are not in revolution." What Mr. Hughes was thinking of, presumably, were the restraints which are imposed by the Bill of Rights in behalf of private rights, and especially the "due process" clause of Amendment V: "nor shall any person be deprived of life, liberty, or property without due process of law"—that is, without what the Supreme Court finds to be justifying circumstances (see pp. 166-167). But Total War is itself a highly justifying, not to say compulsive circumstance, in the presence of which judicial review is apt to be properly self-distrustful, and hence ineffective. Witness, for example, the vast powers which by authorization of Congress the War Production Board (WPB) exercised in control of the distribution of materials and facilities, and of industrial production and output during the recent war, and the almost equally great powers which the Office of Price Administration (OPA) exercised in rationing supplies and controlling prices, rents, and wages, without any restraint by the courts—almost, in fact, without their exercise of power being challenged in court.[112]

[111] University of Illinois *v.* U.S., 289 U.S. 48 (1933); Gilbert *v.* Minn., 254 U.S. 325 (1920). In the recent war the Office of Civilian Defense (OCD) was dependent entirely on the local authorities for the enforcement of its "directives" whenever the patriotic impulses of the public proved an insufficient reliance. Mr. Byrnes' curfew "request" of February 28, 1945, issued in his capacity as Director of War Mobilization, was similarly circumstanced, with the result of producing a sharp controversy between Mr. Byrnes and Mayor LaGuardia over the question of closing-time for New York City's restaurants. See Byrnes' statement in the *New York Times*, March 20, 1945.

[112] As to WPB's powers, see relevant portion of Second War Powers

The Impact of Total War on our Japanese Fellow Citizens

And what Total War can do to personal rights despite the "due process" clause, and despite its chosen instrument judicial review, is shown by the measures which the National Government adopted early in the present war respecting Japanese residents on the West Coast. What, in brief, these measures accomplished was the removal of 112,000 Japanese, two-thirds of them citizens of the United States by birth, from their homes and properties, and their temporary segregation in "assembly centers," later in "relocation centers." No such wholesale or drastic invasion of the rights of citizens of the United States by their own Government had ever before occurred in the history of the country. Nevertheless, taking judicial notice of the dubious state of our defenses on the West Coast and of the reasonable apprehension of invasion following the attack on Pearl Harbor, of the manifest sympathy of many Japanese residents for Japan and the consequent danger of "Fifth Column" activities, and of certain other more or less speculative possibilities, and asserting the broad scope of the blended powers of Congress and the President in war time, the Court said, "We cannot say that these facts and circumstances, considered in the particular war setting, could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United States." The measures in question were therefore pronounced valid, but with the later stipulation by the Court that they must be construed and applied strictly as anti-espionage and anti-sabotage measures, not as concessions to community hostility toward

Act of March 27, 1942, U.S. Code, Supp. IV, tit. 50—War, Appx.—§§633-636a; Steuart & Bro., Inc. *v.* Bowles, 322 U.S. 398 (1944); John Lord O'Brian and Manly Fleischmann, "The War Production Board, Administrative Policies and Procedures," reprint from *George Washington Law Review*, December, 1944. On OPA's powers, see Emergency Price Control Act of January 30, 1942, as amended, U.S. Code, Supp. IV—War, Appx.—§§901-924; Yakus *v.* U.S., 321 U.S. 414 (1944); Bowles *v.* Willingham, 321 U.S. 503 (1944). Against enemies of the United States the War Power is constitutionally unlimited even in theory. Brown *v.* U.S., 8 Cr. 110 (1814); Miller *v.* U.S., 11 Wall. 268 (1870).

the Japanese. A Japanese citizen, accordingly, whose loyalty the Government did not challenge was held to be entitled at any time to unconditional release from a relocation center. At the same time it was clearly implied that the privilege of the writ of *habeas corpus* was always available in like cases unless suspended for reasons deemed by the Constitution to be sufficient.[113]

Can the Constitution Be Suspended in Wartime?

The question arises whether, this same *habeas corpus* privilege aside, the Constitution contemplates the possibility of its own suspension in any other respect in time of war or other serious crisis. In the Milligan Case, which was decided shortly after the Civil War, a majority of the Court took pains to stigmatize any such idea in the strongest terms. "No doctrine," said Justice Davis, "involving more pernicious consequences, was ever invented by the wit of man than that any of its [the Constitution's] provisions can be suspended during any of the great exigencies of government."[114] Unfortunately, this strongly worded assertion is contradicted by the very decision in justification of which it was pronounced, for this held Milligan to have been deprived of his constitutional rights, and his was but one of many such cases, President Lincoln's policy as to which, based on the

[113] Hirabayashi *v.* U.S., 320 U.S. 81 (1943); Korematsu *v.* U.S., 323 U.S. 214 (1944); *ex parte Endo*, 323 U.S. 283 (1944). It is, perhaps, pardonable to indulge a mild scepticism as to the alleged necessity for the Japanese segregation measures. Certainly, chronology supports such scepticism. The Japanese attack on Pearl Harbor occurred December 7, 1941. Yet it was not until February 19 that this policy was inaugurated by the President's order, nor until March 21 that Congress acted, and the Civilian Exclusion Order did not come till May 3—five months after Pearl Harbor! What was the real cause, then, of the segregation measures—increased danger of Japanese invasion, to be aided by sabotage in the United States, or increased pressure from interested and/or hysterical groups of West Coast citizens? Had the authorities stopped short with a curfew order, enforcible by the police, they would have taken ample precaution. *Not one single piece of evidence has ever turned up to implicate one single Japanese, citizen or otherwise, either in continental United States or in Hawaii, in one single effort at sabotage.*

[114] Wall. 2, at 121 (1866).

theory that the entire country was a theater of military operations, may have been a material factor in the war's outcome.

Far different was the outlook of President Roosevelt's message to Congress of September 7, 1942, in which he proclaimed his intention and his constitutional right to disregard certain provisions of the Emergency Price Control Act unless Congress repealed them by the following October 1. "The American people," said he, "can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country.... When the war is won, the powers under which I act will automatically revert to the people—to whom they belong." While the situation which the President foreshadowed did not materialize, thanks to Congress's compliance with his demand, albeit a day late, yet any candid person must admit the possibility of conditions arising in which the safety of the republic would require the waiving of constitutional forms. What is not so easily conceded is the President's apparent assumption that the Constitution lodges the power solely in one man to decide that such a situation has arisen, and by so deciding to invest himself with the role of dictator. The existence of a national crisis warranting the suspension of the most important feature of the Constitution, its division of power between the Legislative and Executive branches, ought to be declared by both branches, otherwise Chief Justice Hughes' words, just quoted, would be given the lie direct.

If so, by Whom?

Congress's power to declare war is the same power as in 1789 belonged to the King of Great Britain. It was quite naturally felt that in a republican form of government the vital issue of war and peace must be left with all the representatives of the people. On the other hand,

Presidential War-Making

Presidents came very early to be recognized as having power to employ the armed forces in defense of the persons and property of Americans situated abroad against attack or imminent danger of it; and this recognition received judicial ratification even prior to the Civil War.[115] And on the basis of these beginnings later Presidents have come, as the scope of the interests, both public and private, seeking protection has expanded, to exercise independently of Congressional sanction a virtual *war-making* power of uncertain dimensions. Thus President McKinley, without consulting Congress, contributed an army of 5,000 men and a naval contingent to the joint expedition of the Powers for the relief of the beleaguered legations in Peking during the Boxer Rebellion; and later a succession of Presidents from Taft to Coolidge waged protracted campaigns, and even conducted elections, in certain of the countries bordering on the Caribbean, and again without Congressional sanction.[116] Moreover, in the very conduct of foreign relations Presidents have frequently skirted the danger of precipitating war, have sometimes precipitated it, without previously taking Congress into their confidence. It is true that Congress, because of its control of the purse, must ultimately be resorted to; nor is it under any constitutional obligation to underwrite what the President has done or proposes to do. Yet if what the President has done is to

[115] For a list of "incidents" reaching from 1798 to 1941, see the compendious little volume by James Grafton Rogers, *World Policing and the Constitution*, 92-123 (World Peace Foundation, Boston, 1945). Also pertinent for the period 1811 to 1934 is J. Reuben Clark's *Memorandum* as Solicitor of the Department of State, entitled *Right to Protect Citizens in Foreign Countries by Landing Forces* (Government Printing Office, 1912, 1934). The majority of the landings were for "the simple protection of American citizens in disturbed areas," and only about a third involved belligerent action. The pre-Civil War case referred to is Durand *v.* Hollins, 4 Blatch. 451 (1860); see also *in re* Neagle, 135 U.S. 1 (1890).

[116] John Bassett Moore, *Digest of International Law*, V, 475-517 (Government Printing Office, 1906); Thomas A. Bailey, *A Diplomatic History of the United States*, 711-712 (New York, 1940).

provoke an attack by another country, Congress's theoretical freedom of action will in fact amount to very little. War is a *fait accompli* of a very compulsive kind.[117]

In short, Congress's power to declare war has repeatedly been exercised in circumstances which reduced it to little more than the function of formally authenticating a preordained result. Furthermore, if it is to amount to more than that in modern conditions it can only be by the two political departments establishing better methods of collaboration than have existed in the past. The problem will become a critical one when the question arises of implementing American obligations to the United Nations Organization. Under the San Francisco Charter the principal powers will be pledged to contribute land, naval, and air contingents to a joint force which will be at the organization's disposal for the purpose of preventing or repressing acts disruptive of international peace and security. The question will then arise whether the President alone, or in consultation and cooperation with Congress, shall determine what forces the United States will contribute in this connection and subject to what conditions. If the war-declaring power of Congress is to retain—or recover—any vitality, undoubtedly the latter method must be followed.[118]

Congressional Peace-Making

At the close of hostilities with Germany the question arose, in consequence of the failure of the Senate to accept the Treaty of Versailles, whether Congress may declare peace. Unquestionably it may repeal its authoriza-

[117] The present writer's *The President, Office and Powers*, ch. v (New York University Press, New York; 2nd Ed., 1941). That *any making of war* must be authorized by Congress is the implication of the early cases of Bas *v.* Tingy, 4 Dall. 37 (1800) and Talbot *v.* Seeman, 1 Cr. 1, 28 (1801).

[118] See for its general connection with this problem the excellent article by Harry Wilmer Jones, entitled "The President, Congress, and Foreign Relations," *California Law Review*, XXIX, 565-585 (July, 1941); also the present writer's address on "The Constitution and the Charter," *Congressional Record*, August 1, 1945, A3994 (unofficial paging).

tion of hostilities, which is all that is meant legally by the term "war"; and while such repeal would not bring about peace in a way to bind the other party to the war, it would produce a technical condition of peace so far as the United States was concerned, of which both the courts and the Executive would have to take account. As a matter of fact, the state of war with Germany and Austria was declared to be at an end by a resolution of Congress which received the President's approval July 2, 1921.[119]

"Letters of marque and reprisal" were formerly issued to privateers, sometimes for the purpose of enabling their grantees to wage a species of private war upon some state against which they had a grievance. Because of the ban which International Law has put upon privateering increasingly since the Declaration of Paris of 1856, this power of Congress must be today deemed obsolete.

¶12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

¶13. To provide and maintain a navy;

Development of Conscription

The only type of standing army known to the Framers was a mercenary, volunteer force, and the only compulsory type of military service known to them was service in the militia, which was confined to local and limited purposes, as it had been in medieval England, and as it still is in clause 15 below. Conscription was first employed to raise an army for service abroad in World War I,[120] and the first peace-time conscription was that author-

[119] "The Power of Congress to Declare Peace," by the present writer in 18 *Michigan Law Review*, 669-675 (1919); Senate Doc. 98, 67th Congress, 2nd Session.

[120] The act was sustained in the Selective Draft Cases, 245 U.S. 366 (1918). The same Act of June 15, 1917, gave the President sweeping powers to commandeer shipbuilding plants and facilities. Commenting on this feature of the act in United States *v.* Bethlehem Steel Corp., 315 U.S. 289 (1942), the Court said: "Under the Constitutional authority to

ized by the Selective Training and Service Act of September 16, 1940, which as enacted forbade the sending of selectees outside the Western Hemisphere except to possessions of the United States and the Philippine Islands.[121] Following Pearl Harbor this restriction was quickly suspended for the duration.[122] Conscription for recruitment of the Navy rests on a more ancient precedent, namely, impressment into the British Navy which, although confined to seamen, antedated 1789. (See also Amendment XIII.)

The limitation of appropriations for the Army to two years reflects the American fear of standing armies. For the navy, on the other hand, building programs may be laid down to run over several years.

¶14. To make rules for the government and regulation of the land and naval forces;

It is by virtue of this paragraph that Congress has enacted the so-called Articles of War and Articles for the Government of the Navy, which constitute the basis of military and naval discipline.

¶15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

National Purposes of the Militia

Congress passed such an act in 1795, which still remains on the statute books. It leaves with the President the right to decide whether an insurrection exists or an invasion threatens.[123]

¶16. To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be

raise and support armies, to provide and maintain a navy, and to make all laws necessary and proper to carry these powers into execution, the power of Congress to draft business organizations is not less than its power to draft men for battle service." *Ibid.*, 305.

121 U.S. Code, tit. 50, §303.

122 *Ibid.*, §751.

123 Martin *v.* Mott, 12 Wheat. 19 (1827); U.S. Code, tit. 32, §81 (a).

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;

The militia was long regarded as a purely State affair, but in the National Defense Act of June 3, 1916, "the militia of the United States" is defined as consisting "of all able-bodied male citizens of the United States" and all similar declarants, between the ages of 18 and 45. The same act also provides for the nationalization of the National Guard, which is recognized as constituting a part of the militia of the United States, and provides for its being drafted into the military service of the United States in certain contingencies.[124] The act rests on the principle that the right of the States to maintain a militia is always subordinate to the power of Congress "to raise and support armies," a doctrine which has received the sanction of the Supreme Court.[125] (See also Section X, ¶3.)

¶17. To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

This paragraph is, of course, the source of Congress's power to govern the District of Columbia. While the power thus conferred is plenary, it is not absolute, but is subject to the positive limitations on Congress's powers. Thus in 1923 the Supreme Court held that an act of Congress authorizing a commission to set a "living" wage

[124] U.S. Code, tit. 32, §§1, 81-84.

[125] Selective Draft Cases, 245 U.S. 366 (1918); Cox *v.* Wood, 247 U.S. 3 (1918).

for women employed in the District was void as a deprivation of "liberty" and "property" contrary to the Fifth Amendment—a decision which has since then been overruled.[126]

It used to be thought that a State's consent to surrender of jurisdiction under this paragraph had to be substantially unqualified; but recent decisions hold that a State may concede and Congress accept a qualified jurisdiction. Nor is the power of a State to concede and of the United States to receive and exercise jurisdiction, over places purchased by the latter within the boundaries of the former, limited by this paragraph. In fact, the paragraph is today largely superfluous.[127]

¶18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

The "Necessary and Proper" Clause

What is a "necessary and proper" law under this paragraph? This question arose in 1819, in the great case of McCulloch *v.* Maryland, and was answered by Chief Justice Marshall thus: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."[128]

The basis of this declaration was furnished by three ideas: First, that the Constitution was ordained by the people and so was intended for their benefit; secondly, that it was "intended to endure for ages to come and, con-

[126] Adkins *v.* Children's Hospital, 261 U.S. 525 (1923); Morehead *v.* N.Y., 298 U.S. 587 (1936); West Coast Hotel Co. *v.* Parrish, 300 U.S. 379 (1937).

[127] James *v.* Dravo Contracting Co., 302 U.S. 134 (1937); Collins *v.* Yosemite Park and Curry Co., 304 U.S. 518 (1938); Stewart & Co. *v.* Sandrakula, 309 U.S. 94 (1940).

[128] Wheat. 316 at p. 421.

sequently, to be adapted to the various crises of human affairs"; and thirdly, that while the National Government is one of enumerated powers—a proposition which is today applicable only to its internal powers—it is sovereign as to those powers. Marshall's view was opposed by the theory that the Constitution was a compact of sovereign States and so should be strictly construed, in the interest of safeguarding the powers of said States. From this point of view the "necessary and proper" clause was urged to be a limitation on Congress's powers, and was interpreted as meaning, in substance, that Congress could pass no laws except those which were "absolutely necessary" to carry into effect the powers of the General Government.

Broadly speaking, Marshall's doctrine has prevailed with the Court since the Civil War. It is true that certain of its decisions touching the New Deal legislation narrowed Congress's discretion in the choice of measures for the effective exercise of national power by subordinating it to the reserved powers of the States; but more recent decisions indicate that this trend was only temporary. In the Darby Case,[129] referred to earlier, Justice Stone, speaking for the Court, asserts that Congress's powers under the "necessary and proper" clause are no more limited by the reserved powers of the States than are its more specific powers. (Cf. Article VI, ¶2, and Amendment X.)

The "coefficient clause" is further important because of the control which it gives Congress over the powers of the other departments of government, but in this connection the doctrines of the Supreme Court at times confront the clause with certain "inherent" executive and judicial powers, of which the Court itself is the final determinator.

[129] 312 U.S. 100 (1941).

Inherent Powers of the National Government

Among the powers of the National Government—and hence, in the first instance, of Congress—are certain ones that have sometimes been assigned to it on the score that they are powers "inherent in a national government," or "inherent in sovereignty," or simply from the necessity of the case. In this connection we have already noted the War Power and the power of foreign relationship. Other such powers are the power to acquire and govern territories, the power to protect the Indian tribes, the power to exclude or deport aliens and to lay special requirements upon them while they remain in the country, and finally—at times—a vaguely recognized power to deal with great emergencies of national consequence.[130] Thus in 1920 we find the Court saying: "It is not lightly to be assumed that in matters requiring national action, a power which must belong to and somewhere reside in every civilized government is not to be found."[131]

Finally, it should be noted that the Court has recognized that Congress can sometimes acquire power simply by prescription, as it were, that is, by exercising it for a long time without its right to do so being challenged, and the same is true of the President.[132]

SECTION IX

The purpose of this section is to impose certain limitations on the powers of Congress.

¶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

[130] American Ins. Co. *v.* Canter, 1 Pet. 511 (1828); United States *v.* Kagama, 118 U.S. 375 (1886); Fong Yue Ting *v.* U.S., 149 U.S. 698 (1893); Hines *v.* Davidowitz, 312 U.S. 52 (1941). The last mentioned case is remarkable for the indefinite power which it inferentially attributes to the National Government to regulate the conduct of resident aliens.

[131] Justice Holmes, speaking for the Court, in Missouri *v.* Holland, 252 U.S. 416 (1920).

[132] United States *v.* Midwest Oil Co., 236 U.S. 459 (1915); Inland Waterways Corp. *v.* Young, 309 U.S. 517 (1940).

thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

This paragraph referred to the African slave trade and is, of course, now obsolete. It is still interesting, nevertheless, for the evidence it affords of the belief of the framers of the Constitution that, "under the power to regulate commerce, Congress would be authorized to abridge it in favor of the great principles of humanity and justice."[1]

The Writ of Habeas Corpus

¶2. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the Public safety may require it.

The writ of *habeas corpus* is the most important single safeguard of personal liberty known to Anglo-American law. Often traced to Magna Carta itself, it dates from, at latest, the seventeenth century, and it is interesting to note that the Constitution simply assumes that, of course, it will be a part of the law of the land. The importance of the writ is that it enables anybody who has been put under personal restraint to secure immediate inquiry by a court into the cause of his detention, and if he is not detained for good cause, his liberty.[2]

Early in the Civil War President Lincoln, without authorization by Congress, temporarily suspended the privilege of the writ for the line of transit for troops en route to Washington, thereby giving rise to the famous case of *ex parte* Merryman,[3] in which Chief Justice Taney, after vainly attempting to serve the writ, filed an opinion denouncing the President's course as violative of

[1] United States *v.* The William, 28 Fed. Cas. No. 16,700 (1808).

[2] Edward Jenks, *Short History of English Law*, 333-335 (Boston, 1913); David Hutchinson, *Foundations of the Constitution*, 137-139 (New York, 1928).

[3] Taney Reps., 246 (1861).

the Constitution. Whether the President or the Chief Justice was in the right seems to depend on whether the district for which the writ was suspended was properly to be regarded as within the field of military operations at this time, for, if it was, the President's power as Commander-in-Chief had full sway. Subsequently Congress passed an act declaring the President "authorized" to suspend the writ in certain kinds of cases wherever arising, though whether "authorized" by the act or by the Constitution itself was not made clear.

The danger from a suspension of the writ is, of course, that the officers of the Government will make unwarranted arrests. The occasions when the privilege of the writ may be suspended are clearly occasions when "the public safety may require" that the Government should have the power to make arrests on suspicion, which it would, perhaps, find it difficult to back up by evidence.

¶3. No bill of attainder or ex post facto law shall be passed.

"Bill of Attainder"

In English history a "bill of attainder" is a legislative act charging somebody with treason and pronouncing a penalty upon such person, usually the penalty of death.

Following our own Civil War a divided Court in a brace of once famous cases gave the term a much more extended meaning, holding, e.g., that it ruled out an act of Congress which required attorneys, as a condition to practicing in United States courts, to take an oath that they had never borne arms against the United States.[4] The requirement was held, with questionable logic, to have no reasonable bearing on attorneys' professional fitness. In 1943 the President, in protesting against a rider to an appropriation bill which conditionally forbade the use of any part of the appropriation for the payment of salaries to certain named officers after a specified date,

[4] *Ex parte* Garland, 4 Wall. 333 (1867). See also Cummings *v.* Mo., 4 Wall. 277.

also invoked this clause, but with doubtful propriety, especially in view of the indefinite scope of the power of the purse. And surely there is a considerable difference between cutting off a man's official head and his physical one. To identify the one with the other is to indulge in tropes.[5] That the rider was constitutionally objectionable as invading the President's power of removal is perhaps more arguable.

The "Ex Post Facto" Clause

Although it was undoubtedly the belief of many of the framers of the Constitution that this clause and its counterpart in Section X, immediately below, would henceforth rule out all retroactive legislation, and particularly all special acts interfering with "vested rights," the Court in the early case of Calder *v.* Bull,[6] confined the prohibition to retroactive *penal* legislation. An "ex post facto law" today is a law which imposes penalties retroactively, that is, upon acts already done, or which increases the penalty for such acts.[7]

¶4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

A "capitation tax" is a poll tax. The requirement that such taxes should be apportioned grew, in part at least, out of the fear that otherwise Congress might endeavor by a heavy tax on negro slaves *per* poll, to drive "the

[5] *New York Times*, July 14 and 15, 1943. On June 13, 1940, the House passed a bill, later dropped, ordering the Secretary of Labor to deport Harry Bridges to Australia, his own country. Professor Chafee (*Free Speech in the United States*, 426 note) asks us to compare with this the bill of attainder by which Strafford was sent to the scaffold three hundred years before. This seems a bit extravagant too, the presence of an alien in the United States being purely by leave and license of the National Government. See Bugajewitz *v.* Adams, 228 U.S. 585 (1913).

[6] 3 Dall. 386 (1798).

[7] The Supreme Court is, of course, the final judge of the effect of a newly enacted penalty upon previous acts. Lindsey *v.* Wash., 301 U.S. 397 (1937).

peculiar institution" out of existence.[8] In other words, the framers were of the opinion, later voiced by Marshall, that "the power to tax involves the power to destroy," and may be used for that purpose.

"Direct tax" was defined under Section VIII, ¶1.

¶5. No tax or duty shall be laid on articles exported from any State.

"Exported" means exported to a foreign country. This provision has been held applicable even to general imposts with respect to goods in process of being sold for exportation.[9] Although the conditions in light of which this provision was framed have long since disappeared, it is good to be informed that there is still something which Congress cannot clamp a tax on.

¶6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another.

¶7. No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

Appropriations and Expenditures

This paragraph is obviously addressed to the Executive, whose power is thus assumed to embrace that of expenditure. Early appropriations, in fact, took the form of lump sum grants, and today there is a tendency to revert to this earlier practice, as is seen in the appropriations which Congress has made in recent years for public works and relief, not to mention the sweeping terms in which appropriations are made in war time for the use of the Army and Navy. It seems clear that such grants

[8] 3 Dall. 171 (1796).
[9] Spalding and Bros. *v.* Edwards, 262 U.S. 66 (1923). Cf. Peck & Co. *v.* Lowe, 247 U.S. 165 (1918).

to an executive agency do not violate the maxim against delegation of legislative power, first, because the function of expenditure is historically an executive function; secondly, because appropriation acts are not "laws" in the true sense of the term, inasmuch as they do not lay down general rules of action for society at large. Rather, they are administrative regulations, and may go into detail or not, as the appropriating body—Congress—may choose.[10]

The above clause was once violated by none other than Abraham Lincoln, who early in the Civil War paid out two millions of dollars from unappropriated funds in the Treasury to persons unauthorized to receive them, for confidential services deemed by him to be of the utmost necessity at the time.[11] But this exception does not disprove the fact that the clause is the most important single curb in the Constitution on Presidential power. Congressional measures intended to curb him directly the President can always veto and his veto will be effective nine times out of ten. But a President cannot do much very long without funds, and these Congress can withhold from him simply by inaction.[12]

¶8. No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign State.

The above provision has never been interpreted as preventing the wives and daughters of those holding office

[10] See the present writer's "Constitutional Aspects of Federal Housing," 84 *University of Pennsylvania Law Review*, 131-156 (1935).

[11] Richardson, *Messages and Papers*, VI, 77-79.

[12] See generally Lucius Wilmerding, *The Spending Power: A History of the Efforts of Congress to Control Expenditures* (New Haven, Yale University Press, 1943). The author shows that once funds are voted, the various devices which Congress has employed to control their expenditure have worked with very indifferent success.

from accepting all sorts of presents, even gold crowns, from foreign potentates.

SECTION X

¶1. No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money, emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, or grant any title of nobility.

International Incapacity of the States

Because of the restrictions imposed on them by this paragraph and ¶3 below, as well as those which result from the powers of the National Government, the States of the Union retain only a very limited capacity at International Law and may exercise that only by allowance of Congress.[1]

As the context shows, the kind of "treaty" here referred to is one whose purpose is the setting up of an arrangement of a distinctly political nature. (See ¶3, below.)

"Bills of credit" are bills based on the credit of the State. Banks chartered by a State may issue notes of small denomination despite this provision, although, of course, they cannot be given the quality of legal tender; and since 1866 such notes have been subject to such a heavy tax by the United States as to render them unprofitable.[2] (See Article I, Section VIII, ¶2.)

The "Obligation of Contracts" Clause

A "law impairing the obligation of contracts" is a law weakening the contract in some way, or making its enforcement unduly difficult.

The clause was framed more especially for the purpose of preventing the States from passing laws to relieve

[1] *The President, Office and Powers*, 203-204; Chief Justice Taney's opinion in Holmes *v.* Jennison, 14 Pet. 540 (1841). Cf. Skiriotes *v.* Fla., 313 U.S. 61 (1941).

[2] Briscoe *v.* Bank of Ky., 11 Pet. 257 (1837); Veazie Bank *v.* Fenno, 8 Wall. 533 (1869).

debtors of their legal obligation to pay their debts, the power to afford such relief having been transferred to the National Government[3] (see Section VIII, ¶4). Later, the Supreme Court under Chief Justice Marshall extended the protection of the clause to public grants of land, and then, in the celebrated Dartmouth College Case, to charters of corporations.[4]

Yet even with this extension the clause no longer interferes seriously with the power of the States to protect the public health, safety, and morals, or even that larger interest which is called the "general welfare," for the simple reason that the State has no right to bargain away this power.[5] Thus the mere fact that a corporation has a charter enabling it to manufacture intoxicating beverages will not protect it from the operation of a prohibition enactment. Similarly, a contract between two persons by which they agree to buy and sell intoxicating beverages would be immediately cancelled by a prohibition law going into effect.[6] Indeed, in the Minnesota Moratorium Case[7] the Court held that a State could, in the midst of an industrial depression, enable debtors to postpone meeting their obligations for a "reasonable" period.

The "Police Power"

Generally speaking, the protection afforded by this clause does not today go much beyond that afforded by Section I of the Fourteenth Amendment. In the words of the Court: "It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety,

[3] Sturges *v.* Crowninshield, 4 Wheat. 122 (1819).

[4] Trustees of Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819), which was preceded by Fletcher *v.* Peck, 6 Cranch 87 (1810), involving the famous—or infamous—Yazoo Land Grant.

[5] Stone *v.* Miss., 101 U.S. 814 (1879).

[6] Manigault *v.* Springs, 199 U.S. 473 (1905).

[7] Home Building and Loan Assoc. *v.* Blaisdell, 290 U.S. 398 (1934).

good order, comfort, or general welfare of the community"[8]—in short, its police power.

What *is* "reasonably necessary" for these purposes is today a question ultimately for the Supreme Court; and the present disposition of the Court is to put the burden of proof upon any person who challenges State action as *not* "reasonably necessary."[9]

¶2. No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

"Imports" and "exports" refer only to goods brought from or destined to foreign countries.[10] A tax on imports still in the original package and in the hands of the importer is prohibited by this clause.[11] (See also p. 44.)

¶3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

The full possibilities of securing cooperation among States by means of "agreement or compact" sanctioned

[8] Atlantic Coast Line Co. *v.* Goldsboro, 232 U.S. at 558 (1914).

[9] See such recent cases as Helvering *v.* Northwest Steel Rolling Mills, 311 U.S. 46 (1940); and Gelfert *v.* National City Bk., 313 U.S. 221 (1941). In Higginbotham *v.* Baton Rouge, 306 U.S. 535 (1939), it was held that the "obligation of contracts" clause does not protect a right to office.

[10] Woodruff *v.* Parham, 8 Wall. 133 (1868); Sonneborn Bros. *v.* Cureton, 262 U.S. 506 (1923). Cf., however, Baldwin *v.* Seelig, 294 U.S. 511 (1935), where a different view was advanced, but quite unnecessarily for the decision of the case, and probably inadvertently.

[11] Brown *v.* Md., 12 Wheat. 419 (1827).

Cooperative Federalism: Interstate Compacts

by Congress have only begun to be realized within recent years.[12] In 1834 New York and New Jersey entered into such a compact "for fixing and determining the rights and obligations of the two States in and about the waters" between them; and in 1921, by a further agreement, they created the "Port of New York District" and established the "Port of New York Authority," which is "a body both corporate and politic," for the comprehensive development of the port. Two years later Congress was asked to sanction an agreement among seven western States which had for its purpose the reclamation of a vast stretch of arid land in the great Colorado River basin. Then in May, 1934, seven northeastern States signed a compact looking to the establishment within their respective jurisdictions of minimum wages for women and minors;[13] while by an act passed June 6 of the same year, Congress gave its consent in general terms "to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their criminal laws and policies."[14] Subsequently Congress has authorized, on varying conditions, compacts touching the production of tobacco, the conservation of natural gas, the regulation of fishing in inland waters, the furtherance of flood and pollution control, and other matters.[15] Moreover, since 1935 at least thirty-six States, beginning with New Jersey, have set up permanent commissions for interstate cooperation, which have led to the formation of a Council of State Governments ("Cosgo" for short), the creation of special commissions for the

[12] Frankfurter and Landis, "The Compact Clause of the Constitution," 34 *Yale Law Journal*, 685-759 (1925).

[13] This and other recent efforts at cooperation among the States, as well as between the National Government and the States, are described in various issues of *State Government* for the years 1933-1944.

[14] U.S. Code, tit. 18, §420.

[15] *Ibid.*, tit. 7, §515; tit. 15, §717j; tit. 16, §§552 and 667a; tit. 33, §§11, 567-567b.

study of the crime problem, the problem of highway safety, the trailer problem, problems created by social security legislation, etc., and the framing of uniform State legislation for dealing with some of these.

One of a series of such statutes drawn up in 1935 gives State officers in "fresh pursuit" of a criminal the right to ignore State lines; another expedites the process of interstate extradition (see Article IV, Section II, ¶2); while a third provides for the extradition of material witnesses. Many States have already adopted all these measures. The interstate compact device, supplemented by commissions on interstate cooperation and by uniform legislation, is today producing cooperation among the States on a grand scale.[16] (See also p. 40.)

Federal Grants-in-Aid

Furthermore, from an early date the National Government has systematically entered into compacts with newly admitted States whereby, in return for a grant of lands for educational purposes, and other concessions, such States have pledged themselves to refrain from taxing for a term of years lands sold by the National Government to settlers.[17] And since 1911, through so-called "Federal Grants-in-Aid," a quasi-contractual relationship between the National Government and the States has developed on a much more extensive scale. Thus Congress has voted money to subsidize forest-protection, education in agricultural and industrial subjects and in home economics, vocational rehabilitation and education, the maintenance of nautical schools, experimentation in reforestation, highway construction, etc. in the States; in return for which cooperating States have appropriated equal sums for the same purposes, and have brought their further powers to the support thereof along lines

[16] "The States Put Their Heads Together," *Current History*, May 1938; and see generally Jane P. Clark, *The Rise of a New Federalism* (New York, 1938).

[17] Stearns *v.* Minn., 179 U.S. 223 (1900).

laid down by Congress.[18] The Social Security Act of August 14, 1935, marks the culmination to date of this type of National-State cooperation. It brings the national taxing-spending power to the support of such States as desire to cooperate in the maintenance of old-age pensions, unemployment insurance, maternal welfare work, vocational rehabilitation, and public health work, and in financial assistance to impoverished old age, dependent children, and the blind. Such legislation is, as we have seen, within the national taxing-spending power (see pp. 27-28); but what of the objection that it "coerced" complying States into "abdicating" their powers? Speaking to this point in the Social Security Act Cases, the Court has said: "The . . . contention confuses motive with coercion. . . . To hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." And again: "The United States and the state of Alabama are not alien governments. They coexist within the same territory. Unemployment is their common concern. Together the two statutes before us [the Act of Congress and the Alabama Act] embody a cooperative legislative effort by State and National Governments, for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other. The Constitution does not prohibit such cooperation."[19]

Social Security

In short, expansion of national power within recent years has been matched by *increased* governmental activity on the part of the States also, sometimes in cooperation with each other, sometimes in cooperation with the National Government.

The case of Virginia *v.* West Virginia,[20] decided in 1918, makes it clear that the obligations which a State ac-

[18] A. F. Macdonald, *Federal Aid* (New York, 1928).

[19] Stewart Mach. Co. *v.* Davis, 301 U.S. 548 (1937); Carmichael *v.* So. Coal and Coke Co., 301 U.S. 495 (1937).

[20] 246 U.S. 565.

cepts by entering into an agreement consented to by Congress are, sometimes at least, legal and not merely moral, as was once thought, and that Congress and the Supreme Court have ample powers to compel their enforcement against a reluctant or defaulting State.[21]

ARTICLE II

This article makes provision for the executive power of the United States, which it vests in a single individual, the President.

SECTION 1

¶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:

Question of the Source of the President's Powers

What, precisely, does the opening clause of this paragraph do? Does it confer on the President his power, or merely his title? If the former, then the remaining provisions of this article exist only to emphasize or to qualify "the executive power," as, for instance, where they provide for the participation of the Senate in the appointing and treaty-making powers. If the latter, then the President has only such powers as are conferred on him in more specific terms by these same remaining provisions.

The question is one which has been debated from the outset of the Government. The first occasion was in 1789, when Congress, in the absence of a specific constitutional provision regarding the power of removal, conceded the

[21] As to the subordination of property rights to the compact power in certain cases, see Hinderlider *v.* La Plata R. and Cherry C. Ditch Co., 304 U.S. 92 (1938); and Delaware River Joint Toll Com's'n *v.* Colburn, 310 U.S. 419 (1940). Cf. Ware *v.* Hylton, 3 Dall. 199 (1796).

power in the case of the heads of the executive departments to the President alone.[1] Then in 1793 Hamilton and Madison renewed the debate with reference to Washington's Neutrality Proclamation of that year. No provision either of the Constitution or of an act of Congress gave the President the power to issue such a proclamation, but Hamilton defended it, nevertheless, as within the "executive power"; while Madison, reversing his position in the debate of four years earlier, urged the opposed view.[2]

Today the honors of war rest distinctly with the "power" theory of the clause. Especially is this so when one consults the views and practices of recent incumbents of the Presidency. The first Roosevelt classified all Presidents as of either the Buchanan or the Lincoln type. Mr. Taft was a Buchanan President, sticking as close as bark to a tree to the letter of the Constitution and the statutes in interpreting his powers. T. R., on the other hand, was the Lincoln type, taking the position that the President was a "steward of the people," and as such entrusted with the duty of doing "anything that the needs of the Nation demanded unless such action was forbidden by the Constitution and the laws."[3] Although in his books on the Presidency *Professor* Taft denounced this view as making the President "a universal Providence,"[4] *Chief Justice* Taft in his opinion for the Court in the Oregon Postmaster Case supplied the constitutional basis for it when he invoked the opening clause of Article II.[5] For the second Roosevelt's conception of his powers one turns not to the "stewardship theory," but the Stuart theory, which is summed up by John Locke in his second

[1] The present writer's *The President's Removal Power*, 10-23 (National Municipal League, New York, 1927).

[2] *The President, Office and Powers*, 208-212.

[3] *Autobiography*, 388-389 (New York, 1913).

[4] *Our Chief Magistrate and His Powers*, 144 (Columbia University Press, 1916).

[5] Myers *v.* U.S., 272 U.S. 52 (1926).

Presidential "Prerogative"

Treatise on Civil Government in his description of "Prerogative" as "the power to act according to discretion for the public good, without the prescription of the law and sometimes even against it."[6] Mr. Roosevelt's incumbency was marked by a succession of emergencies, and in meeting them he did not always keep to the path of constitutional or legal prescription. In handing over to Great Britain in the late summer of 1940 fifty over-age naval craft the President violated several statutes and appropriated to himself temporarily Congress's power to "dispose of property of the United States" (see Article IV, Section III).[7] Yet that this was done with the general approval of the American people there can be no reasonable doubt—thus confirming Locke's further remark that "the people are very seldom or never scrupulous or nice in the point of questioning the prerogative whilst it is in any tolerable degree employed for the use it was meant—that is, the good of the people and not manifestly against it." (See further pp. 59 and 89-91.)

The President's Term

The President's term of four years, prior to the adoption of the Twentieth, Norris "Lame Duck," Amendment, began on March 4 of the year following each leap-year. This happened for two reasons. In the first place, the old Congress of the Confederation set the first Wednesday in March, 1789, which chanced to be March 4, as the date on which the Constitution should go into effect. Actually Washington did not take the oath of office until April 30 of that year. Nevertheless, disregarding this fact, the first Congress, by an act which Washington himself approved on March 1, 1792, provided that "the term of four years for which a President and Vice-President shall be elected, shall, in all cases, commence on the fourth day

[6] *Op. cit.* ch. XIV.

[7] See the present writer in the *New York Times* of October 13, 1940.

of March next succeeding the day on which the votes of the election shall have been given." Thus Washington's first term was in effect, if not technically, shortened by act of Congress nearly two months; while that of President Roosevelt was similarly curtailed by the going into effect of the Twentieth Amendment.

It will be noticed that the Constitution makes no provision regarding the re-election of a President. The understanding which formerly limited any individual's tenure of the office to two terms rested on custom and the consciences of incumbents of the office.[8]

The Electoral College

¶2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

This and the following paragraph provide for the so-called "Electoral College," or Colleges. It was supposed that the members of these bodies would exercise their individual judgments in their choice of a President and Vice-President, but since 1796 the Electors have been no more than party dummies.

The word "appoint" in this section is used, the Court has said, "as conveying the broadest power of determination." Electors have consequently been chosen, first and last, in the most diverse ways: "by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people in districts and partly by the legislature;

[8] On the "third-term question" see *The President, Office and Powers*, 35-38, 326-329.

by choice by the legislature from candidates voted for by the people; and in other ways. . . ."[9]

Why "Minority Presidents"

Although Madison testified that the district system was the one contemplated by the Framers, Electors are today universally chosen by popular vote on State-wide tickets. The result is that the successful candidate may have considerably less than a majority, or even than a plurality, of the popular vote cast. Thus, suppose that New York and Pennsylvania were the only two States in the Union, and that New York with forty-five electoral votes went Democratic by a narrow margin, while Pennsylvania with thirty-eight electoral votes and with a somewhat smaller population than New York went overwhelmingly Republican. The Democratic candidate would be elected, although the Republican candidate would have the larger popular vote.

In fact, both Lincoln in 1860 and Wilson in 1912, while carrying much less than a majority of the popular vote in the country at large, had sweeping majorities in the "Electoral College." This was because the defeated party was split in those particular elections. Should, however, a strong third party arise which drew about equally from the two old-line parties, the probable result would be to throw successive elections into the House of Representatives, where the constitutional method of choice is far from democratic. For this reason the Constitution ought to be amended, as the late Senator Norris proposed, to require that the electoral vote of a State should be divided among or between its principal parties in proportion to their strength at the polls; or in lieu of this reform the district system should be revived by the several State legislatures.

[9] See data given in McPherson *v.* Blacker, 146 U.S. 1 (1892). As to the power of Congress to protect the choice of Presidential Electors from corruption, see Burroughs *v.* U.S., 290 U.S. 534 (1934).

¶3. The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.

This paragraph has been superseded by Amendment XII.

¶4. The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States.

Under the Act of March 1, 1792, previously mentioned, the Electors are chosen on the Tuesday following the

The Procedure of Presidential Elections

first Monday in November of every fourth year; while by the Act of June 5, 1934, enacted to give effect to the Twentieth Amendment, the Electors of each State meet and give their votes on the first Monday after the second Wednesday in December, following the November election, and the two houses meet to count the votes in the hall of the House of Representatives on the ensuing January 6, at 1 p.m.[10] (See also Article I, Section IV, ¶2.)

¶5. No person except a natural-born citizen, or 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.

Would a person born abroad of American parents be eligible to the office of President? The answer depends on the answer returned to a question posed earlier (see p. 49), whether the act of Congress pronouncing such persons to be citizens of the United States "at birth" regards them as aliens needing to be naturalized or as citizens *because* of birth.

Does "fourteen years a resident within the United States" mean residence immediately preceding election to office? This question would seem to have been answered in the negative in the case of President Hoover.

¶6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such

[10] U.S. Code, tit. 3, §5a. See p. 11 *ante* regarding a proposal to change the date for choosing Presidential Electors.

officer shall act accordingly until the disability be removed or a President shall be elected.

Presidential Succession

By the Presidential Succession Act of 1886 Congress has provided that in case of the disqualification of both President and Vice-President the Secretary of State shall act as President provided he possesses the qualifications laid down in ¶5 above; if not, then the Secretary of the Treasury, etc. In any case, the officer of the Cabinet who acts as President still retains his Cabinet post, since it is by virtue of his holding such post that he is called upon to act as President.[11]

A bill recently (June 25, 1945) introduced in the House of Representatives proposes that "if a double vacancy in the office of President and Vice-President occurs more than ninety days before a mid-term Congressional election a special election shall be held for President and Vice-President"; which means, presumably, that an election of Presidential Electors would be held, who would then elect a President and Vice-President in the prescribed way; and the President and Vice-President thus chosen would necessarily be chosen for four years, this being the term fixed by the Constitution (see ¶1 above).

Congress has never provided a method for determining when a President is unable "to discharge the powers and duties" of his office, so that the Vice-President should take his place, but undoubtedly it could do so. One suggestion is that this function should be devolved upon the Cabinet, another that it should be entrusted to the Supreme Court. In the two cases in which Presidents have become disabled, Garfield in 1881 and Wilson in 1919, the question was left to the President's immediate *entourage* and was determined contrary to apparent fact.

Another question which the first clause of this para-

[11] U.S. Code, tit. 3, §21.

graph leaves unsettled is whether the Vice-President, when he succeeds to "the powers and duties of the said office," becomes President. In all cases hitherto the occasion of the Vice-President's taking over the Presidential office has been the death of the President, and the Vice-President has promptly assumed the title of President and has remained in office until the end of the term. Probably these precedents also settle the question for those cases in which the Vice-President might be called upon to discharge the duties of the Presidential office on account of the President's resignation or removal. But it can hardly be the intention of the Constitution that a President should be permanently displaced for a merely temporary disability,[12] an inference which is strengthened by the fact that in the contingencies mentioned by the Twentieth Amendment the Vice-President is merely to "act as President."

Certain other deficiencies of ¶5 are remedied by Section III of the Twentieth Amendment.

¶7. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

Earlier decisions exempting federal judicial salaries from taxation under a general income tax having been overruled, doubtless the President's salary is subject to the same kind of exaction. A special tax on the President's salary would be void on the face of it.[13]

¶8. Before he enter on the execution of his office he shall take the following oath or affirmation:

[12] Herbert W. Horwill, *The Usages of the American Constitution*, 58-87 (Oxford, 1925).

[13] See O'Mally *v.* Woodrough, 307 U.S. 277 (1939), overruling Evans *v.* Gore, 253 U.S. 245 (1920), and Miles *v.* Graham, 268 U.S. 501 (1925).

The President's Oath of Office

"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."

The fact that the President takes an oath "to preserve and protect" the Constitution does not authorize him to exceed his own powers under the Constitution on the pretext of preserving and protecting it. The President may veto a bill on the ground that in his opinion it violates the Constitution, but if the bill is passed over his veto, he must, by the great weight of authority, ordinarily regard it as law until it is set aside by judicial decision, since the power of interpreting the law, except as it is delegated by the law itself, is not an attribute of "executive power."[14]

It may be, nevertheless, that in an extreme case the President would be morally justified in defying an act of Congress which he regarded as depriving him of his constitutional powers, until there could be an appeal to the courts or to the people, and in point of fact such defiances have in a few instances occurred.[15]

SECTION II

¶1. The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of

[14] For an illustration of Presidential interpretation of the Constitution which did not "come off," see the final draft of Jefferson's message to Congress of December 8, 1801. A. J. Beveridge, *Life of John Marshall*, III, 605-606 (Boston, 1919). The supposition that Jackson "asserted a right not to carry out a Court decision when acting in an executive capacity" is denied by Mr. Charles Warren in his *Supreme Court in United States History*, II, 222-224; see also *ibid.*, 205*ff.*

[15] See the speeches of Curtis, Groesbeck, and Stanbery in President Johnson's behalf, *Trial of Andrew Johnson*, etc., I, 377; II, 189 and 359 (Washington, 1868); also *The President, Office and Powers*, 222-223.

their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

"Commander-in-Chief in Wartime": Lincoln and F.D.R.

The power of the President as Commander-in-Chief is primarily that of military command in wartime, and as such includes, as against the persons and property of enemies of the United States encountered within the theater of military operations, all the powers allowed a military commander in such cases by the Law of Nations. President Lincoln's famous Proclamation of Emancipation rested upon this ground. It was effective within the theater of military operations while the war lasted, but no longer.

Moreover, Lincoln seems at times to have regarded the entire country as a theater of military operations and hence subject to military rule; and on this theory he suspended—first without Congress's approval, later with it—the *habeas corpus* privilege in the case of persons suspected of "disloyal practices," and ultimately, contrary to Congressional requirement, decreed the trial of such persons before a military tribunal. In the famous Milligan Case, however, decided in 1866, the Supreme Court pronounced such trials illegal, although four of the Justices voiced the opinion that Congress could, the country being at war, have authorized them.[1]

In the recent war Mr. Roosevelt quite frankly avowed the belief that as "Commander-in-Chief in wartime" he possessed powers other than those of military command, powers which, if claimable at all by the National Government in peacetime, would have first to be put in operation by Congressional legislation, and then enforced through the usual peacetime agencies in conformity with

[1] On Lincoln's view of his powers as Commander-in-Chief in wartime see J. G. Randall, *Constitutional Problems under Lincoln* (New York, 1926). Randall deals with the legal basis of the Emancipation Proclamation at pp. 372-385.

such legislation. Thus, to take the most conspicuous exemplification of the President's theory, industrial relations were governed in the main throughout the war under an agreement between the President and certain representatives of employers and employees which was entered into shortly after Pearl Harbor. By this agreement labor was pledged not to strike for the duration and ownership was pledged not to resort to the lockout; and all disputes between employers and employees were referred to the War Labor Board, a body which was without legal status and whose decisions were only "advisory." Suppose, however, its advice was not accepted by one of the parties to a dispute; what then? At this point the President stepped in, and brought to bear upon the recalcitrants such "indirect sanctions" as were available from various acts of Congress, most of which were certainly not enacted with any anticipation that the powers they conferred would be utilized for such purpose. Thus non-compliant workers who happened to be subject to conscription were confronted with induction into the armed forces, or employers holding war contracts were ordered not to employ such workers; and non-compliant employers might be denied "priorities," or have their plants seized by the Government under legislation authorizing this to be done when "necessary production" lagged. But in the case of Montgomery Ward, which claimed to be engaged not in "production" but in "distribution" only, the applicability of the legislation just referred to was challenged by a non-compliant company, with the result of raising the question whether the President as "Commander-in-Chief in wartime" was vested by the Constitution itself with the power to make such a seizure. That a military commander has the right to requisition private property to meet an impelling military necessity, subject to the requirement that the property be paid for in due course, is well established;

"Indirect Sanctions"

but the taking over of the Ward properties clearly fell outside the precedents to date. It has to be acknowleged, however, that just as the permeation of the North with disloyal opinions and activities during the Civil War made it difficult to set definite boundaries to the theater of military operations, so do the facts of Total War, which is as much of an industrial operation as it is a military one, make it difficult to maintain a hard and fast line between civilian and military activities and between the governmental powers which are respectively applicable to each. Total War has completely destroyed International Law so far as it formerly attempted to set limits to methods of warfare. Its effect on Constitutional Limitations could be equally disastrous. One's hope must be that the ensuing peace will repair the damage, as it did fairly completely following the Civil War.[2]

Commander-in-Chief and Chief Executive

From an early date the Commander-in-Chief power came to be merged with the President's duty to "take care that the laws be faithfully executed." So, while in using military force against unlawful combinations too strong to be dealt with through the ordinary processes of law the President acts by authorization of statute, his powers are still those of Commander-in-Chief.[3] In cases of "necessity," accordingly, he, or his subordinates at the scene of action, may proclaim martial law—of which two

[2] On the above paragraph see Judge Sullivan's informative opinion dismissing the Government's petition for an injunction and declaratory opinion against Montgomery Ward & Co., *New York Times*, January 28, 1945; Executive Order 9370, 8 *Federal Register* 164 (August 19, 1943); Employers Group of Motor Freight Carriers, Inc. *v.* NWLB (U.S. Ct. of Appeals, D.C., No. 8680), decided June 2, 1944; Steuart and Bro., Inc. *v.* Bowles, 322 U.S. 398 (1944); John Lord O'Brian and Manly Fleischman, "The War Production Board, Administrative Policies and Procedures," reprinted from the *George Washington Law Review*, December, 1944; Thomas J. Graves, *The Enforcement of Priorities, Conservation and Limitation Orders of the War Production Board, 1942-1944* (Princeton University Ph.D. Thesis); Mitchell *v.* Harmony, 13 How. 115 (1852); United States *v.* Russell, 13 Wall. 623 (1872).

[3] U.S. Code, tit. 50, §202; Martin *v.* Mott, 12 Wheat. 19 (1827). And see generally *The President, Office and Powers*, 166-189.

grades are today recognized—*preventive* and *punitive*. The latter, which is equivalent to *military government* is not, by the Milligan Case, mentioned above, allowable when the civil courts are open and properly functioning, nor in the presence of merely "threatened invasion. The necessity must be actual and present; the invasion real."[4] Nevertheless, immediately following the Japanese assault on Pearl Harbor, on December 7, 1941, military government was instituted in Hawaii and continued in force with gradually diminishing rigor for three years. For Total War, when "home front" activities are only an extension of the battle-front and when crippling and demoralizing attacks by air may be launched from bases hundreds of miles away, the test set by the above-quoted dictum is inadequate.

Preventive Martial Law

Under "preventive martial law," so-called because it authorizes "preventive" arrests and detentions, the military acts as an adjunct of the civil authorities but not necessarily subject to their orders. It may be established whenever the executive organ, State or national, deems it to be necessary for the restoration of good order. The concept, being of judicial origin, is of course for judicial application, and ultimately for application by the Supreme Court, in enforcement of the "due process" clauses.[5] (See also, Section III of this Article, and Article IV, Section IV.)

[4] The quoted dictum is from 4 Wall. at pp. 126-127. On the Hawaiian experience, see "Hawaii under Martial Law" by Robert S. Rankin, a reprint from 5 *Journal of Politics*, No. 3 (August, 1943); also Charles Fairman, "The Law of Martial Rule and the National Emergency," reprinted from 45 *Harvard Law Review*, No. 8 (June, 1942).

[5] Moyer *v.* Peabody, 212 U.S. 78 (1909); Sterling *v.* Constantin, 287 U.S. 378 (1932). The Great Depression produced a perfect epidemic of declarations of "martial law" in some ill-defined sense of the term, by governors of States. "The records of the War Department show that in the fiscal year 1934, twenty-seven States mobilized the guard for emergency duty, and in the next year the number reached thirty-two. The occasions have often been small, even trivial in compass." Fairman, *loc. cit.*, 1275.

The President's Cabinet

"The principal officers" "of the executive departments" have, since Washington's day, composed the President's Cabinet, a body utterly unknown to the Constitution. They are usually of the President's own party and loyalty to the President is an indispensable qualification, although, of course, such loyalty may not be carried to the extent of violating the law.[6]

It has been frequently suggested, twice indeed by committees of Congress, that the members of the Cabinet should be given seats on the floors of Congress, and permitted to speak there.[7] There is obviously nothing in the Constitution which stands in the way of this being done at any time.

Nor, for that matter, is there anything to prevent the President from making his Cabinet up out of the chairmen of the principal committees of the House of Representatives or the Senate, for a Cabinet post is not *as such* a "civil office under the authority of the United States"; nor does a member of the Cabinet *as such* "hold any office under the United States" (see pp. 17-18). Such a step might eventually lead to something akin to the British system of Cabinet government.

The Pardoning Power

A "reprieve" suspends the penalties of the law; a "pardon" remits them.

"Offenses against the United States" are offenses against the national laws, not State laws. The term also includes acts of so-called "criminal contempt," in defiance of the national courts or their processes.[8]

Pardons may be absolute or conditional and may be conferred upon specific individuals or upon classes of offenders, as by amnesty.

[6] See generally Mary L. Hinsdale, *History of the President's Cabinet* (Ann Arbor, 1911) and Henry B. Learned, *The President's Cabinet* (New Haven, 1912).

[7] Hinsdale, 302-303; House Rep. 43, 38th Cong., 1st Sess'n; Senate Rep. 873, 46th Cong., 3rd Sess'n.

[8] *Ex parte* Grossman, 267 U.S. 87 (1925).

It was formerly supposed that a special pardon, to be effective, must be accepted by the person to whom it was proffered.[9] In 1927, however, in sustaining the right of the President to commute a sentence of death to one of life imprisonment, against the will of the prisoner, the Court abandoned this view. "A pardon in our days," it said, "is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[10]

Pardons may issue at any time after the offense pardoned has been actually committed but not before then, for that would be to give the President a power to set the laws aside, that is, a dispensing power,[11] for asserting the like of which James II lost his throne.

It is sometimes said that a pardon "blots out of existence the guilt" of the offender, but such a view, although applicable in the case of one who was pardoned *before* conviction, is extreme as to one whose offense was established by due process of law. A pardon cannot qualify such a man for a post of trust from which those convicted of crime are by law excluded. In such case the pardoned man is in precisely the same situation as a man who has served his sentence. The law will punish him no further for his past offense, but neither will it ignore altogether the fact that he committed it.[12] But a pardon is efficacious to restore a convicted person's civil rights even when completion of his sentence would not have been.

Although Congress may not interfere with the Presi-

[9] United States *v.* Wilson, 7 Pet. 150 (1833); Burdick *v.* U.S., 236 U.S. 79 (1915).

[10] Biddle *v.* Perovich, 274 U.S. 480 (1927).

[11] 1 Opinions of Attorney Gen'l, 342 (1820); United States *v.* Wilson, cited above; *ex parte* Garland, 4 Wall. 333 (1866); United States *v.* Klein, 13 Wall. 128 (1872).

[12] See Samuel Williston, "Does a Pardon Blot Out Guilt?", 28 *Harvard Law Review*, 647-663 (1915).

dent's exercise of the pardoning power, it may itself, under the "necessary and proper" clause, enact amnesty laws remitting penalties incurred under the national statutes.[13]

¶2. *Clause* 1. 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;

The Treaty-Making Power

It is usual to regard the process of treaty-making as falling into two parts, negotiation and ratification, and to assign the former to the President exclusively and the latter exclusively to the Senate. In fact, it will be observed, the Constitution makes no such division of the subject, but the President and the Senate are associated throughout the entire process of "making" treaties. Originally, indeed, Washington tried to take counsel with the Senate even regarding the negotiation of treaties, but he early abandoned this method of procedure as unsatisfactory. Thus what was intended to be *one* authority consisting of two closely collaborating organs became split into *two*, usually rival and often antagonistic, authorities, performing sharply differentiated functions. However, in 1816, the Senate created the Committee on Foreign Relations as a standing committee, and through this medium most Presidents have managed to keep more or less in touch with Senatorial sentiment regarding pending negotiations, but not always with the result of conciliating it.[14] Today the actual initiation and negotiation of treaties is, by the vast weight of both practice and opinion, the President's alone.

Moreover, ratification also belongs to the President alone, only he may not ratify a treaty with the result of

[13] Brown *v.* Walker, 161 U.S. 591 (1896).

[14] Ralston Hayden, *The Senate and Treaties*, 1789-1817, *passim* (New York, 1920); Samuel B. Crandall, *Treaties, Their Making and Enforcement*, ch. VI (Washington, 1916); the present writer's *The Constitution and World Organization*, ch. III (Princeton University Press, 1944).

making it, unless the Senate by a two-thirds vote of the members present, there being at least a quorum, advises such ratification and consents to it. And since the Senate may or may not consent, it may consent conditionally, stating its conditions in the form of amendments to the proposed treaty or of reservations to the proposed act of ratification, the difference between the two being, that whereas amendments, if accepted by the President and the other party or parties to the treaty, change it for all parties, reservations merely limit the obligations of the United States thereunder. Amendments are accordingly resorted to in the case of bilateral treaties, and reservations in the case of general international treaties, like the Hague Conventions or the League of Nations Covenant.

Of course, if the President is dissatisfied with the conditions laid down by the Senate to ratification he may refuse to proceed further with the matter, as may also the other party or parties to the proposed treaty.[15] Between 1789 and 1929 about 900 treaties were proclaimed by the President. Another 200 were either rejected by the Senate or so tampered with by it that either the President or the other contracting party declined to go on with them.

The Treaty Power vs. States Rights

The power to make treaties is bestowed upon the United States in general terms and extends to all proper subjects of negotiation between nations. It should be noted, however, that a treaty to which the United States is party is not only an international compact but also "law of the land," in which latter respect it may not override the higher law of the Constitution. Therefore, it may not change the character of the government which is established by the Constitution nor require an organ of that government to relinquish its constitutional powers. The *powers* of the States, on the other hand, in con-

[15] The Foreign Policy Association's *Information Service*, IV, no. 16 (October 12, 1928), gives a list of treaties amended by the Senate, both those afterwards ratified and those not ratified.

tradistinction to the right of their peoples to maintain efficient governments for the exercise of those powers, set no limit to the treaty-making power.[16] (See Article VI, ¶2, and Amendment X.)

How broad the scope of the treaty-making power is, is well illustrated by the treaty of 1916 between the United States and Canada providing for the reciprocal protection of migratory birds which make seasonal flights from the one country to the other. Congress passed a law putting this treaty into effect and authorizing the Secretary of Agriculture to draw up regulations to govern the hunting of such birds, any violation of these regulations to be subject to certain penalties; and the treaty and the law were sustained by the Supreme Court, the latter as a law "necessary and proper" to put the treaty into effect [17]

How Our Treaties Are Enforced

How is a treaty enforced? Being "law of the land" the provisions of a treaty may, if they do not intrude upon Congress's domain and it was the design of the treaty-making body to put them into effect without reference to Congress, be enforced in court like any other law when private claims are based upon them; and by the President, when the other contracting sovereignty bases a claim upon them. An example of the former case would be where an alien claimed the right to own land in the United States or to engage in business under a provision of a treaty between the United States and his home country.[18] An instance of the latter would be a request by a party to the consultative pact which issued from the Inter-American Conference for Peace at Buenos Aires in December, 1936, for a further conference regarding inter-American relations. To agree to such a conference

[16] See generally the present writer's *National Supremacy* (New York, 1913); also University of Illinois *v.* U.S., 289 U.S. 48 (1933); and United States *v.* Belmont, 301 U.S. 324 (1937).

[17] Missouri *v.* Holland, 252 U.S. 416 (1920).

[18] Hauenstein *v.* Lynham, 100 U.S. 483 (1879); Jordan *v.* Tashiro, 278 U.S. 123 (1928); Nielson *v.* Johnson, 279 U.S. 47 (1929).

would be well within the President's diplomatic powers.[19]

But it frequently happens that treaty provisions contemplate supplementary action by Congress, as did, for instance, the treaty with Canada just referred to; and this is necessarily the case where money is needed to carry a treaty into effect (see Article I, Section IX, ¶7). Does, however, the same rule apply generally in the case of treaty provisions the enforcement of which involves executive and/or judicial action in the area of Congress's enumerated powers, its power for instance to declare war, its power to regulate foreign commerce, etc.? While there are a few judicial *dicta* which assert that the maxim "*leges posteriores priores contrarias abrogant* (later laws repeal earlier contradictory ones)" operates reciprocally as between treaties and acts of Congress, and hence carry the implication that the treaty-making power is capable of imparting to its engagements the quality of "law of the land" enforceable by the courts within the area of Congress's powers, yet actually no treaty provision has ever been found to effect such a repeal.[20] Moreover, the trend of practice has been from an early date toward an affirmative answer to the above question, and an affirmative answer is further supported by the rule of interpretation that general powers yield to specific ones.[21]

But is Congress *obliged* to carry out a treaty which it alone may carry out? The answer would seem to be that it is not *legally* obliged to do so, since the Constitution generally leaves it full discretion as to whether or not it shall exercise its powers. But morally it would be obliged to carry out the pledges of the United States duly entered

[19] See *The President, Office and Powers*, 242-243.

[20] See e.g. Whitney *v.* Robertson, 124 U.S. 190 (1888); and United States *v.* Lee Yen Tai, 185 U.S. 213 (1902). So far as the present writer has been able to find, no alleged conflict between a treaty and an act of Congress has ever been resolved by the Court against the latter.

[21] Crandall's *Treaties*, etc., chs. XII and XIII are especially informative on this point. Senate Documents, 56th Congress, 2nd Session, VII, 25 (Document No. 231).

into unless in the specific situation before it an honorable nation would be morally justified in breaking its word.

Treaties of the United States may be terminated in accordance with their own provisions or by agreement with the other contracting party; or as "law of the land" they may be repealed by act of Congress, or denounced by the President or the President and Senate; but any such one-sided procedure still leaves the question of their international obligation outstanding.[22] The United States has the same right as any other nation has, and no more, to determine the scope of its obligations under International Law.

Executive Agreements by Authorization of Congress

Besides treaties proper, the President frequently negotiates agreements with other governments which are not referred to the Senate for its advice and consent. These are of two kinds: those which he is authorized by Congress to make, or which he lays before Congress for approval and implementation; and those which he enters into by virtue simply of his diplomatic powers and powers as Commander-in-Chief.[23] As early as 1792 Congress authorized the Postmaster General to enter into postal conventions; as recently as 1934 it authorized the President to enter into foreign-trade agreements and to lower customs rates as much as fifty per cent on imports from the other contracting countries in return for equivalent concessions, an authorization which it renewed in 1937, 1940, and 1943. Similarly, the Lease-Lend Act of March 11, 1941, is the fountainhead of the numerous agree-

[22] Head Money Cases, 112 U.S. 580 (1884); Chinese Exclusion Case, 130 U.S. 581 (1889).

[23] See *The President, Office and Powers*, 235-239; Wallace McClure, *International Executive Agreements* (Columbia University, New York, 1941); Myres S. McDougal and Asher Lans, "Treaties and Congressional Executive or Presidential Agreements: Interchangeable Instruments of National Policy," reprinted from 54 *Yale Law Journal*, Nos. 2 and 3 (1945).

ments with our allies and associates in the present war under which our government first and last furnished them more than forty billions worth of munitions of war and other supplies. Nor is the validity of such agreements and compacts today open to serious question in view of repeated decisions of the Court.[24]

Executive Agreements Pure and Simple

Instances of "treaty making" by the President without the aid or consent of either Congress or the Senate are still more numerous. One was the exchange of notes in 1817 between the British Minister Bagot and Secretary of State Rush for the limitation of naval forces on the Great Lakes. Not till a year later was it submitted to the Senate, which promptly ratified it. Of like character was the protocol of August 12, 1898, between the United States and Spain, by which the latter agreed to relinquish all title to Cuba and to cede Puerto Rico and her other West Indian possessions to the United States; the exchange of notes between the State Department and various European governments in 1899 and 1900 with reference to the "Open Door" in China; the exchange in 1908 of so-called "identic notes" with Japan concerning the maintenance of the integrity of China; the "Gentlemen's Agreement," first drawn in 1907, by which Japanese immigration to this country was long regulated; the *modus vivendi* by which after the termination of the Treaty of Washington in 1885 American fishing rights off the coast of Canada and Newfoundland were defined for more than a quarter of a century; the protocol for ending the Boxer Rebellion in 1901; the notorious Lansing-Ishii agreement of November 2, 1917, recognizing Japan to have "special rights" in China; the armistice of November 11, 1918—to say nothing of the entire complexus of conventions and understandings by which our

[24] The leading cases are Field *v.* Clark, 143 U.S. 649 (1892); and Hampton, Jr. & Co. *v.* U.S., 272 U.S. 494 (1928).

relations with our "Associates" in World War I and our "Allies" in World War II were determined.

Obviously, the line between such agreements and treaties which have to be submitted to the Senate for its approval is not an easily definable one. So when the Senate refused in 1905 to ratify a treaty which the first Roosevelt had entered into with the government of Santo Domingo for putting its customs houses under United States control, the President simply changed the "treaty" into an "agreement" and proceeded to carry out its terms, with the result that a year or so later the Senate capitulated and ratified the "agreement," thereby converting it once more into a "treaty." Furthermore, by recent decisions of the Supreme Court, an "executive agreement" within the power of the President to make is law of the land which the courts must give effect to, any State law or judicial policy to the contrary notwithstanding.[25] This, perhaps, is going rather too far. It would be more accordant with American ideas of government by law to require, before a purely executive agreement be applied in the field of private rights, that it be supplemented by a sanctioning act of Congress.

Nor is the "executive agreement," whether made with or without the sanction of Congress, the only inroad which practice under the Constitution has made upon the original role of the Senate in treaty-making. Not only, as was pointed out above, is the business of negotiation today within the President's exclusive province, but Congress has come into possession of a quite indefinite power to legislate with respect to external affairs. The annexation of Texas in 1845 by joint resolution is the leading precedent. The example thus set was followed a half century later in the case of Hawaii; and of similar import are the Joint Resolution of July 2, 1921, by which war with

[25] United States *v.* Belmont, 301 U.S. 324 (1937); United States *v.* Pink, 315 U.S. 203 (1942).

the Central Powers was brought to a close, and the Joint Resolution of June 19, 1934, by which the President was enabled to accept membership for the United States in the International Labor Organization. Such precedents make it difficult to state any limit to the power of the President and Congress, acting jointly, to implement effectively any foreign policy upon which they agree, no matter how "the recalcitrant third plus one man" of the Senate may feel about the matter.

The National Official Establishment

¶2. *Clause* 2. 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;

Except the President and the Vice-President all civil officers of the United States are appointive and fall into two classes, the so-called "Presidential officers" and "inferior officers."

The steps of appointment in the first class are, first, their nomination by the President; secondly, their appointment "by and with the advice and consent of the Senate"; thirdly, their commissioning, which is also by the President[26] (see Section III).

The offices of "ambassador," "public minister" and "consul" being recognized by the Law of Nations, it was at first thought that the President might nominate to them as occasion arose in our intercourse with foreign nations, but since 1855 Congress has asserted its right to restrict such appointments, which it is able to do through its control of the purse.

Besides "ambassadors" and "public ministers" there has sprung up in the course of time a class of "personal agents" of the President, in whose appointment the Sen-

[26] Marbury *v.* Madison, 1 Cr. 137 (1803).

ate does not participate. Theoretically these do not usually have diplomatic quality, but if their identity is known they will be ordinarily accorded it in the countries to which they are sent. If such agents act simply as observers for the President or are dispatched to communities or governments without standing at International Law, they are obviously legitimate enough. But it would seem that resort to them should not be carried to such an extent as to defeat the evident purpose of the Constitution to lodge the important diplomatic business of the United States with representatives of the *United States* in whose appointment the Senate has participated.[27]

The War Agencies

"Shall be established by law": All civil offices of the United States except those of President, Vice-President, Ambassadors, Public Ministers and Consuls, and possibly of Justices of the Supreme Court, are supposed to be the creations of Congress. The great majority, however, of the alphabetical agencies, like WPB, WLB, WMC, ODT, and so on, through which the recent war was conducted on the home front, were created by the President as ramifications of the OEM (Office of Emergency Management), also his creation; but most of them eventually received Congress's blessing and approval in the shape of appropriations or in legislation augmenting or regulating their powers. OPA (successor to Presidentially created OPACS) was brought into existence by Congress.

When Congress creates offices it does so by virtue of its powers under the "necessary and proper" clause; and by the same authorization it may also stipulate what qualifications appointees to them shall have, so long as it leaves *some* discretion to the appointing power.[28] Thus the Civil Service Act of 1883 leaves the appointing officer the right to select from *among* those who have best sustained the tests of fitness imposed by the act.

[27] *The President, Office and Powers*, 230-232.
[28] *Ibid.*, 70-71, 346-348.

Congressional Regulation of Offices

Furthermore, Congress has very broad power to regulate the conduct in office, especially regarding their political activities, of officers and employees of the United States. By the Civil Service Act of 1883 all such persons, and members of Congress as well, are forbidden to receive or solicit any contribution to be used for a political purpose.[29] By the Hatch Act of 1939[30] all persons in the executive branch of the Government, or any department or agency thereof, except the President and Vice-President and certain "policy determining" officers, are forbidden to "take an active part in political management or political campaigns," although they are still permitted to "express their opinions on all political subjects and candidates"; and by the Hatch Act of 1940[31] these regulations are extended to employees of State and local governments who are engaged in activities financed in whole or part by national funds. As to the constitutionality of these measures, particularly in view of their care to preserve the freedom of speech and press of persons subject to them, there seems to be little doubt.[32]

Also, Congress may, and usually does, limit the term for which an appointment to office may be made; while as to those officers who are instruments and agents only of the constitutional powers of Congress, the latter may limit drastically their removability during such terms. If, however, an officer is an agent of the President in the exercise of any of his powers, whether constitutional or statutory, such officer is for that reason removable at the will of the President. And all non-judicial officers of the United States are subject to disciplinary removal by the President for good cause, by virtue of his duty to "take care that the laws be faithfully executed."[33]

[29] U.S. Code, tit. 18, §208.
[30] Act of August 2, 1939; U.S. Code Supp., tit. 18, §§61-61K.
[31] Act of July 19, 1940; 54 Stat. 767-772.
[32] See *ex parte* Curtis, 106 U.S. 371 (1882); United States *v.* Wurzbach, 280 U.S. 396 (1930).
[33] *The President, Office and Powers*, 84-96.

¶2. *Clause* 3. 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.

"Inferior Officers"

"Inferior officers" are evidently officers subordinate to the heads of departments or the courts of law, but many classes of such officers are still appointed by the President with the advice and consent of the Senate because Congress has never vested their appointment elsewhere.

By the Oregon Postmaster Case,[34] referred to earlier, one who is vested under this clause with the power to appoint an inferior officer is at the same time vested with the power to remove him, the power of removal being a part of the appointing power. Finally, any person who is appointed to an executive post in the National Government by an officer upon whom Congress is not authorized to confer appointing power is classified as an "employee."[35]

¶3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

"Happen" in this connection means "happen to exist"; otherwise if a vacancy existed on account of inaction of the Senate it would have to continue throughout the recess, and in this way the work of government might be greatly impeded.[36]

SECTION III

¶He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and

[34] Myers *v.* U.S., 272 U.S. 52 (1926).
[35] United States *v.* Germaine, 99 U.S. 508 (1879).
[36] *The President, Office and Powers*, 75, 229.

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.

Legislative Leadership of the President

Prior even to recent Administrations, the duty conferred by the opening clause of this section had come to be, at the hands of outstanding Presidents like Washington, Jefferson, Theodore Roosevelt, and Wilson a tremendous power of legislative leadership.[1] The President is not, on the other hand, obliged by this clause to impart information which, in his judgment, the public interest requires should be kept secret.[2]

The President has frequently summoned Congress into what is known as "special session." His power to adjourn the houses has never been exercised.

The power to "receive ambassadors and other public ministers" includes the power to dismiss them for sufficient cause; and the exercise of the latter power may, as in the case of Count Bernstorff early in 1917, result in a breach of diplomatic relations leading eventually to hostilities. The same power also carries with it the power to recognize new governments or to refuse them recognition, also a very important power sometimes, as was

[1] See generally H. C. Black, *The Relation of the Executive Power to Legislation* (Princeton, 1919); W. E. Binkley, *The Powers of the President* (New York, 1937); *The President, Office and Powers*, 255-282.

[2] A ruling by Attorney General Jackson, dated April 30, 1941, holds that all FBI investigative reports are confidential documents which the President is entitled in the public interest to withhold from Congressional investigating committees. Early in 1944 an administrative assistant to the President refused to answer questions put to him by a Senate sub-committee, but later yielded on the President's order to do so. *Ibid.*, February 29 and March 1, 5, and 10. And see generally Charles Warren, "Presidential Declarations of Independence," 10 *Boston University Law Review*, No. 1 (January 1930).

shown by President Wilson's success in thus bringing about the downfall of President Huerta of Mexico in 1916.

Finally, it may be said that it is the President's power under this clause, taken together with his power in connection with treaty-making and with the appointment of the diplomatic representatives of the United States, that gives him his large initiative in determining the foreign policies of the United States.[3]

The Enforcement of the Laws

The President, be it noted, does not enforce the laws himself, but sees to it that they are enforced, and this is so even in the case of those laws which confer powers upon the President directly rather than upon some head of department or bureau.[4]

Because of his duty "to take care that the laws be faithfully executed," the President has the right to take any necessary measures which are not forbidden by statute to protect against impending danger those great interests which are entrusted by the Constitution to the National Government. He may order a marshal to protect a Justice of the Supreme Court whose life has been threatened, and his order will be treated by the courts as having the force of law. He may dispatch troops to points at which the free movement of the mails and of interstate commerce is being impeded by private combinations, or through the Department of Justice he may turn to the courts and ask them to use their power of injunction to forbid such combinations. In the same way, as we saw earlier, he may use the army and navy to protect Amer-

[3] See especially in this connection Justice Sutherland's opinion for the Court in United States *v.* Curtiss-Wright Corp., 299 U.S. 304 (1936). While rather overenthusiastic in some of its statements, the opinion does sum up the substantial results of practice and opinion under the Constitution.

[4] Williams *v.* U.S., 1 How. 290 (1843), and cases there cited.

ican rights abroad,[5] at least unless restrained by statute or by lack of funds.

In the language of the Supreme Court, his duty is not limited "to the enforcement of acts of Congress or of treaties of the United States according to their express 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."[6]

Delegations of Legislative Power

The President's executive powers have been further enlarged in recent years by the growing practice on the part of Congress of passing laws in general terms, which have to be supplemented by regulations drawn up by the head of a department under the direction of the President. Under the legislation which Congress passed during World War I, the following powers, among others, were vested in the President: to control absolutely the transportation and distribution of foodstuffs; to fix prices; to license importation, exportation, manufacture, storage, and distribution of the necessaries of life; to operate the railroads; to issue passports; to control cable and telegraph lines; to declare embargoes; to determine priority of shipments; to loan money to foreign governments; to enforce Prohibition; to redistribute and regroup the executive bureaus; and in carrying these powers into effect the President's authorized agents put in operation a huge number of executive regulations having the force of law; and the two War Powers Acts and other legislation repeated this pattern in the recent war.[7]

[5] Durand *v.* Hollins, 4 Blatch. 451 (1860); *in re* Neagle, 135 U.S. 1 (1890); *in re* Debs, 158 U.S. 564 (1895); *The President, Office and Powers*, 240-254.

[6] 135 U.S. at 64.

[7] See especially Yakus *v.* U.S., 321 U.S. 414 (1944), in which the Emergency Price Control Act of January 30, 1942, was sustained against the objection that it delegated legislative power unconstitutionally to OPA.

Meantime, however, the Court had held that Congress in enacting the NIRA in 1933 had parted with its own powers somewhat too lavishly, and for the first time in the history of the country an act of Congress was set aside, in the "Hot Oil" Cases of 1934,[8] as violative of the maxim—nowhere mentioned in the Constitution—that "the legislature may not delegate its powers." Congress, the Court argued, had failed to lay down any "standards" to guide executive action, and without doubt it had acted with unnecessary haste. Even so, subsequent decisions upholding broad delegations of power to various administrative agencies of the Government make it plain that, as the sphere of national power expands and the problems confronting the National Government become more complex, Congress will encounter ever lessening judicial resistance to its growing policy of leaving the details of legislative projects to be filled in by such agencies, which are able to carry on constant researches in their respective fields and to adapt their measures to changing conditions with comparative ease.[9]

Moreover, in United States *v.* Curtiss-Wright Export Corporation,[10] the Court, speaking by Justice Sutherland, used language implying that there is virtually no constitutional limit to Congress's power to delegate to the President authority which is "cognate" to the latter's constitutional powers, and especially his powers in the diplomatic field. The Lease-Lend Act which, while we were still formally at peace, authorized the President for a stated period (it was afterward renewed) to manufac-

[8] Panama Refining Co. *v.* Ryan, 293 U.S. 388 (1934). See also Schechter Bros. *v.* U.S., 295 U.S. 495 (1935).

[9] See especially Justice Roberts' dissenting opinion in Hood and Sons *v.* U.S., 307 U.S. at p. 603 (1939); also Opp Cotton Mills *v.* Administrator, etc., 312 U.S. 126 (1941); Yakus *v.* U.S., 321 U.S. 414 (1944). In the last cited case the Court sustained the Emergency Price Control Act of January 30, 1942, against the objection that it delegated to OPA unconstitutionally Congress's power to control prices in wartime.

[10] See note 3 above.

ture or "otherwise procure" to the extent of available funds "defense articles" (i.e., anything judged by him to be such), and lease, lend, exchange, or "otherwise dispose" of them on terms "satisfactory" to himself to any government, if he deemed that in so doing he was aiding the defense of the United States, dramatically illustrated and confirmed this implication. (See also p. 21.)

The late President Taft used to say that the President's duty to "commission all the officers of the United States" was the most onerous "manual labor" thrust upon him by the Constitution.

SECTION IV

¶The President, Vice-President and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

Executive Responsibility

Besides their liability to the impeachment process (see Article I, Section III, ¶s 6 and 7), the President's principal subordinates are answerable to him, since as the law has stood from the beginning of the National Government, except for a brief period after the Civil War, he has had a practically unrestricted power of removal; but Congress may qualify this power in the case of agencies whose powers are derived solely from Congress, and especially is this true as to agencies like the Interstate Commerce Commission, the Federal Trade Commission, and so on, which are often required to proceed in a semi-judicial manner.[1]

Furthermore, all officers below the President, including such "independent commissions," are responsible to the courts in various ways. Thus, an order of the President himself not in accordance with law will be set aside

[1] Humphrey *v.* U.S., 295 U.S. 602 (1935).

by the courts if a case involving it comes before them.[2] Also, anybody less than the President may be prohibited by writ of injunction from doing a threatened illegal act which might lead to irreparable damage, or be compelled by writ of mandamus to perform a duty definitely required by law, such suits being usually brought in the United States District Court for the District of Columbia.[3] Also, by common law principles, a subordinate executive officer is personally liable under the ordinary law for any act done in excess of authority;[4] but Congress may, in certain cases, exonerate the officer by a so-called act of indemnity;[5] while as the law stands at present, any officer of the United States who is charged with a crime under the laws of a State for an act done "under the authority of the United States" is entitled to have his case transferred to the national courts.[6]

The extent of the President's own liability to the ordinary law, while he is clothed with official authority, is a matter of some doubt.[7] Impeachment aside, his principal responsibility seems to be simply his accountability, as Chief Justice Marshall expressed it, "to his country in his political character, and to his own conscience."

[2] Kendall *v.* U.S., 12 Pet. 524 (1838); United States *v.* Lee, 106 U.S. 196 (1882).

[3] United States *v.* Schurz, 102 U.S. 378 (1880); United States *v.* Black, 128 U.S. 40 (1888); Riverside Oil Co. *v.* Hitchcock, 190 U.S. 316 (1903).

[4] Little *v.* Barreme, 2 Cr. 170 (1804); United States *v.* Lee, cited above; Spalding *v.* Vilas, 161 U.S. 483 (1896).

[5] Mitchell *v.* Clark, 110 U.S. 633 (1884).

[6] Tennessee *v.* Davis, 100 U.S. 257 (1879); *in re* Neagle, 135 U.S. 1 (1890).

[7] See Beveridge's *Marshall*, III, 444-455, where President Jefferson's refusal to answer a subpoena addressed to him by Chief Justice Marshall, on the occasion of the Burr trial, is discussed. Cf. Mississippi *v.* Johnson, 4 Wall. 475 (1866).

ARTICLE III

This article completes the framework of the National Government by providing for "the judicial power of the United States."

SECTION 1

The National Judicial Power

¶The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

"Judicial power" is the power to decide "cases" and "controversies" in conformity with law and by the methods established by the usages and principles of law.[1]

Its Inherent Attributes

Like "legislative" and "executive power" under the Constitution, "judicial power," too, is thought to connote certain incidental or "inherent" attributes. One of these is the ability to interpret the standing law, whether the Constitution, acts of Congress, or judicial precedents, with an authority to which both the other departments are constitutionally obliged to defer.[2] But "political questions" often afford an exception to this general rule (see pp. 119, 137, and 139), as also do so-called "questions of fact," which are often left to administrative bodies, although their determination may affect the scope of the authority of such bodies very materially.[3] And closely re-

[1] Prentis *v.* Atl. Coast Line Co., 211 U.S. 210 (1908).

[2] See e.g., Federal Power Com's'n *v.* Pacific Power and L. Co., 307 U.S. 156 (1939).

[3] Interstate Com. Com's'n *v.* Ill. C. R. Co., 215 U.S. 452 (1910); Interstate Com. Com's'n *v.* Union P. R.R. Co., 222 U.S. 541 (1912); Shields *v.* Utah Idaho Cent. R. Co., 305 U.S. 177 (1938); Sunshine Anthracite Coal Co. *v.* Adkins, 310 U.S. 381 (1940); Perkins *v.* Lukens Steel Co., 310 U.S. 113 (1940).

lated to this attribute of judicial power is another, which may be termed power of "finality of decision." The underlying idea is that when a court of the United States is entrusted with the determination of any question *whether* of law or of fact, its decision of such question cannot constitutionally be made reviewable except by a higher *court*, that is, cannot be made reviewable by either of the other two departments, or any agency thereof.[4] Thus, so long as the decisions of the Court of Claims as to amounts due claimants against the Government were subject to disallowance by the Secretary of the Treasury, it was held not to be a "court," with the result that the Supreme Court could not take appeals from it.[5] But the principle is not an altogether rigid one, for the Court of Claims is today regarded as a true court, despite the fact that its judgments have to be satisfied out of sums which only Congress may appropriate.[6] Also, the courts of the United States are today generally required to serve as adjuncts in the work of such administrative bodies as the Interstate Commerce Commission, the Federal Trade Commission, the National Labor Relations Board, etc., by backing up the valid findings of such tribunals with orders which those to whom they are addressed must obey if they do not want to go to jail for "contempt of court."[7]

Contempt of Court

Which calls attention to a third "inherent" judicial attribute, namely, the power of a court to vindicate its dignity and authority in the way just mentioned. This power was defined in general terms in the Judiciary Act of 1789 and further restricted by the Act of 1831, which limited punishable contempt to disobedience to any

[4] For the start of this doctrine, see Hayburn's Case, decided in 1792, 2 Dall. 409. See especially the reporter's notes.
[5] See Gordon *v.* U.S., 117 U.S., appendix (1864).
[6] DeGroot *v.* U.S., 5 Wall. 419 (1867).
[7] The great leading case is Interstate Com. Com'n *v.* Brimson, 154 U.S. 447 (1894).

judicial process or decree and to misbehavior in the presence of the Court, "or so near thereto as to obstruct the administration of justice."[8] The purpose of the last clause was to get rid of a doctrine of the common law which, although it has the sanction of Blackstone, is otherwise of dubious authenticity, that criticism reflecting on the conduct of a judge in a pending case constituted contempt because of its tendency to draw into question the impartiality of courts and to "scandalize justice."[9] Eighty-five years later, nevertheless, the Supreme Court largely restored the discredited doctrine by an enlarged interpretation of the "so near thereto" clause.[10] But not only was this decision overturned in 1941,[11] but the Court a little later, by a vote of five Justices to four, ruled that for an utterance to be held in contempt simply in reliance on the common law, it must offer an "extremely serious" threat of causing a miscarriage of justice or of obstructing its orderly administration, otherwise the constitutional guaranty of freedom of press would be invaded.[12]

Two other restraints on the contempt power are, first, a provision of the Clayton Act of 1914, which makes certain classes of "criminal contempts" triable by a jury;[13] second, as was mentioned earlier, the President's pardoning power (see p. 93).

In contrast to certain State courts, no court of the United States possesses the power, in the absence of authorization by Congress, to suspend the sentence of a convicted offender,[14] clemency being under the Constitution an executive function.

[8] U.S. Code, tit. 28, §385; *ex parte* Robinson, 19 Wall. 505 (1874).
[9] See the bibliographical data in J. Douglas's opinion for the Court in Nye *v.* U.S., 313 U.S. 33 (1941).
[10] Toledo Newspaper Co. *v.* U.S., 247 U.S. 402 (1918).
[11] See note 9 above.
[12] Bridges *v.* California, 314 U.S. 252 (1941).
[13] U.S. Code, tit. 28, §387; Michelson *v.* U.S., 266 U.S. 42 (1924).
[14] *Ex parte* United States, 242 U.S. 27 (1913); Holiday *v.* Johnston, 313 U.S. 342 (1941).

Also it would seem that the Supreme Court regards itself as having the inherent power to determine whether an appointment to it was constitutionally valid, although such power may be invoked only by one who is able to show that "he has sustained or is in danger of sustaining a direct injury" as a result of the challenged appointment.[15]

Power to determine "good behavior," and to dismiss from office for lack of it, belongs to the High Court of Impeachment (Article I, Section III, ¶6); although it is persuasively argued that it might also be lodged, by act of Congress, in a court, together with power to dismiss a judge from office for disability, without loss of salary.[16]

The Size of the Court Set by Congress

Although *a* Supreme Court is provided for by the Constitution, the organization of the existing Court rests on an act of Congress. The size of the Court is also a matter for legislative determination at all times, subject to the requirement that existing incumbents shall not be thrown out of office. Originally the Court had six members; today it has nine, any six of whom constitute a quorum.[17] At one time during the Civil War it had ten members, an enlargement which was partly occasioned by the fact that the unfavorable attitude of several of the Justices toward the war was thought to endanger the Government's policies.[18] Again, in 1870, at the time of the decision in Hepburn *v.* Griswold,[19] setting aside the Legal Tender Act of 1862, the two vacancies then existing in the Court's membership were filled by appointees

[15] *Ex parte* Albert Levitt, Petitioner, 302 U.S. 633 (1937). This was the case in which the Court declined to pass upon the validity of Justice Black's appointment. It seems curious that the Court, in rejecting petitioner's application, did not point out that it was being asked to assume original jurisdiction contrary to the decision in Marbury *v.* Madison.

[16] See *ante* p. 11.

[17] U.S. Code, tit. 28, §321.

[18] C. B. Swisher, *Roger B. Taney*, 566 (New York, 1935).

[19] 8 Wall. 603.

who were known to disapprove of that decision, and fifteen months later the decision was reversed by the new majority.[20] Though possessing all the formal attributes of a judicial tribunal, the Court today exercises such vast, and such undefined powers, in the censorship of legislation, both national and State, and in interpretation of the former, that the social philosophies of suggested appointees to it are quite legitimately a matter of great concern to the appointing authority, the President and Senate.[21]

The Inferior Judicial Establishment

The "inferior courts" covered by this section comprise today ten Circuit Courts of Appeals and eighty odd District Courts, with approximately 180 judges. Since they rest upon act of Congress alone, they may be abolished by Congress at any time; but whether their incumbents may be thus thrown out of office is at least debatable. When in 1802 Congress repealed an act of the previous year creating certain Circuit Courts of the United States, it also threw their judges out of office; but the Act of 1913, abolishing the Commerce Court, left its judges still judges of the United States.

The territorial courts, those of Hawaii and Alaska, do not exercise "judicial power of the United States," but a special judicial power conferred upon them by Congress, by virtue of its sovereign power over these places (see Article IV, Section III, ¶2). Their judges accordingly have a limited tenure and are removable by the President.[22]

Also, there are certain courts exercising jurisdiction

[20] Sidney Ratner, "Was the Supreme Court Packed by President Grant?" in 50 *Political Science Quarterly*, 343-358; Knox *v.* Lee, 12 Wall. 457.

[21] This was well understood by the Senatorial opponents of Mr. Hughes's appointment as Chief Justice. See *New York Times*, February 12-15, 1930; and see the data compiled by the late Senator Robinson in his answer to Senator Borah, respecting President Roosevelt's Court Proposal of February 5, 1937. *Ibid.*, March 31, 1937.

[22] American Ins. Co. *v.* Canter, 1 Pet. 511 (1828).

over a limited class of cases, like the Court of Claims and the Court of Customs and Patent Appeals, which are regarded as "legislative," *not* "constitutional" courts. The powers of such courts sometimes embrace non-judicial elements, but any purely "judicial" determination by them may be made appealable, if Congress wishes, to the regular national courts. Nevertheless, since they do not participate in "the judicial power of the United States" within the sense of this section, the tenure of their judges rests solely on act of Congress.[28]

The word "diminished" in this section was considered above in connection with Article II, Section I, ¶7.

SECTION II

Jurisdiction of the National Courts

¶1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

Declaratory Judgments

While the "cases" and "controversies" here enumerated constitute the potential jurisdiction of the national courts, the lower national courts derive *all* their jurisdiction *immediately* from acts of Congress, and the same is true of the Supreme Court as to its *appellate jurisdiction*.[1] It was formerly thought that for a "case" or "con-

[28] *Ex parte* Bakelite Corp., 279 U.S. 438 (1929).

[1] Kline *v.* Burke Constr. Co., 260 U.S. 266 (1922); Durousseau *v.* U.S., 6 Cr. 307 (1810); *ex parte* McCardle, 7 Wall. 506 (1869); The Francis

troversy" to be such the party initiating it must ask the court for a remedy and "execution." This, however, is no longer the view of the Supreme Court; and by an act passed by Congress June 14, 1934, courts of the United States are authorized "in cases of actual controversy," "to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such." So far the Court has not taken jurisdiction under the act of any case in which the complaining party might not have asked for "relief" had he chosen to do so; and it will apparently be very slow to do so, especially where a declaratory judgment would result in overturning a State law.[2]

"Cases in Law and Equity"

Whether a case is one "in law" or "in equity" is a mere matter of history, and depends today on the kind of remedy that is asked for. Criminal prosecutions and private actions for damages are cases "in law," since these were early decided in England in the regular law courts. An application for an injunction, on the other hand, was passed upon by the Lord Chancellor, as a matter of grace, and so is a *suit* "in equity." Heretofore the distinction between the two kinds of cases has been maintained in the field of national jurisdiction, as it is in most of the States, although the same courts dispense both "law" and "equity." By the Act of June 19, 1934, however, the Supreme Court is empowered to merge the two procedures "so as to secure one form of civil action . . . for both" in the District Courts of the United States and the Courts

Wright, 105 U.S. 381 (1881); St. Louis and Iron Mountain R.R. *v.* Taylor, 210 U.S. 281 (1908); also Robert J. Harris, Jr., *The Judicial Power of the United States*, ch. II for a review of controversies on this point (Louisiana State University Press, 1940).

[2] On the above paragraph see Fidelity Trust Co. *v.* Swope, 274 U.S. 123 (1927); U.S. Code, tit. 28, 400; Alabama State Federation of Labor *v.* McAdory, decided June 11, 1945; also Edwin M. Borchard, *Declaratory Judgments*, 249-303 (New York, 1934).

of the District of Columbia, and it has since adopted rules for this purpose which went into effect from the final adjournment of the Seventy-fifth Congress.[3]

A case is one "arising under this Constitution, the laws of the United States, and treaties" of the United States, when an interpretation of one or the other of these is required for its final decision.[4] But while the "judicial power" extends to *all* such cases, there is a certain category of them in which the Court does not usually claim full liberty of decision. These are cases involving so-called "political questions," the best example of which is furnished by questions respecting the rights or duties of the United States in relation to other nations. When the "political departments," Congress and the President, have passed upon such questions, the Court will generally accept their determinations as binding on itself in deciding cases.[5] Of course, it rests with the Supreme Court to say finally whether a question is "a political question" in this sense. (See also Article IV, Section IV.)

"Political Questions"

Cases "arising under this Constitution" are cases in which the validity of an act of Congress or a treaty or of a legislative act or constitutional provision of a State, or of any official act whatsoever which purports to rest directly on the Constitution, is challenged with reference to it. As to acts of Congress the view of the clause just quoted was established in 1803 by the Court itself in the famous decision of Chief Justice Marshall in the case of Marbury *v.* Madison.[6] In brief, the Court's argument on that occasion was as follows: Since the Constitution is *law* (see Article VI, ¶2), it must be interpreted and en-

Judicial Review

[3] U.S. Code, tit. 28, §723 (b) and (c); 82 *United States Supreme Court Reports*, Lawyers Edition, 1563*ff*.

[4] Cohens *v.* Va., 6 Wheat. 264 (1821), decided by Chief Justice Marshall.

[5] *Willoughby On the Constitution*, III, 1329-1336 (New York, 1929).

[6] 1 Cr. 137.

forced by the judges in cases "arising" under it; since it is "*supreme law*" the judges must give it preference over any other law. Also, as is the case with any other law, judicial interpretation of it is final for the case to which it is applied, while by the doctrine of precedent—*stare decisis*—the same interpretation will be adhered to in like cases in the future unless the Court becomes convinced that it erred in the first place, something which has happened a great many times, and especially within the last few years. Furthermore, long standing practice shows that Congress will ordinarily, in shaping new legislation, accord considerable deference to the Court's view of the Constitution.

Some Stand-out Presidents

The idea, nevertheless, that absolute deference is required by the Constitution is one that has been successively rejected by such popular leaders as Jefferson, Jackson, Lincoln, and Theodore Roosevelt, as well as by all the leading historians of the Constitution.[7] As Lincoln expressed the matter in his first Inaugural: "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."[8]

Certainly, it ought to be borne in mind that by the very theory of judicial review the supreme law of the land is the Constitution itself and not any official version of it; that the Supreme Court has no abstract right to pass on the constitutionality of laws, but only for the purpose of deciding cases,[9] and lastly, that the Court has

[7] See the present writer's *Court Over Constitution*, 68-84 (Princeton University Press, 1938).
[8] Richardson, *Messages and Papers*, VI, 9-10.
[9] See the Court's language in 261 U.S. at 544.

again and again, as was just remarked, discarded as erroneous views which it had previously held as to the Constitution's meaning.[10]

Growth of Judicial Review in Recent Years

During the first seventy-seven years following the establishment of the Constitution only two provisions of Congressional acts were set aside by the Court. Between 1920 and the beginning of President Franklin D. Roosevelt's first administration 22 such provisions were disallowed; and between June 1, 1934 and June 1, 1936, 13 such acts were voided in whole or in part.[11] And a comparable development occurred in the Court's censorship of State laws. Within the fifty years between 1887 and 1937 hundreds of such measures were set aside. Not without solid justification did the late Justice Holmes declare, in a dissenting opinion, shortly before his retirement from the Bench, that he could discover "hardly any limit but the sky" to the power claimed by the Court to disallow State acts "which may happen to strike a majority of this Court as for any reason undesirable."[12] In the course of the last few years, however, the Court's disallowance of statutes, both State and national, has fallen off, and especially as to the latter, that being the logical consequence of the broader views of national power which the Court has adopted in sustaining the New Deal legislation. Nor is it altogether true that, as Justice Stone said in his dissenting opinion in United States *v.* Butler, "the only check on our [the Court's] exercise of power is our own sense of self-restraint," if this means *unaided* "sense of self-restraint," since this may be stimulated, as perhaps

10 "However the Court may interpret the Constitution, it is still the Constitution which is the law and not the decision of the Court." Warren, *The Supreme Court in United States History*, III, 470; and see below, p. 185 note 21.

11 W. C. Gilbert, *Provisions of Federal Law Held Unconstitutional by the Supreme Court of the United States* (Washington, 1936).

12 Baldwin *v.* Mo., 281 U.S. 586, at 595 (1930).

it was somewhat in 1937, by the imminent possibility of Congress exercising its undoubted power to enlarge the Court.[13]

Congressional Control of Jurisdiction as a Check on Judicial Review

Moreover, through its unlimited control over the Supreme Court's appellate jurisdiction, as well as of the total jurisdiction of the lower federal courts, Congress is in position to restrict the actual exercise of judicial review at times, or even to frustrate it altogether.

Thus in 1869 it prevented the Court from passing on the constitutionality of the Reconstruction Acts by repealing the latter's jurisdiction over a case which had already been argued and was ready for decision;[14] and in the war just closed it confined the right to challenge the validity of provisions of the Emergency Price Control Act and of orders of the OPA under it to a single Emergency Court of Appeals and to the Supreme Court upon review of that court's judgments and orders.[15]

It frequently happens that cases "arising under this Constitution, the laws of the United States, and treaties" of the United States are first brought up in a State court, in consequence of a prosecution by the State itself under one of its own laws or of an action by a private plaintiff claiming something under a law of the State. If in such a case the defendant sets up a counter claim under the Constitution or laws or treaties of the United States, thereupon the case becomes one "arising under this Constitution," etc.[16] By the famous 25th Section of the Judiciary Act of 1789, the substance of which still remains on the statute books, such a case may be appealed to the Supreme Court if the decision of the highest State Court to which under the law of the State it can come affirms the

[13] See 297 U.S. at 79 (1936); also the present writer's *Constitutional Revolution, Ltd.*, 107-113 (Claremont Colleges, Claremont, 1941).

[14] *Ex parte* McCardle, 7 Wall. 506.

[15] U.S. Code, tit. 50, app., §924 (d); Lockerty *v.* Phillips, 319 U.S. 182 (1943); Yakus *v.* U.S., 321 U.S. 414 (1944); Bowles *v.* Willingham, 321 U.S. 503 (1944).

[16] Cohens *v.* Va., 6 Wheat. 264 (1821).

claim based on State law;[17] while by an act passed in 1914 the Supreme Court may, by writ of *certiorari* bring the kind of case described before itself for final review even if the claim which was based on State law was rejected by the State court in deference to national law.[18]

"All cases affecting ambassadors, other public ministers and consuls." The word "all" is used here in a rather Pickwickian sense, as we learn from a case in which the Supreme Court refused to pass on the marital difficulties of the, then, Roumanian vice-consul stationed at Cleveland, Ohio.[19]

"Admiralty and Maritime Jurisdiction"

"Cases of admiralty and maritime jurisdiction" are not only cases arising from acts or injuries done upon the high seas and within the marine league, as at common law, but also for acts and injuries done upon "the navigable waters of the United States."[20] Thus a collision on one of the Great Lakes would fall within this jurisdiction as well as a collision at sea. The same jurisdiction, which is exclusive of the State courts,[21] also extends to all contracts and claims of a maritime nature, and in wartime, to prize cases. There was once a tendency on the part both of writers and of the Court itself to treat this clause as a basis of Congressional power supplemental to the power to regulate commerce. The great extension of the latter power today renders this device unnecessary.

"Controversies" means "justiciable" controversies, that is, such controversies as are capable of being decided by a judicial tribunal in accordance with an applicable rule of law. Inasmuch as the courts of one government—in this case, those of the United States—do not enforce the penal

[17] U.S. Code, tit. 28, §344 (a). [18] *Ibid.*, §344 (b).

[19] Ohio *ex rel.* Popovici *v.* Agler, 280 U.S. 379 (1930).

[20] The Genessee Chief, 12 How. 443 (1851). The case is notable as being the first to overturn on ground of error a previous decision of the Court on a question of constitutional interpretation. The decision in question was that in the case of The Thomas Jefferson, 10 Wheat. 428 (1825).

[21] Knickerbocker Ice Co. *v.* Stewart, 253 U.S. 149 (1920).

laws of other governments—in this case those of the States—such controversies are always of a "civil" nature.[22]

Suability of the United States

The "controversies to which the United States shall be a party" are either controversies in which it appears as plaintiff or in which it has consented to be sued.[23] Under the so-called Tucker Act, passed in 1887, the National Government consents to be sued in the Court of Claims at Washington on all claims founded upon any contract "express or implied" and for damages, "in cases not sounding in tort," in respect to which the party would be entitled to redress against the United States if it were suable;[24] while by a bill passed in 1929, but vetoed by President Coolidge on account of some of its procedural features, it would have assumed a like responsibility for damages to property caused by the negligence of its officers and agents when acting in the course of their duties. Inasmuch as the personal liability of officers at common law for their official torts is usually perfectly valueless, some such reform is greatly to be desired.

"Controversies between two or more States" today comprehends almost any sort of controversy between States of the Union. Within recent times the Court has made it clear that it regards the National Government as possessing adequate authority to enforce the Court's decrees against any State which might fail to obey them.[25]

Judicial Invasion of State Power

By the terms of the Eleventh Amendment "controversies between a State and citizens of another State" include only such controversies as are commenced by a State. But the restrictive force of this limitation had been in recent decades greatly broken down by the practice of

[22] Muskrat *v.* U.S., 219 U.S. 345 (1911). See also Wisconsin *v.* Pelican Ins. Co., 127 U.S. 265 (1887).

[23] United States *v.* Clarke, 8 Pet. 438 (1834); Williams *v.* U.S., 289 U.S. 553 (1933); Monaco *v.* Miss., 292 U.S. 313 (1934).

[24] U.S. Code, tit. 28, §41 (20).

[25] Virginia *v.* W.Va., 246 U.S. 565 (1918). Warren, *The Supreme Court and Sovereign States* (Princeton, 1924).

the United States District Courts in entertaining applications for injunctions against State officers, and especially State public utility commissions, forbidding them to attempt to enforce State laws or regulations which were claimed by the applicant to be unconstitutional, with the result often of postponing the actual going into effect of such laws or regulations until—if ever—their constitutionality was sustained by the Supreme Court. Sometimes a period of several years—in one case fifteen years—had elapsed before the State measure involved, although it was finally held to be valid, was allowed to go into operation.[26] Certain statutory restraints have been laid upon this jurisdiction from time to time,[27] but even more important in curbing it today are the present Supreme Court's enlarged views of State power in the regulation of public utility rates. (See pp. 32-33.)

Judicial Protection of State Interests

The grounds upon which controversies commenced by the State itself may be based are today very broad, for in recent years the Supreme Court (see ¶2, below) has recognized increasingly the right of a State government to intervene in behalf of important interests of its citizens, or a considerable section of them, and to ask the Court to protect such interests against the tortious acts of outside persons and corporations and of other States. Thus, in the leading case the Court granted the petition of Georgia for an injunction against certain copper companies in Tennessee, forbidding them to discharge noxious gases from their works in Tennessee over the adjoining counties of Georgia; and it was on this precedent that Governor Arnall recently relied chiefly in his successful appeal to the Court to concede Georgia's right to maintain before it an original suit under the Sherman Act to enjoin an alleged conspiracy of some twenty rail-

[26] J. Brandeis, dissenting, in St. Joseph Stockyards Co. *v.* U.S., 298 U.S. 38 (1936).

[27] See U.S. Code, tit. 28, §§41 (I) and 380.

roads to fix discriminatory rates from which, he claimed, Georgia and the South generally suffered grave economic detriment. The case has still to be tried on its merits.[28] But a State has no capacity to intervene in this way in behalf of its citizens as against alleged wrongs by the National Government. In such cases the citizen must seek his own remedy in the national courts.[29]

The Diversity of Citizenship Jurisdiction

The judicial power of the United States is extended to the kinds of controversies already mentioned because there is no other tribunal for such controversies. It is extended to controversies "between citizens of different States" for a quite different reason, namely, to make available a tribunal for such cases which shall be free from local bias. In this field, accordingly, Congress has felt free to leave the States a concurrent jurisdiction and as the statute now stands, the United States District Courts have original jurisdiction of controversies between citizens of different States in which three thousand dollars or more is involved, while controversies of the same pecuniary importance, if brought by a plaintiff in a court of a State of which defendant is not a resident, may be removed by the latter to the nearest United States District Court.[30] It was long the doctrine of the Court that the national courts were free to decide cases of this description in accordance with their own notions of "general principles of common law," but recent decisions overrule this view, holding that the substantive law enforced must be that laid down by the courts of the State where the cause of action arose, a rule which applies equally to suits in equity and actions at law.[31]

[28] Georgia *v.* Tenn. Copper Co., 206 U.S. 230 (1907); Georgia *v.* Pa. R.R. Co., decided March 26, 1945. See also Missouri *v.* Ill., 180 U.S. 208 (1901).

[29] Massachusetts *v.* Mellon, 262 U.S. 447 (1923).

[30] U.S. Code, tit. 28, §41 (1) and 71.

[31] Erie R.R. Co. *v.* Tompkins, 304 U.S. 64 (1938); Ruhlin *v.* N.Y. Life Ins. Co., 304 U.S. 202 (1938); Freeman *v.* Bee Machine Co., 319 U.S. 448 (1943). The cases overruled are headed by Swift *v.* Tyson, 16 Pet. 1, decided in 1842.

The word "citizens" in this clause, as well as other clauses of this paragraph, has come practically to include corporations, since the Court always presumes that the stockholders of a corporation are all citizens of the State which chartered it, even when the corporation is being sued by a stockholder from another State.[32]

The word "State" does not denote the District of Columbia.[33]

¶2. 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 Supreme Court's Original Jurisdiction

Jurisdiction is either original or appellate. In Marbury *v.* Madison, which was earlier referred to as the case in which the Court first pronounced an act of Congress void as being in conflict with the Constitution, it was held that Congress could not extend the original jurisdiction of the Supreme Court to other cases than those specified in the first sentence of this paragraph.[34] On the other hand, if a case "in which a State is party" is also one "arising under the Constitution and laws of the United States," the original jurisdiction of the Supreme Court over it is not exclusive, but may, if Congress so enacts, be brought elsewhere in the first instance.[35] Also this original jurisdiction is subject to the limitations imposed by the Eleventh Amendment. No State, therefore, may make itself a collection agency of debts due its citizens from another State, and expect the Supreme Court to further

[32] Dodge *v.* Woolsey, 18 How. 331 (1853); Ohio and Miss. R.R. Co. *v.* Wheeler, 1 Bl. 286 (1861).

[33] Hepburn *v.* Ellzey, 2 Cr. 445 (1805).

[34] 1 Cr. 137 (1803).

[35] Cohens *v.* Va., 6 Cr. 264 (1821); Ames *v.* Kan., 111 U.S. 449 (1884); United States *v.* Calif., 297 U.S. 175 (1936).

the transaction by lending its original jurisdiction; but an outright assignment of such debts to the plaintiff State is a horse of another color.[36]

The Court's appellate jurisdiction Congress may enlarge or diminish at will so long as it does not exceed the catalogue of "cases" and "controversies" given in ¶1, above. However, so long as Congress chooses to leave a case within the appellate power of the Court, it cannot presume to dictate to the latter how it shall decide such case, or how it shall interpret the law, of which the Constitution is a part, for the purpose.

The appellate jurisdiction of the Supreme Court as to fact in "cases of law" is much curtailed by Amendment VII. Even so, the Court will always review findings of fact by a State court, or by an administrative agency, to any extent necessary to vindicate rights claimed under the Constitution.[37]

¶3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

In spite of its mandatory form the opening clause of this paragraph, like the parallel provision on the same subject in Amendment VI, only establishes trial by jury as a privilege of accused persons, which such persons may accordingly waive if they choose.[38] The substance of the other two clauses is also covered by that amendment.

[36] New Hampshire *v.* La., 108 U.S. 76 (1883); South Dakota *v.* N.C., 192 U.S. 286 (1904).

[37] Fiske *v.* Kan., 274 U.S. 380 (1927); Crowell *v.* Benson, 285 U.S. 22 (1932); also Alabama *v.* U.S., decided June 11, 1945, in which the Court set aside an order of the I.C.C. increasing intrastate passenger rates as having insufficient support in "the findings."

[38] Patton *v.* U.S., 281 U.S. 276 (1930).

SECTION III

"Treason"

¶1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. 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.

"Levying war" consists, in the first place, in a combination or conspiracy to effect a change in the laws or the government by force, but a war is not "levied" until the treasonable force is actually assembled.[1]

One "adheres" to the enemies of the United States, "giving them aid and comfort," when he knowingly furnishes them with assistance of any sort.[2]

"Overt act" means simply open act, that is to say, an act which may be testified to, and not a mere state of consciousness. Otherwise, the precise force of this requirement is still a matter of some doubt. At the common law treason by levying war involved a conspiracy, so that if an overt act of war in pursuance of the conspiracy took place, all the conspirators were equally liable for it at the place where it occurred; and in the Bollman Case early in 1807 Chief Justice Marshall followed the common law doctrine. A few weeks later, however, while presiding at Richmond over the trial of Aaron Burr for treason, he turned his back on this doctrine completely by holding that Burr must be linked with the conspiracy by an overt act of his own. And recently the Court held, five to four, that in a prosecution for treason by giving "aid and comfort," the overt act or acts testified to must be of themselves sufficient to justify the charge without

[1] *Ex parte* Bollman, 4 Cr. 75 (1807).

[2] Charles Warren, "What Is Giving Aid and Comfort to the Enemy?", 27 *Yale Law Journal*, 331-347 (1918).

the support of other evidence. The holding just about gives the *coup de grâce* to the "treason" clause.[3]

¶2. 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.

Bills of attainder are absolutely forbidden by Article I, Section IX, ¶3. The word "attainder" here apparently means simply *conviction.*

ARTICLE IV

This article, sometimes called "the Federal Article," defines in certain important particulars the relations of the States to one another and of the National Government to the States.

SECTION I

The "Full Faith and Credit" Clause

¶ 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 accordance with what is variously known as Conflict of Laws, Comity, or Private International Law, rights which a person acquires under the laws or through the courts of one country may often receive recognition and enforcement in the courts of another country, and it is the purpose of the above section to guarantee that this shall be the case among the States in certain instances.[1]

[3] Cf. the Bollman Case, cited above; Beveridge's *Marshall,* III, 618-626; *Willoughby On the Constitution,* II, 1125-1133; Cramer *v.* U.S., decided April 13, 1945.

[1] T. M. Cooley, *Principles of Constitutional Law,* 196-206 (3rd ed., Boston, 1898).

The provision is especially important in making judgments rendered in civil cases by the courts of one State enforcible in the courts of other States. By an act passed by Congress in 1790, "the records and judicial proceedings of the courts of any State . . . shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."[2] But a judgment to be entitled to such recognition must have been rendered with jurisdiction in accordance with the requirements of "due process of law," one of which is that the defendant in a personal action is entitled to be served personally with the process of the State where the case is brought, and hence within its borders, since no State's process runs farther.[3] An extension of this rule in the once celebrated case of Haddock *v.* Haddock[4] to a certain class of divorce suits gave rise at one time to some curious complications in the field of marital relations. Nor, in overruling this decision recently did the Court clarify the situation materially. For while holding that any State is entitled to divorce anybody who is "bona fide domiciled" within its borders even though the other spouse, being outside the State, was not personally served, yet it has since handed down another ruling the logic of which appears to expose to the danger of going to jail anybody who, having left his home State, gets a divorce in another State, remarries and then returns to State No. 1, or *goes to some third State*, provided a jury of his last place of residence can be persuaded that his residence in the divorcing State lacked "domiciliary intent," that is to say, the intention of remaining there from then on.

Divorce Troubles of the Court

[2] U.S. Code, tit. 28, §687; Mills *v.* Duryee, 7 Cr. 485 (1813); McElmoyle *v.* Cohen, 13 Pet. 326 (1839). See also Hauley *v.* Donoghue, 116 U.S. 3 (1885); and Huntington *v.* Attrill, 146 U.S. 657 (1892).

[3] Pennoyer *v.* Neff, 95 U.S. 714 (1877); Milliken *v.* Meyer, 311 U.S. 457 (1940).

[4] 201 U.S. 562 (1906).

This obviously contravenes the Act of 1790, the divorce being conceded to be valid in the State where granted.[5]

In thus setting its face against an established social trend the Court may temporarily produce a countercurrent capable of involving a few hapless individuals, but it can hardly hope to make much permanent headway. And the fact is that "domiciliary intent" is a pretty poor peg to hang an interpretation of the "full faith and credit" clause on in an age when "home is where the garage is," when it is not a trailer camp. Fortunately the situation is not remediless.[6]

Within recent decades the Court has occasionally strayed beyond the precincts of the Act of 1790, and given extraterritorial effect to State statutes in certain situations, but has lately given signs of having abandoned this line of decision.[7] At the same time it has appeared to adopt the theory that even when operating under the mandate of that early act, it is entitled to engage in a species of arbitration between the act's requirements and those of local policy[8]—a theory which is not unlikely to lead to some complications too.

SECTION II

¶1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Interstate Comity

This paragraph entitles the citizens of each State "to all privileges and immunities of citizens" in any State wherein they may be temporarily sojourning.[1] But there are

[5] Cf. Williams *v.* N.C., 317 U.S. 287 (1942); and Williams *v.* N.C., decided May 21, 1945.

[6] See the present writer on "Out-Haddocking Haddock," 93 *University of Pennsylvania Law Review*, 341-356 (1945), especially at p. 356; and the citations there given.

[7] See Bradford Electric Light Co. *v.* Clapper, 286 U.S. 161 (1932), and cases there cited. Cf. Pacific Employers Ins. Co. *v.* Indust'l Ac. Com's'n, 306 U.S. 493 (1939).

[8] Pink *v.* AAA Highway Exp., 314 U.S. 201 (1942).

[1] This is now the established doctrine. For an early, considerably

certain privileges and immunities for which a State may require previous residence, as for example the privilege of voting, the privilege of fishing in the waters of the State, and so on.[2] It is for the Supreme Court to say finally whether a particular privilege is one of citizenship merely or one for which the additional qualification of residence may be fairly required.

The term "citizens" here does not include corporations.[3] Thus a corporation chartered elsewhere may enter a State to engage in local business only on such terms as the State chooses to lay down, provided these do not deprive the corporation of its rights under the Constitution—of its right, for instance, to engage in interstate commerce, or to appeal to the national courts, or, once it has been admitted into a State, to receive equal treatment with corporations chartered by the latter.[4] Again, it is for the Supreme Court to pass judgment in each case.

Interstate Extradition

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

The word "crime" here includes "every offense forbidden and made punishable by the laws of the State where the offense is committed."[5]

The performance of the duty which is cast by this paragraph upon the States was imposed by an act of Congress passed February 12, 1793, upon the governors there-

broader view of the purpose of the clause, see Justice Washington's opinion in Corfield *v.* Coryell, 4 Wash. C.C. 371 (1823) (*Federal Cases*, No. 3,230).

[2] Blake *v.* McClung, 172 U.S. 64 (1898), and cases there cited.

[3] Paul *v.* Va., 8 Wall. 168 (1868).

[4] International Paper Co. *v.* Mass., 246 U.S. 135 (1918); Terral *v.* Burke Constr. Co., 257 U.S. 529 (1922); Hanover Fire Ins. Co. *v.* Carr, 272 U.S. 494 (1926).

[5] Kentucky *v.* Dennison, 24 How. 66 (1861).

of, but the Supreme Court shortly before the Civil War ruled that, while the duty is a legal duty, it is not one the performance of which can be compelled by writ of mandamus,[6] and in consequence governors of States have often refused compliance with a demand for extradition when in their opinion substantial justice required such refusal. On the other hand, the Act of 1793 does not prevent a State from surrendering one who is not a fugitive within its terms, nor from trying a fugitive for a different offense than the one for which he was surrendered.[7]

As was pointed out earlier, the deficiencies of this clause have been today partly remedied by compacts among the States and by uniform State legislation, as well as by national legislation under the "commerce" clause (see pp. 40-42 and 75-77). Especially important in the latter connection is the Act of May 18, 1934, which makes it an offense against the United States for a person to flee from one state to another in order to avoid persecution or the giving of testimony in certain cases.[8]

¶3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

"Person held to service or labor" meant slave or apprentice. The paragraph is now of historical interest only.

SECTION III

The Admission of New States

¶1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State

[6] *Ibid.*; cf. Virginia *v.* W.Va., 246 U.S. 566 (1918).
[7] Lascelles *v.* Ga., 148 U.S. 537 (1893); Innes *v.* Tobin, 240 U.S. 128 (1916).
[8] U.S. Code, tit. 18, §408e.

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 theory which the Supreme Court has adopted in interpretation of the opening clause of this paragraph is that when new States are admitted into "this Union" they are admitted upon a basis of equality with the previous members of the Union, since "*this* Union" is a Union of equal States.[1]

¶2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

Congress and the Public Lands

Congress's control of the public lands is derived from this paragraph. The relation of the National Government to such of its public lands as lie within the boundaries of States is not, however, that of simple proprietorship, but includes many of the elements of sovereignty. The States may not tax such lands;[2] while Congress may punish trespasses upon them, "though such legislation may involve the exercise of the police power."[3] Furthermore, in disposing of such lands Congress may impose conditions on their future alienation or that of the water power thereon which the State where the lands are may not alter.[4]

The Fifty Destroyer Deal

Although "other property" undoubtedly includes warships, this fact did not, as we saw earlier, deter President Roosevelt from handing over to Great Britain, in Septem-

[1] Coyle *v.* Okla., 221 U.S. 559 (1911). Cf. Stearns *v.* Minn., 179 U.S. 223 (1900).
[2] Van Brocklin *v.* Tenn., 117 U.S. 151 (1886).
[3] Camfield *v.* U.S., 167 U.S. 518 (1897).
[4] United States *v.* San Francisco, 310 U.S. 16 (1940). This case involved the famous "Hetch-Hetchy" grant by the Raker Act of December 19, 1913.

ber, 1940, in return for leases from the latter of certain sites for naval bases in the west Atlantic, fifty over-age destroyers without consulting Congress. But as Congress later appropriated money for the construction of the said bases, it may perhaps be thought to have ratified the arrangement. (See p. 81.)

The debts of various nations of Europe to the United States are also "property belonging to the United States," so that Congress's ratification had to be obtained to agreements for their settlement after World War I. Likewise, electrical power developed at a dam of the United States is "property belonging to the United States" (see pp. 28 and 35).

The Power to Govern Territories

But the above clause is also important for another reason—it is the source to which has sometimes been traced the power of the United States to govern territories, though, as we have seen, this and the power to acquire territory are best ascribed simply to the sovereignty inherent in the National Government as such;[5] as is also the power to cede territory to another government, as for example, the Philippine Islands to the Philippine Republic.

And while the treaty-making power may acquire territory, its incorporation into the United States ordinarily waits upon action by Congress. Such incorporation may be effected either by admitting the territory into "this Union" as new States or, less completely, by extending the Constitution to it.[6] Until territory is thus incorporated into the United States persons born therein are not citizens of the United States under the Fourteenth Amendment, though Congress may admit them to citizenship; and the power of Congress in legislating for

[5] The entire subject of the power to acquire and govern territories is comprehensively treated in *Willoughby On the Constitution*, I, chs. XXIII-XXXII.

[6] Downes *v.* Bidwell, 182 U.S. 244 (1901).

such unincorporated territory is limited only by "fundamental rights" of the individual, of which trial by jury is not one.[7] Incorporation, however, makes the inhabitants of territories citizens of the United States, and extends to them the full protection of the Constitution. Alaska is an incorporated territory; Puerto Rico, and the Philippines are unincorporated. The status of Hawaii remains doubtful, with the weight of the evidence favoring the idea that it is incorporated.[8]

Conquered territory may be governed temporarily by the President by virtue of his power as Commander-in-Chief of the Army and Navy, but Congress may at any time supplant such government with one of its own creation.[9]

SECTION IV

National Guarantees to the States

¶ 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.

A "Political Question"

"The United States" here means the governing agency created by the Constitution, but especially the President and Congress; for the Court has repeatedly declared that what is a "republican form of government" is "a political question," and one finally for the President and the houses to determine within their respective spheres.[1] Thus Congress may approve of the government of a new State by admitting it into the Union, or the houses of Congress may indicate their approval by seating the Senators and Representatives of the State, or the President

[7] Dorr *v.* U.S., 195 U.S. 138 (1904).
[8] R. M. C. Littler, *The Governance of Hawaii*, ch. III (Stanford University, 1929); cf. Hawaii *v.* Mankichi, 190 U.S. 197 (1903).
[9] Santiago *v.* Nogueras, 214 U.S. 260 (1909).
[1] Luther *v.* Borden, 7 How. 1 (1849).

may do the same by furnishing a State with military assistance in cases where he is authorized so to act.

Inasmuch as the adoption of the initiative, referendum, and recall by many States within recent decades seems not to have imperiled their standing with Congress, it must be concluded that a considerable admixture of direct government does not make a government "unrepublican."[2] On the other hand, it has been recently urged in Congress that certain southern States have so reduced the number of qualified voters within their borders, by making the payment of a poll tax a prerequisite to voting, that they are no longer "republican in form," and that therefore Congress could and should invalidate such requirements.

The President is authorized by statute to employ the forces of the United States to discharge the duties of the United States under the second part of this paragraph, in which connection he may in proper cases proclaim martial law.[3] (See pp. 91-92.)

For certain other phases of National-State relationship see pp. 23-24, 28, 40, 46, 75-78, 143-145, 173-174.

ARTICLE V

The Amending Power

¶ 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

[2] Pacific States Tel. and Tel. Co. *v.* Ore., 223 U.S. 118 (1912).

[3] On the power of the State executive in dealing with "domestic violence," see Moyer *v.* Peabody, 212 U.S. 78 (1909). It would seem that the President succeeds to this power when the forces of the United States enter a State on its invitation to put down disorder.

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.

"Political Questions"

From the various opinions filed in the recent case of Coleman *v.* Miller,[1] in which certain questions were raised concerning the status of the proposed Child Labor Amendment (pending since 1924), it would seem that the Court today regards all questions relating to the interpretation of this article as "political questions," and hence as addressed exclusively to Congress. This is either because all such questions have been in the past effectually determined by Congressional action; or because the Court lacks adequate means of informing itself about them; or because the "judicial power" established by the Constitution does not extend to this part of the Constitution. Nevertheless, certain past decisions of the Court dealing with Article V may still be usefully cited for the light shed by their statement of the actual results, as well as the logical implications, of Congressional action in the past.

"The Congress, whenever . . . both houses shall deem it necessary": The necessity of amendments to the Constitution is a question to be determined by the two houses alone, and neither the President nor the courts have any voice in the matter.[2]

"Two-thirds of both houses" means two-thirds of a quorum in both houses.[3] (See Article I, Section V, ¶1.)

"Legislatures" means the legislative assemblies of the

[1] 307 U.S. 433 (1939).
[2] The National Prohibition Cases, 253 U.S. 350 (1920).
[3] *Ibid.*; Missouri Pac. R. Co. *v.* Kan., 248 U.S. 276 (1919).

States and does not include their governors, far less their voters. Moreover, when acting upon amendments proposed by Congress, the State legislatures—and doubtless the same is true of conventions within the States—do not act as representatives of the States or the populations thereof, but in performance of a "federal function" imposed upon them by this article of the Constitution.[4]

If a State legislature ratifies a proposed amendment may it later reconsider its vote, the amendment not having yet received the favorable vote of three-fourths of the legislatures? In Coleman *v.* Miller this question was answered "No," on the basis of Congressional rulings in connection with the adoption of the Fourteenth Amendment. May a legislature, after rejecting a proposed amendment, reconsider and ratify it? On the same basis, this question was answered "Yes" in Coleman *v.* Miller. Within what period may a proposal of amendment be effectively ratified? Within any period which Congress chooses to allow either in advance, or by finding that a proposed amendment has been ratified, is again the verdict of Coleman *v.* Miller.

Of the two methods here laid down for proposing amendments to the Constitution only the first has ever been resorted to, and, prior to the proposal to repeal the Eighteenth Amendment, all proposals had been referred to the State legislatures.[5] In that instance, Congress prescribed that ratification should be by popularly elected conventions, chosen for the purpose, but left their summoning, as well as other details, to the several State legislatures. What ordinarily resulted was a popular referendum within each State, the conventions being made up almost entirely of delegates previously pledged

[4] Hawke *v.* Smith, 253 U.S. 221 (1920).

[5] It was contended in United States *v.* Sprague, 282 U.S. 716 (1931), that as the Eighteenth Amendment affected the liberties of the people and the rights of the State, it ought to have been submitted to conventions in the States, but the Court rejected the contention.

to vote for or against the proposed amendment.[6] The term "convention," therefore, it must be presumed, does not today, if it ever did, denote a *deliberative* body; it is sufficient if it is representative of popular sentiment.

Chief Justice Marshall characterized the constitution-amending machinery as "unwieldy and cumbrous." Undoubtedly it is, and the fact has had an important influence upon our institutions. Especially has it favored the growth of judicial review, since it has forced us to rely on the Court to keep the Constitution adapted to changing conditions. What is more, this machinery is, *prima facie* at least, highly undemocratic. A proposed amendment can be added to the Constitution by 36 States containing considerably less than half of the population of the country, or can be defeated by 13 States containing less than one-twentieth of the population of the country.

Of the two exceptions to the amending power the first is today obsolete. This does not signify, however, that the only change that the power which amends the Constitution may not make in the Constitution is to deprive a State without its consent of its "equal suffrage in the Senate." The amending, like all other powers organized in the Constitution, is in form a delegated, and hence a limited power, although this does not imply necessarily that the Supreme Court is vested with authority to determine its limits. The one power known to the Constitution which clearly is not limited by it is that which ordains it—in other words, the original, inalienable power of the people of the United States to determine their own political institutions.

[6] See Everett S. Brown's valuable article on "The Ratification of the Twenty-first Amendment," 29 *American Political Science Review*, 1005-1017 (1935).

ARTICLE VI

¶1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation.

This paragraph, which is now of historical interest only, was intended to put into effect the rule of International Law that when a new government takes the place of an old one it succeeds to the latter's financial obligations.

The Supremacy Clause

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

This paragraph has been called "the linch pin of the Constitution," and very fittingly, since it combines the National Government and the States into one governmental organization, one Federal State.

It also makes plain the fact that, while the National Government is for the most part one of enumerated powers, as to its powers it is supreme over any conflicting State powers whatsoever.[1] When, accordingly, a collision occurs between national and State law the only question to be answered is, ordinarily, whether the former was within a fair definition of Congress's powers. Notwithstanding which the Court has at various periods proceeded on the view that the Tenth Amendment segregates to the control of the States certain "subjects," production for instance, with the result that the power of

[1] See Chief Justice Marshall's famous decisions in Wheaton's Reports, Vols. IV, VI, and IX.

the States over such "subjects" constitutes a limitation on the granted powers of Congress. Obviously such a view cannot be logically reconciled with the "supremacy clause." As Madison put it in 1791: "Interference with the powers of the States is no constitutional criterion of the power of Congress. If the power is not given, Congress cannot exercise it; if given, they may exercise it, although it should interfere with the laws or even the constitution of the State."[2] And Chief Justice Marshall repeatedly repelled the view that the powers which the Constitution does not delegate to the United States served to limit the powers which it does so delegate. The latter, he held, were defined only by the terms of the constitutional grants, which should be liberally construed, by the *express* limitations of the Constitution, and by the discretion of Congress and its responsibility to its constituents.[3] The most recent decisions reaffirm this view. (See pp. 38-43.)

On the other hand, the supremacy of the National Government within its sphere does not enable it to press its otherwise constitutional measures to the extent of menacing the right of the *peoples* of the States to maintain effective governments for State purposes, a principle which is implied both from the nature of the federal system as "an indissoluble Union of indestructible States," and from the guaranty by the United States to "Every State in this Union" of "a republican form of government."[4]

Constitutional Tax Exemption Again

But not only is the "supremacy" clause important as a sort of third dimension of national power, thrusting aside all conflicting State powers; it is also of great significance as having been a source of private immunity, particularly

[2] *Annals of Congress*, col. 1891.
[3] Gibbons *v.* Ogden, 9 Wheat. 1 (1824).
[4] Texas *v.* White, 7 Wall. 700 (1868).

from State taxation. Thus, in the famous case of McCulloch *v.* Maryland,[5] the Court under Chief Justice Marshall held that a State may not tax an "instrumentality" of the National Government even by a non-discriminatory tax; and on the basis of this rule it was later held that a State may not reach by a general tax national official salaries or incomes from national bonds.[6] Then in a case decided in 1928 the Court ruled that a State tax on sales of gasoline might not be validly applied in the case of sales of the commodity to the National Government for use by its Coast Guard Fleet and a Veterans' Hospital, thus prompting the query whether a butcher who sold meat to a Congressman would be subject validly to State taxation on such sales or on the profits thereof![7] In recent cases, however, the Court has greatly curtailed the operation of the principle of tax exemption not only as a limitation on national power, but as a limitation on State power also, and especially in the field of income taxation (see pp. 23-24). Congress is still able, by virtue of the "necessary and proper" and "supremacy" clauses, to exempt instrumentalities of the National Government, or private gains therefrom, from State or local taxation; but any person, natural or corporate, claiming such an exemption must ordinarily be able to point to an explicit stipulation by Congress to that effect. Moreover, Congress is always free to waive such exemptions when it can do so without breach of contract, and any such waiver will generally be liberally construed by the Court in favor of the taxing authority.[8]

[5] 4 Wheat. 316 (1819).

[6] See *Supplement to National Municipal Review*, XIII, No. 1 (January 1924).

[7] Panhandle Oil Co. *v.* Miss., 277 U.S. 218 (1928). Cf. Union Pac. R.R. Co. *v.* Peniston, 18 Wall. 5 (1873).

[8] Besides the leading case of Graves *v.* N.Y., 306 U.S. 466 (1939), see such recent cases as Pittman *v.* HOLC, 308 U.S. 21 (1939); Tradesmen's National Bank *v.* Okla. Tax Com's'n, 309 U.S. 560 (1940); Philadelphia Co. *v.* Dipple, 312 U.S. 168 (1941); and Cleveland *v.* U.S., 323 U.S. 329 (1945). Cf., however, Mayo *v.* U.S., 319 U.S. 441 (1943). An early case

Finally, this paragraph, in establishing the obligation of State judges to prefer "this Constitution, the laws of the United States which are made in pursuance thereof," and the treaties of the United States, to conflicting State laws and constitutions, renders the local courts, in cases coming before them, a first line of defense of national against State power. But suppose a State court thinks an act of Congress *not* to be "in pursuance" of the Constitution, may it then prefer the conflicting State law? It has been so assumed from an early date; but, as we have already seen, such determinations by State courts are not final (see pp. 122-123).

¶3. The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office of public trust under the United States.

National Duties of State Officers

State officers have many duties, both positive and negative, laid upon them by the Constitution (see Article I, Section III, ¶1; Section IV, ¶1; Section X; Article II, Section I, ¶2; Article III, Section II, ¶2; Article IV, Sections I and II; Article V; Amendments XIII, XIV, XV, XVII, and XIX), and Congress may frequently increase these by virtue of its "necessary and proper" powers, provided it does not require them to act outside their normal field of authority.[9] Thus the Draft Act of 1917 was enforced to a great extent through State officers; while

sustaining a Congressional waiver of exemption is Austin *v.* Alderman, 7 Wall. 694 (1869).

[9] *Ex parte* Siebold, 100 U.S. 371. See also Houston *v.* Moore, 5 Wheat. 1 (1820); Wayman *v.* Southard, 10 Wheat. 1 (1825); Prigg *v.* Pa., 16 Pet. 539 (1842); United States *v.* Jones, 109 U.S. 513 (1883); Robertson *v.* Baldwin, 165 U.S. 275 (1897); and Parker *v.* Richard, 250 U.S. 235 (1919).

nowadays there is constant cooperation, both in peacetime and in wartime, in many fields between national and State officers and official bodies.[10]

Indeed, the possible uses to which the State governments might be put as agents of the National Government have never yet been fully appreciated, but it may be supposed that as the powers of Congress expand and those of the State governments correspondingly contract, the latter may be utilized more and more by the National Government for administrative purposes.[11]

"Religious Test"

A "religious test" is one demanding the avowal or repudiation of certain religious beliefs. While no religious test may be required as a qualification for office under the United States, indulgence in immoral practices claiming the sanction of religious belief, such as polygamy, may be made a disqualification.[12] Contrariwise, alleged religious beliefs or moral scruples do not furnish ground for evasion of the ordinary duties of citizenship, like the payment of taxes or military service, although, of course, Congress may of its own volition grant exemptions on such grounds. The related subject of "religious freedom" is discussed immediately below (see pp. 149-150).

"Oath or affirmation": This option was provided for the special benefit of the Quakers.

[10] See Jane P. Clark, *The Rise of a New Federalism*, chs. II-V (Columbia University Press, 1938).

[11] For an interesting discussion of the constitutional aspects of this question, see Professor James Hart's article in 13 *Virginia Law Review*, 86-107 (1926), apropos of President Coolidge's order of May 8, 1926, for Prohibition Enforcement.

[12] Reynolds *v.* U.S., 98 U.S. 145 (1878); Mormon Church *v.* U.S., 136 U.S. 1 (1890), support this proposition, assuming they are still law of the land.

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.

The Constitution an Act of Revolution

The Articles of Confederation provided for their own amendment only by the unanimous consent of the thirteen States, given through their legislatures. The provision made for the going into effect of the Constitution upon its ratification by *nine* States, given through *conventions* called for the purpose, clearly indicates the establishment of the Constitution to have been, in the legal sense, an act of revolution.

¶ Done in convention by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

George Washington, President, and Deputy from Virginia.

New Hampshire—John Langdon, Nicholas Gilman.

Massachusetts—Nathaniel Gorham, Rufus King.

Connecticut—William Samuel Johnson, Roger Sherman.

New York—Alexander Hamilton.

New Jersey—William Livingston, David Brearly, William Patterson, Jonathan Dayton.

Pennsylvania—Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas Fitzsimons, Jared Ingersoll, James Wilson, Gouverneur Morris.

Delaware—George Read, Gunning Bedford, Jr., John Dickinson, Richard Bassett, Jacob Broom.

Maryland—James McHenry, Daniel of St. Thomas Jenifer, Daniel Carroll.

Virginia—John Blair, James Madison, Jr.

North Carolina—William Blount, Richard Dobbs Spaight, Hugh Williamson.
South Carolina—John Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler.
Georgia—William Few, Abraham Baldwin.

ATTEST: WILLIAM JACKSON, *Secretary.*

AMENDMENTS[1]

The Bill of Rights

THE first ten amendments make up the so-called Bill of Rights of the National Constitution. They were designed to quiet the fears of mild opponents of the Constitution in its original form and were proposed to the State legislatures by the first Congress which assembled under the Constitution. They bind only the National Government and in no wise limit the powers of the States of their own independent force;[2] but the rights which they protect against the National Government are, nevertheless, today not infrequently claimable against State authority under the Court's interpretation of the "due process" clause of the Fourteenth Amendment.[3]

[1] The first ten amendments were proposed in 1789 and adopted in 810 days. The Eleventh Amendment was proposed in 1794 and adopted in 339 days. The Twelfth Amendment was proposed in 1803 and adopted in 229 days. The Thirteenth Amendment was proposed in 1865 and adopted in 309 days. The Fourteenth Amendment was proposed in 1866 and adopted in 768 days. The Fifteenth Amendment was proposed in 1869 and adopted in 356 days. The Sixteenth Amendment was proposed in 1909 and adopted in 1278 days. The Seventeenth Amendment was proposed in 1912 and adopted in 359 days. The Eighteenth Amendment was proposed in 1917 and adopted in 396 days. The Nineteenth Amendment was proposed in 1919 and adopted in 444 days. The Twentieth Amendment was proposed in 1932 and adopted in 327 days. The Twenty-first Amendment was proposed in 1933 and adopted in 286 days. For these statistics, which were compiled by Rep. Everett M. Dirksen of Illinois, see the *New York Times*, February 21, 1937. Several of the amendments were, however, the outcome of many years of agitation.

[2] Barron *v.* Balt., 7 Pet. 243 (1833).

[3] See Near *v.* Minn., 283 U.S. 697 (1931); Powell *v.* Ala., 287 U.S. 45 (1943); Palko *v.* Conn., 302 U.S. 319 (1937).

Also, the efficacy of the Bill of Rights as a restriction on the National Government is confined to the territorial limits of the United States, including within that term the "incorporated" territories (see pp. 136-137), except when "fundamental rights" are involved, it being for the Supreme Court to say what rights are "fundamental" in this sense.[4] The right to trial by jury, an inherited feature of Anglo-American jurisprudence, is not such a right;[5] immunity from "cruel and unusual punishment" is.[6]

AMENDMENT I

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

Religious Freedom

Congress may make *no law at all* "respecting an establishment of religion," nor yet "prohibiting the free exercise" of religious belief; and it may not make laws which *abridge* "the freedom of speech or of the press" or the rights of assembly and petition.

The religious freedom here envisaged has two aspects. It "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship," and conversely it "safeguards the free exercise of the chosen form of religion."[1] But "the free exercise thereof" does not embrace actions which are "in violation of social duties or subversive of good order"; hence it was within Congress's power to prohibit polygamy in the territories.[2] So

[4] Downes *v.* Bidwell, 182 U.S. 244 (1901).
[5] Dorr *v.* U.S., 195 U.S. 138 (1904).
[6] Weems *v.* U.S., 217 U.S. 349 (1910).
[1] J. Roberts for the Court in Cantwell *v.* Penn., 310 U.S. 296 at 303 (1940).
[2] Reynolds *v.* U.S., 98 U.S. 145 (1878). See also Davis *v.* Beason, 133 U.S. 333 (1890); and Mormon Church *v.* U.S., 136 U.S. 1 (1890). It was never intended that the First Amendment to the Constitution "could

it was held in 1878, and sixty-two years later, the Court added these words of qualification to a decision setting aside a State enactment as violative of religious freedom: "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public."[3] Yet four years later, when the promoters of a religious sect, whose founder had at different times identified himself as Saint Germain, Jesus, George Washington, and Godfre Ray King, were convicted of using the mails to defraud by obtaining money on the strength of having supernaturally healed hundreds of persons, they found the Court in a softened frame of mind. Although the trial judge, carefully discriminating between the question of the truth of defendants' pretensions and that of their good faith in advancing them, had charged the jury that it could pass on the latter but not the former, this caution did not avail with the Court, which upset a verdict of "guilty."[4] The Chief Justice, speaking for himself and Justices Roberts and Frankfurter, dissented: "I cannot say that freedom of thought and worship includes freedom to procure money by making knowingly false statements about one's religious experiences"[5]—which sounds uncommonly like common sense. The ultimate fate of these defendants is still undetermined, and meantime fifty-nine recently convicted polygamists have decided to try their luck with the Court.

"An establishment of religion" means a state church,

be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society," 133 U.S. at 342.

[3] 310 U.S. at 306. *Semble* that the Constitution does not protect one in uttering obscene, profane, or libelous words, even with pious intent. Chaplinsky *v.* N.H., 315 U.S. 568 (1942).

[4] United States *v.* Ballard, 322 U.S. 78 (1944). The Court's disposal of the case was exceedingly curious, and was perhaps intended as a "stall," which would permit it to set its thinking on the general problem of religious liberty in better order, something very much needed. See pp. 192-195 below.

[5] 332 U.S. at 88-89.

such as for instance existed in Massachusetts for more than forty years after the adoption of the Constitution.

Freedom of Speech and Press

What is an *abridgment* of freedom of speech or press? According to Blackstone, who was the oracle of the common law when the First Amendment was framed, "liberty of the press consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman," he asserted, "has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, and illegal, he must take the consequences of his own temerity. . . . To punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty."[6] Also, as the law stood at that time, the question whether a publication or oral utterance was of "a pernicious tendency" was, in a criminal trial, a question not for the jury but for the judge; nor was the truth of the utterance any defense.

The idea of freedom of utterance which has become established in American constitutional law is both broader and more flexible than this. Previous restraints are allowable "in exceptional cases, such as publications in time of war, which would be a hindrance to national effort, or obscene publications, or publications inciting to violence and overthrow by force of orderly government."[7] On the other hand, the law may not constitutionally punish all utterances which it may not subject to previous censure.

[6] 4 *Blackstone Comms.*, 151.
[7] Near *v.* Minn., 283 U.S. 697 (1931); see especially headnote 8.

The principal source of Congress's authority in this respect outside the territories and the District of Columbia is, of course, its power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the National Government (see Article I, Section VIII, ¶18); and naturally restraints which may be necessary and proper for this purpose at one time may not be so at another. In wartime, when even the privilege of the writ of *habeas corpus* may be suspended (see Article I, Section IX), freedom of speech and publication may be drastically curbed, both directly, by the imposition of penalties for forbidden utterances, and indirectly by the withholding of information at the source. In quieter times restraint "must find its justification in a reasonable apprehension of danger to organized government."[8] The Alien Registration Act of June 28, 1940, makes it a penal offense against the United States to advocate "knowingly" the desirability of overthrowing by force and violence "any government in the United States," to print or publish matter advocating violence "with intent to cause the overthrow" of any such government, or to help organize any group or society advocating violence, etc.[9] While these provisions are probably constitutional, their enforcement today would be likely to be cushioned by the "clear and present danger" rule, originally urged by Justices Holmes and Brandeis in dissenting opinions in connection with convictions after the last war under the Espionage Act of 1918.[10] The practical significance of the rule is that the Supreme Court reserves the right in connection with any prosecution for forbidden utterances to say whether the defendant made them in circumstances which created "a clear and present danger" that they would lead to violence,

[8] Herndon *v.* Lowry, 301 U.S. 242, at 258 (1937).

[9] U.S. Code, tit. 18, §10.

[10] See especially Abrams *v.* U.S., 250 U.S. 616, at 630 (1919); and Gitlow *v.* N.Y., 268 U.S. 652, at 672-673 (1925).

either the violence the defendant advocated, or any other kind. The application of a reinforced version of the "clear and present danger" rule in limitation of the judicial power to punish contempts was mentioned on an earlier page (see p. 114).

Congress's control over the newspaper press is reinforced by its control of the mails. Few newspapers or periodicals can profitably circulate except locally unless they enjoy the "second class privilege," that is, the privilege of specially low rates, and this privilege is under the practically absolute control of Congress, which may be delegated to the Postmaster General.[11] Moreover, Congress may banish from the mails altogether, as well as from the channels of interstate commerce, indecent, fraudulent, and seditious matter.[12] For there can be no right to circulate what there is no right to publish, circulation indeed being only an incident of publication. Nor is it an invasion of freedom of the press to require a newsgathering agency to treat its employees in the same way as other employers are required to treat theirs; or to subject it to the anti-monopoly provisions of the Sherman Anti-Trust Act.[13]

The Right of Assembly

The right of assembly is also to be defined with reference to the primary necessity of good order. Under the common law any assemblage was illegal which aroused the apprehensions of "men of firm and rational mind with families and property there," and it is not unlikely that the First Amendment takes this principle into account.[14]

[11] United States *ex rel.* Milwaukee Soc. Dem. Pub. Co. *v.* Burleson, 255 U.S. 407 (1921), and cases there cited.

[12] *In re* Rapier, 143 U.S. 110 (1892); Public Clearing House *v.* Coyne, 194 U.S. 497 (1904); Lewis Pub. Co. *v.* Morgan, 229 U.S. 288 (1913).

[13] Associated Press *v.* NLRB, 301 U.S. 103 (1937); Associated Press *v.* U.S., decided June 18, 1945.

[14] See a valuable article by J. M. Jarrett and V. A. Mund, "The Right of Assembly," in 9 *New York University Law Quarterly Review*, 1-38 (1931). People *v.* Kerrick, 261 Pac. Rep. (Calif.) 756 (1927); and State *v.* Butterworth, 104 N.J.L. 579 (1928), are two modern cases which were

The great majority of the decisions of the Court touching freedom of religion, speech, press, and assembly within recent years have stemmed from the theory that these rights are protected against the States by the "due process" clause of Amendment XIV. The subject is dealt with below (see pp. 188-195). It is relevant at this point, however, to raise the question whether doctrines which are suitable enough as restraints on local governmental authorities should be regarded as invariably appropriate against agencies of the National Government, to which is more and more attributed the power of dealing with serious emergencies affecting the country's peace and prosperity.

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.

The Right to Bear Arms

The expression "a free State" is obviously here used in the generic sense, and refers to the United States as a whole rather than to the several States (see Article I, Section VIII, ¶s 15 and 16).

The amendment does not cover concealed weapons, the right "to bear arms" being the right simply to bear them openly. Nor will the Court apply it to sawed-off shot-guns, being unable to say of its own knowledge that their possession and use furthers in any way the preservation of a "well regulated militia."[1] Moreover, this

thoroughly argued and carefully decided. "Although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral." J. Brandeis, concurring in Whitney *v.* Calif., 274 U.S. 357 (1927).

1 United States *v.* Miller, 307 U.S. 174 (1939), sustaining the National Firearms Act of June 26, 1934 (U.S. Code, 1940 Ed., tit. 26, §§2720-2733), which levies a virtually prohibitive tax on the transfer of such weapons and requires their registration. J. McReynolds' opinion for the Court in this case contains interesting historical data regarding the antecedents

right, being a right of citizenship rather than of person, may be denied aliens, at least on reasonable grounds.[2]

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.

This and the following Amendment sprang from certain grievances which contributed to bring about the American Revolution. They recognize the principle of the security of the dwelling which was embodied in the ancient maxim that a man's house is his castle.

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.

"Unreasonable Searches and Seizures"

This Amendment reflected the abhorrence of the times against so-called "general warrants," from which the Colonists had suffered more or less.[1] Today it owes its chief importance from the doctrine first laid down by the Court in 1886 in Boyd *v.* United States,[2] that the above provisions must be read in conjunction with the "self-incrimination" clause of Amendment V, so that when any seizure of papers or things is "unreasonable" in the

of Amendment II. The Second War Powers Act contains a provision which restricts the President's power to requisition property by requiring that it be not construed so as "to impair or infringe in any manner the right of the individual to keep and bear arms." U.S. Code, tit. 50—War, Appx.—§636.

[2] Patsone *v.* Pa., 232 U.S. 139 (1914) deals with a closely analogous point.

[1] Hutchinson, *Foundations*, 293-298.

[2] 116 U.S. 616.

sense of the Fourth Amendment, such papers and things may not, under the Fifth Amendment, be received by any federal court in evidence against the person from whom they were seized.

This rule was brought into prominent notice a few years ago in connection especially with the efforts to enforce National Prohibition. Some cases of seizure by United States agents operating *without search warrants* which were held at that time by the Court to be violative of the Fourth Amendment are the following: The obtaining by stealth of letters from the home of an accused during his absence;[3] the removal of liquors in similar circumstances;[4] the seizure of narcotics at the home of one of several conspirators, following their arrest at the home of another some distance away.[5] On the other hand, an officer does not have to obtain a warrant in order to search a vehicle which he has "probable cause" to believe is conveying things in violation of law;[6] and the fruits or implements of crime may be seized without a warrant at the time and place of the arrest of the suspect.[7] Nor is it a violation of the amendment for federal officers to "listen in" on conversations carried on over the telephone by persons suspected of crime, nor to use a detectaphone to gather a conversation between such persons in an adjoining room, conversations not being "effects" or "things."[8]

Nor do all arrests—that is, seizures of the person—have to be on a warrant. Anyone may arrest another whom he sees attempting to commit a felony or forcible breach of the peace; and a peace officer may arrest on reasonable

[3] Weeks *v.* U.S., 232 U.S. 383 (1914).
[4] Amos *v.* U.S., 255 U.S. 313 (1921).
[5] Agnello *v.* U.S., 269 U.S. 20 (1925).
[6] Carroll *v.* U.S., 267 U.S. 132 (1925).
[7] Adams *v.* N.Y., 192 U.S. 585 (1904).
[8] Olmstead *v.* U.S., 277 U.S. 478 (1928); Goldman *v.* U.S., 316 U.S. 129 (1942).

grounds of suspicion of felony.[9] Indeed, even a house may be entered without a warrant in order to effect the arrest of a person known to be there, for treason, felony, or breach of the peace;[10] and the same principle would doubtless justify a seizure without a warrant of contraband clearly discernible by the senses.

But where a warrant is required positive evidence must support the application for it, and if granted in too sweeping terms a search or seizure under it will be "unreasonable" and so unconstitutional;[11] nor will a warrant calling for the seizure of one thing authorize the seizure of something else.[12]

"Houses" means dwelling-places, not places of business. The security thrown by the common law about the former did not reach the latter; far less did it extend to the open fields.[13]

This subject is further dealt with below, in comment on Amendment V. (See pp. 161-163.)

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 offense 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.

[9] Bad Elk *v.* U.S., 177 U.S. 529 (1900), sums up the common law on this point. See also 5 *Corpus Juris*, 395-407; and H. L. Wilgus, "Arrest without Warrant," 22 *Michigan Law Review*, 541, 673, 798 (1924).
[10] Cooley, *Principles*, 230-231.
[11] Hale *v.* Henkel, 201 U.S. 43 (1906).
[12] Byars *v.* U.S., 273 U.S. 28 (1927).
[13] Hester *v.* U.S., 265 U.S. 57 (1924).

Rights of Accused Persons

Amendments IV, V, VI, and VIII constitute a "bill of rights" for accused persons. For the most part they were compiled from the Bills of Rights of the early State constitutions, and in more than one respect they represented a distinct advance upon English law of that time and indeed for many years afterward.

"Infamous crime" is one rendered so by the penalty attached to it. Any offense punishable by imprisonment, or loss of civil or political privileges, or hard labor, is, the Court has held, "infamous" in the sense of the Constitution.[1]

"Presentment or indictment": A presentment is returned upon the initiative of the grand jury; an indictment is returned upon evidence laid before that body by the public prosecutor.

The "grand jury" here stipulated for is the grand jury as it was known to the common law, and so consists of at least twelve and not more than twenty-three persons chosen from the community by a process prescribed by law. Once constituted it has large powers of investigation, but its presentments or indictments must have the support of at least twelve members.

Courts-Martial and Military Commissions

"The land and naval forces" are, of course, subject to military law, administered through the court-martial (see Article I, Section VIII, ¶14). But the exception has also a broader purpose, namely, "to authorize the trial by court martial of the members of our armed forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts."[2] The term "land and naval forces" includes camp followers as well as enrollees;[3] but in the

[1] *Ex parte* Wilson, 114 U.S. 417 (1885); United States *v.* Moreland, 258 U.S. 433 (1922).

[2] *Ex parte* Quirin ("The Case of the Saboteurs"), 317 U.S. 1 at 43 (July Special Term, 1942).

[3] Burdick, *Law of the American Constitution*, 264, and cases there cited.

Case of the Saboteurs[4] who landed on our shores in June, 1942, from German submarines and were later picked up in civilian dress in New York City and Chicago by the FBI, the Court declined to say that it included enemy personnel who were found in disguise within our lines and so were charged with violating the laws of war. The Court's position was that such cases were never deemed to fall within the guaranties of the amendments, citing in this connection Section 2 of the Act of Congress of April 10, 1806, which, following the Resolution of the Continental Congress of August 21, 1776, imposed the death penalty on alien spies "according to the law and usage of nations, by sentence of a general court martial."[5] The trial of the saboteurs by military commission was consequently held to be within the merged powers of the President and Congress. The argument is not altogether persuasive so far as its purport is to restrict the meaning of the phrase "cases arising in the land and naval forces." The broader proposition that the seven alien saboteurs were not entitled to plead the guaranties of the Constitution seems not to have been urged by the Government, possibly because the eighth was a citizen of the United States.[6]

"In time of war or public danger": In other words, the Fifth Amendment is designed for times of war as well as for times of peace. But it is obvious that in order to en-

[4] Note 2 above.

[5] 317 U.S. at 41.

[6] The Court cites Major André's case as offering a parallel of that of the saboteurs. But André was caught red-handed by American soldiers between the lines of the two armies, in the immediate field of their operations. For a latitudinarian view of the jurisdiction of courts martial, see Charles Warren, "Spies and the Power of Congress to Subject Certain Classes of Civilians to Trial by Court Martial," *American Law Review*, March-April, 1919, pp. 195-228; also the 82nd Article of War: "Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere [N.B.], shall be tried by a general court martial or by a military commission, and shall, on conviction thereof, suffer death." U.S. Code, tit. 10, §1554.

force its provisions, as well as those of the following amendment, the courts must be open and functioning properly.[7] (See also Article I, Section IX, ¶2.)

Double Jeopardy

"Twice in jeopardy": There is still standing a decision of the Court to the effect that a person has been in jeopardy when he has been regularly charged with a crime before a tribunal properly organized and competent to try him, certainly so after acquittal.[8] Some State courts hold, on the other hand, that the trial must have been without legal error, with the result of putting the government on an equality with the accused as regards the right to take appeals on questions of law,[9] and a recent decision of the Court rules that this view of the matter does not violate "fundamental rights."[10]

If the jury cannot agree, or if it was illegally constituted, there is no trial, and so no jeopardy, under the clause; and the same result follows where a verdict of conviction is set aside on appeal by the accused.[11]

This question arises: When the same deed is an offense under two different laws, may the author of the deed be tried under both laws? If one law was a national law and the other a State law, then the clause, since it governs only the National Government, has no application.[12] If, however, both laws were enactments of Congress, then the test would be whether the two offenses are distinguishable by requiring somewhat different evidence in proof of each.[13] Thus, in the case referred to, a drunken

[7] *Ex parte* Milligan, 4 Wall. 2 (1866). The attempt of counsel of the Saboteurs to invoke this case in behalf of their clients was countered by the Court by pointing out that Milligan had not surrendered his civilian status.

[8] Kepner *v.* U.S., 195 U.S. 100 (1904); see also United States *v.* Oppenheimer, 242 U.S. 85 (1916).

[9] S. E. Baldwin, *The American Judiciary*, 248-249 (New York, 1905).

[10] Palko *v.* Conn., 302 U.S. 319 (1937).

[11] United States *v.* Perez, 9 Wheat. 579; Trono *v.* U.S., 199 U.S. 521.

[12] United States *v.* Lanza, 260 U.S. 377; Jerome *v.* U.S., 318 U.S. 101 (1943).

[13] Gavieres *v.* U.S., 220 U.S. 338 (1911); followed and approved in Blockenburger *v.* U.S., 284 U.S. 299 (1932).

person who insulted a police officer in the public streets was validly prosecuted under different ordinances first for the drunkenness and then for the insult. Also, the clause refers only to criminal liability, so that Congress may, without violating it, "impose both a civil and a criminal sanction in respect to the same act or omission."[14]

"Life or limb" has come to mean, since drawing and quartering have gone out of style, life or liberty.

The Self-Incrimination Clause

"Nor shall be compelled in any criminal case to be a witness against himself": The relation of the Fourth Amendment to the Supreme Court's interpretation of this clause was dealt with above (see pp. 155-156).

The source of this clause was the maxim that "no man is bound to accuse himself (*nemo tenetur prodere*—or *accusare*—*seipsum*)," which was brought forward in England late in the sixteenth century in protest against the inquisitorial methods of the ecclesiastical courts. At that time the common law itself permitted accused defendants to be questioned. What the advocates of the maxim meant was merely that a person ought not to be put on trial and compelled to answer questions to his detriment unless he had first been properly accused, i.e., by the grand jury. But the idea once set going gained headway rapidly, especially after 1660, when it came to have attached to it most of its present-day corollaries.[15]

The Supreme Court's interpretation of this clause of Amendment V embodies three important propositions: first, an *accused* on trial cannot be required to take the stand at all; secondly, a *witness* in any proceeding whatsoever in which testimony is legally required may refuse

[14] Helvering *v.* Mitchell, 303 U.S. 391 (1938); United States *v.* Hess, 317 U.S. 537 (1943).

[15] See generally J. H. Wigmore, *Evidence in Trials at Common Law*, IV, Section 2250 (2nd ed., 1923); also the present writer's "The Supreme Court's Construction of the Self-Incrimination Clause," 29 *Michigan Law Review*, 1-27, 195-207 (1930).

to answer any question his answer to which might be used as evidence against him in a future criminal prosecution, or which might uncover other evidence against him; thirdly, neither an accused nor a witness may, generally speaking, be required to produce books and papers which might furnish incriminating evidence against them, or which might disclose new evidence.[16]

But a witness must explicitly claim his constitutional immunity or he will not be considered to have been "compelled" to testify;[17] and if an accused does take the stand in his own behalf, he must submit to cross-examination;[18] while if he does not, it is by no means certain that the trial judge may not, without violating the clause draw the jury's attention to the fact;[19] nor does the clause require the exclusion of the body of an accused as evidence of his identity.[20]

Also, the privilege of witnesses is a purely personal one, and hence may not be claimed by an agent or officer of a corporation in its behalf, nor even in his own behalf as regards books and papers of the corporation,[21] a rule which also applies to the case of the custodian of the records of a labor union.[22] Finally, Congress may at any time put the privilege of the clause beyond the reach of a witness by promising him immunity from prosecution;[23] and, indeed, it seems fairly probable that the

[16] Boyd *v.* U.S., 116 U.S. 616 (1886); Counselman *v.* Hitchcock, 142 U.S. 547 (1892).

[17] United States *v.* Monia, 317 U.S. 424 (1943).

[18] Brown *v.* Walker, 161 U.S. 591 (1896); Johnson *v.* U.S., 318 U.S. 189 (1943).

[19] Twining *v.* N.J., 211 U.S. 78 (1908). However, a defendant in a prosecution by the United States enjoys a statutory right to have the jury instructed that his failure to testify creates no presumption against him. U.S. Code, tit. 28, §632 (Act of March 16, 1878); Bruno *v.* U.S., 308 U.S. 287 (1939). See also 318 U.S. at 196.

[20] Holt *v.* U.S., 218 U.S. 245 (1910).

[21] Hale *v.* Henkel, 201 U.S. 43 (1906); Wilson *v.* U.S., 221 U.S. 361 (1911).

[22] United States *v.* White, 322 U.S. 694.

[23] Brown *v.* Walker, cited above.

President may do the same by proffering the witness a pardon for his alleged offense,[24] which must, of course, have been an offense against the United States, otherwise it would not be subject to prosecution by the National Government anyway.

"Liberty," "Property," and "Due Process of Law"

From the point of view of constitutional limitations on power, and so from the point of view of the control exercised by the Supreme Court, through judicial review, upon the powers of government, whether State or national, in the United States, this clause and its companion piece, the "due process of law" clause of Amendment XIV, are the most important clauses of the Constitution.[25]

"Liberty" meant at the common law little more than the right not to be physically restrained except for good cause. Whether the cause was good or not would be inquired into by a court, in connection with an application for a writ of *habeas corpus,* or in connection with an action for damages for false imprisonment.[26] About forty years ago, however, the Court, following the urging of influential members of the American Bar and the lead given by certain of the State Courts, adopted the view that the word "liberty" as used here and in the Fourteenth Amendment was intended to protect the "freedom of contract" of adults engaged in the ordinary employments, especially when viewed from the point of

[24] Cf. Burdick *v.* U.S., 236 U.S. 79 (1915), and Biddle *v.* Perovich, 274 U.S. 480 (1927).

[25] See the present writer on "Due Process of Law before the Civil War," 24 *Harvard Law Review*, 366, 460 (1911); C. W. Collins, *The Fourteenth Amendment and the States* (Boston, 1912); R. L. Mott, *Due Process of Law* (Indianapolis, 1926); *Willoughby On the Constitution*, III, chs. XCI-CV; Benjamin F. Wright, *The Growth of American Constitutional Law* (Boston, 1942); Carl B. Swisher, *American Constitutional Development* (Boston, 1943). The relevant pages in these works can be tracked down through their indexes.

[26] C. E. Shattuck, "The True Meaning of the Term 'Liberty'," 4 *Harvard Law Review*, 365-392 (1891).

view of would-be employers.[27] Then about 1925 the Court took the further step of extending the term as it is used in the Fourteenth Amendment to certain of the rights, described as "fundamental," which were already protected against the National Government by the more specific language of the Bill of Rights, among these being freedom of speech and press.[28] Finally, more recently, the Court, responding to the social teachings of the New Deal, has come practically to dismiss the conception of "freedom of contract" as a definition of "liberty" and to substitute for it a special concern for "the rights of labor," its right to organize, and its right to strike and picket, so long as too obvious violence is avoided. (See pp. 189-190.)

At the common law "property" signified ownership, which was "exercised in its primary and fullest sense over physical objects only," and more especially over land.[29] Today in Constitutional Law it covers each and all of the valuable elements of ownership, and moreover has tended at times to merge with the more indefinite rights of "liberty," as defined above.[30]

It should be noted, however, that the clause does not say that no person "shall be deprived of liberty or property" in any possible circumstances, but that "no person shall be deprived of life, liberty or property *without the process of law*."

Originally, "due process of law" meant simply the modes of *procedure* which were *due* at the common law,

[27] Allgeyer *v.* La., 165 U.S. 578 (1897); Holden *v.* Hardy, 169 U.S. 366 (1898); Lochner *v.* N.Y., 198 U.S. 45 (1905). For the Bar's connection with this development, see Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (Princeton University Press, 1942).

[28] See Charles Warren, "The New Liberty under the Fourteenth Amendment," 39 *Harvard Law Review*, 431-465; also Gitlow *v.* N.Y., 268 U.S. 652 (1925).

[29] T. E. Holland, *Elements of Jurisprudence*, 211 (13th ed.; Oxford, 1924); 2 *Blackstone Comms.*, ch. 1.

[30] See Truax *v.* Raich, 239 U.S. 33 (1915); Truax *v.* Corrigan, 257 U.S. 312 (1921); Duplex Printing Co. *v.* Deering, 254 U.S. 443 (1921); Baldwin, *American Judiciary*, 91-92.

especially in connection with the accusation and trial of supposed offenders. It meant, in short, the kind of procedure which is described in detail in the more definite provisions of Amendments V and VI.[31] Today "due process of law" means "reasonable" law or "reasonable" procedure, that is to say, what a majority of the Supreme Court find to be *reasonable* in some or other sense of that extremely elastic term. In other words, it means, in effect, *the approval of the Supreme Court*; but, as will be pointed out presently, this approval will sometimes be extended on easier terms than at others.

Administrative Proceedings

"Due process of law" requires that criminal cases be tried judicially and in accordance with the specifications of Amendments V and VI; also that "actions at common law"—that is, suits for damages—be tried by a jury if more than twenty dollars is involved. Not so with Administrative Proceedings, which in recent decades have become an important feature of government, both in the National Government and in the States.

For example, Congress has delegated to the Interstate Commerce Commission the power to set "reasonable rates," and when the Commission orders a carrier to observe a certain rate as "reasonable," the Court will sustain its order as having been set by "due process of law," provided the Commission did not act "arbitrarily" but gave the carrier an opportunity to be heard, that it observed all the rules of law which the Court has laid down for such cases (see p. 31), and finally that its findings of fact were sustained by "substantial evidence."[32]

[31] See the articles cited in note 25 above; Murray's Lessee *v.* Hoboken Land & Imp. Co., 18 How. 272 (1856); Hurtado *v.* Calif., 110 U.S. 516 (1884).

[32] Interstate Com. Com's'n *v.* Un. P. R.R. Co., 222 U.S. 541 (1912); Interstate Com. Com's'n *v.* L. & N. R.R. Co., 227 U.S. 88 (1913). And, of course, the same rules held far more recently created administrative bodies. See Consolidated Edison Co. *v.* NLRB, 305 U.S. 197 (1938); Opp Cotton Mills *v.* Administrator of Wage and Hr. Div. etc., 312 U.S. 126 (1941).

In more general terms, "due process of law" in administrative proceedings means: first, a fair hearing for the party whose interests are involved, by the administrative agency making the decision,[33] secondly, final interpretation of the law or laws which are involved, by the courts; thirdly, such review of the administrative body's findings of facts as the Court thinks desirable for that kind of case.[34] It should be noted, however, that whenever the Court holds an administrative finding of fact to be subject to judicial review, it thereby slows down the enforcement of the legislation involved very materially. In fact, State regulation of public utility rates had at one period been rendered largely farcical by this type of judicial review.[35] (See p. 125.)

"Reasonable" Law

But as was earlier indicated, this clause also goes to the substantive content of legislation, or in other words, requires that Congress exercise its powers "reasonably," that is to say, *reasonably in the judgment of the Court.* A similar requirement is laid upon the State legislatures by the Fourteenth Amendment, but with two differences which potentially operate to Congress's advantage. In the first place, whereas the "police power" of the States is an indefinite power to provide for "the public health, safety, morals, and general welfare," most of Congress's powers are defined by reference to a specified subject-matter, like "post offices and post roads," "commerce among the States," etc., and this difference is sufficient to invoke in Congress's favor and against the States the rule of legal interpretation that the specific is to be preferred to the general. In the second place, the Fifth

[33] Morgan *v.* U.S. 304 U.S. 1 (1938); and Shields *v.* Utah Idaho Central R.R. Co., 305 U.S. 177 (1938).

[34] See generally John Dickinson, *Administrative Justice and the Supremacy of Law* (Cambridge, 1927).

[35] See J. Brandeis, dissenting, in St. Joseph Stocky'ds Co. *v.* U.S., 298 U.S. 38 (1936); also Crowell *v.* Benson, 285 U.S. 22 (1932).

Amendment contains no "equal protection" clause, but this does not signify that the Court will not pass upon the soundness of the factual justification urged in support of a specially drastic discrimination by the National Government against a particular class of its citizens, as, for example, that which characterized its policies toward the West Coast Japanese early in World War II. (See pp. 57-58.)

Narrow Versus Broad Judicial Review

And in another respect national and State legislation stand much more nearly on a parity with each other, since in the case of both the Court has at all times available from its own past decisions two widely different approaches to the question of the "reasonableness" of a challenged legislative measure, and hence of its conformity with the "due process of law" requirement. One approach is furnished by the proposition that a legislative act is presumed to be valid, and deduces from this the further one that if facts *could* exist which would render the legislation before it "reasonable," it must be assumed by the Court that they did exist.[86] The other, on the contrary, invokes the idea that "liberty is the rule and restraint is the exception," and hence demands that special justification be adduced in support of any new inroad upon previous freedom of action, as almost any law is bound to be.[87]

In other words, under the latter rule the Court does something very like what Congress did in the first place, in balancing the apparent detriments of the statute from the point of view of "liberty" or "property" as against its anticipated benefits from the point of view of "public policy." And it was from this approach that the Court in 1923, being then very much under the influence of laissez-faire concepts of governmental power, set aside as

[86] Munn *v.* Ill., 94 U.S. 113 (1876); Powell *v.* Pa., 127 U.S. 678 (1888). See also J. Stone, in United States *v.* Carolene Products Co., 304 U.S. 144 (1938).

[87] Adkins *v.* Children's Hospital, 261 U.S. 525 at 546.

"unreasonable" and "arbitrary" an act of Congress establishing a minimum wage for women industrially employed in the District of Columbia[38]—a decision which it overturned in 1936,[39] under the influence of the New Deal ideology.[40]

The Power of Eminent Domain

The power which the Government exerts when it "takes private property" for "public use" is called the power of eminent domain. Before the Civil War it was generally denied that the National Government could exercise the power of eminent domain within a State without the consent of the State[41] (see Article I, Section VIII, ¶17). Today, however, it is well settled that the National Government may take property by eminent domain whenever it is "necessary and proper" for it to do so in order to carry out any of the powers of the National Government; and that it may, in proper cases, vest this power in corporations chartered by it.[42]

Property is "taken," generally speaking, only when title to it is transferred to the Government or the Government takes over or assumes to control its valuable uses, or when, in the case of land, it commits a deliberate and protracted trespass.[43] It is not "taken" simply because its value declines in consequence of an exertion of lawful power by the Government. Thus, Congress may lower the tariff or declare war, etc., without having to compensate those who suffer losses as a result of its action.[44]

What is a "public use?" Existing precedents yield a broad definition of this term in connection with both

[38] The case just cited.
[39] West Coast Hotel *v.* Parrish, 300 U.S. 379 (1937).
[40] See Swisher, *op. cit.*, note 25 above, chs. 34 and 35.
[41] The present writer's *National Supremacy*, 262-263.
[42] Kohl *v.* U.S., 91 U.S. 367 (1875); California *v.* Pac. Cent. R.R. Co., 127 U.S. 1 (1888); Luxton *v.* No. R. Bridge Co., 153 U.S. 525 (1894).
[43] United States *v.* Gr't Falls M'f'g Co., 112 U.S. 645 (1884); Portsmouth Harbor Land & Hotel Co. *v.* U.S., 260 U.S. 327 (1922).
[44] Knox *v.* Lee, 12 Wall. 457 (1871); Omnia Com'l Co. *v.* U.S., 261 U.S. 502 (1923).

the taxing power and the power of eminent domain, when these are exercised by the States, and there is no reason why the same rule should not hold when the like powers are exercised by the National Government.[45]

"Just compensation" must be determined by an impartial body, not necessarily a court or a jury.[46] (See also p. 32.)

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 defense.

The Requisites of Trial by Jury

Such trial is by the common law jury of twelve, whose verdict of "guilty" or "not guilty" must be unanimous to convict or acquit.[1] By the theory of the common law the court was judge of the law and the jury was judge of the facts, nor could the jury be called to account by the court for its determinations within its proper field any more than the court could be called to account by the jury.[2] In actual practice, nevertheless, the judge had great freedom in advising the jury concerning his own impressions of the merits of a case, the weight of the evi-

[45] Green *v.* Frazier, 253 U.S. 233 (1920). And cf. United States *v.* Gettysburg Elec. R. Co., 160 U.S. 668 (1896).

[46] Bauman *v.* Ross, 167 U.S. 548 (1897).

[1] Maxwell *v.* Dow, 176 U.S. 581 (1900). For the history of the jury see J. B. Thayer, *Preliminary Treatise on Evidence*, ch. II (Boston, 1898); also the excellent sketch in A. W. Scott's *Fundamentals of Procedure*, ch. III (New York, 1922).

[2] This distinction of function is noted by Coke. *Co. Lit.* 155b. The independence of the jury was established in 1670, as the result of Bushell's Case. Thayer, *op. cit.*, 166-169.

dence, the reliability of witnesses, and so on.[3] And while this feature of jury trial, too, is an element of the institution as it is embodied in the Constitution a federal judge must always make it clear to the jury that the final determination of all matters of fact rests with the latter, and that his remarks on such matters are advisory only.[4] The right to trial by jury may be waived as to any offense,[5] while except by allowance of Congress it does not extend to petty offenses.[6]

"A speedy trial" means a reasonably speedy trial, and the right to it may be secured by the writ of *habeas corpus*. "Public trial" does not mean one which takes place under the eye of the movie camera, nor even one to which the public at large is admitted. It is enough if representatives of the public, and especially friends of the prisoner, are admitted in order to see that justice is done.

"State and district": The jury must be drawn from the vicinage of the crime, it being assumed that this will be ordinarily the residence of the accused, who will thus be guaranteed a trial by his neighbors. But in modern conditions the vicinage of the crime may run over and beyond the boundaries of several States; while persons charged with conspiring to violate the laws of the United States or to defraud the National Government may be

[3] *Ibid.*, ch. III, *passim*. Thayer declares it "impossible to conceive" of jury trial existing at any stage of English history in a form that "would withhold from the jury the assistance of the court in dealing with facts. Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words." *Ibid.*, 188n. "The jury works well in England because the bench is stronger than the bar." W. S. Holdsworth, *Some Lessons from Our Legal History*, 85 (New York, 1928).

[4] Quercia *v.* U.S., 289 U.S. 466 (1933). See also Glasser *v.* U.S., 315 U.S. 60 (1942), for an informative opinion touching several constitutional aspects of a criminal trial in a federal court.

[5] Patton *v.* U.S., 281 U.S. 276 (1930).

[6] Schick *v.* U.S., 195 U.S. 65 (1904).

dragged to the remotest parts of the Union on account of something done there by somebody else.[7]

"Nature and cause of the accusation": That is to say, the law must furnish a reasonably definite standard of guilt.[8] Applying the sense of this requirement in interpretation of the "due process" clause of the Fourteenth Amendment, the Court recently set aside a New Jersey statute which penalized "gangsters," but sustained a Minnesota statute which authorized proceedings against "psychopathic personalities." In the latter case the material term had been closely defined by judicial interpretation; in the former it had not.[9]

"Assistance of counsel" is intended to assure an accused that he is kept informed of his rights. It includes assistance in preparing a defense as well as during trial; and while the right may be waived, the Supreme Court will be slow to find a waiver.[10] The relation between a prisoner and his counsel is a confidential one and communications between them may on no account be divulged in court.[11] (See also p. 182.)

Finally, while the criminal law often permits the evidence offered against a defendant to be supplemented by presumptions to his disadvantage, there must always be a rational connection between the facts proved and the fact presumed, a matter as to which the Supreme Court is the final judge under the "due process" clause. Thus it was held to be reasonable for Congress to enact that a defendant who was discovered to be in the possession of opium should be required to assume the burden of prov-

[7] See United States *v.* Johnson, 323 U.S. 273 (1944); U.S. Code, tit. 18, §88; and J. Holmes, dissenting, in Hyde *v.* U.S., 225 U.S. 347 at 384 (1913).

[8] United States *v.* Cohen Grocery Co., 255 U.S. 81 (1921).

[9] Lanzetta *v.* N.J., 306 U.S. 451 (1939); Minnesota *v.* Probate Court, 309 U.S. 270 (1940).

[10] Powell *v.* Ala., 287 U.S. 45 (1932); Johnson *v.* Zerbst, 304 U.S. 458 (1938); Adams *v.* U.S., 317 U.S. 269 (1943).

[11] On the above points see also Cooley, *Principles*, 319-324.

ing that he had not obtained it through illegal importation.[12] On the other hand, it was held recently that there was no such rational connection between the possession of a firearm by a person who had been previously convicted of a crime of violence and the presumption created by the Federal Firearms Act of June 30, 1938, that he had obtained the firearm in violation of the act.[13]

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 reexamined in any court of the United States, than according to the rules of the common law.

Trial by Jury in Civil Cases

The purpose of this Amendment, the Court holds, is to retain the line between the province of the judge and that of the jury in cases comparable to suits at common law, as it stood in 1787. It therefore leaves the judge his power at common law "to instruct the jury on the law and advise them on the facts," as well as his power "to set aside their verdict and order a new trial if in his opinion it is against the law or the evidence."[1] From this point on, the line is not always easy to trace. In general, the Court has held that federal courts of appeal must remand for retrial cases in which they reverse the verdict of a lower court, and may not substitute a judgment of their own on the merits; but the more recent cases somewhat mitigate this view, which obviously favors the law's delays.[2] The amendment applies only to suits at common

[12] Yee Hem *v.* U.S., 268 U.S. 178 (1925).

[13] Tot *v.* U.S., 319 U.S. 463 (1943); cf. U.S. Code, tit. 15, §902 (f). This seems to be only case since "the constitutional revolution" of April 12, 1937, in which a Congressional statute or any part thereof has been disallowed on constitutional grounds. See also 279 U.S. 1 and 639 (1929).

[1] Henry Rottschaeffer, *Handbook of American Constitutional Law*, pp. 866-874 (St. Paul, 1939).

[2] Guthrie Nat'l Bk. *v.* Guthrie, 173 U.S. 528 (1899); Slocum *v.* N.Y. Life Ins. Co., 228 U.S. 364 (1913); Dimick *v.* Schiedt, 293 U.S. 474 (1935); Baltimore & C. Line *v.* Redman, 295 U.S. 654 (1935).

law, and hence does not apply to proceedings in equity, or admiralty, or in those authorized by the bankruptcy statutes or for the collection of the revenues.[8]

AMENDMENT VIII

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

"Excessive bail": This is a matter which is left by the statutes to judicial discretion.

A punishment is "cruel and unusual" if it is unusually severe for the type of offense being dealt with.[1]

AMENDMENT IX

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

The Fundamental Rights of the Individual

In other words, there are certain rights of so fundamental a character that no free government may trespass upon them, whether they are enumerated in the Constitution or not.[1] In point of fact, the course of our constitutional development has been to reduce fundamental rights to rights guaranteed by the sovereign, from the natural rights that they once were—a development reflected especially in the history of the "due process of law" clause.

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.

The Reserved Rights of the States

The earliest official interpreters of the Constitution regarded this amendment as merely stating the truism that not all powers are delegated to the National Govern-

[8] Rottschaeffer, *loc. cit.*

[1] Weems *v.* U.S., 217 U.S. 349 (1910).

[1] See Justice Chase's opinion in the early case of Calder *v.* Bull, 3 Dall. 386 (1798); and Loan Assoc. *v.* Topeka, 20 Wall. 655 (1873).

ment.[1] But in the case of City of New York *v.* Miln[2] decided shortly after Chief Justice Marshall's death, a majority of the Court committed itself to the proposition that as to certain of its powers of "internal police" "the authority of a State is complete, unqualified, and exclusive," with the result that the delegated powers of the United States must be defined in such a way as not to invade the fields normally occupied by such State powers; and, as we have previously seen, the Court has at various times reiterated this or equivalent doctrine, although its logical incompatibility with the "supremacy" clause seems clear. (See pp. 142-145.) Recent cases, however, make it clear that it is the doctrine of the Court today, that when an exercise of national power is *otherwise* constitutional, there is no reserved power to nullify it.[3]

"United States" means primarily the political branches of the National Government; but the term may be comprehensive enough to include any authority which was created by and which rests upon the Constitution, as for instance, the power of amending it (see Article V).

"States" means the State governments and the people of the States.

"The people" means the people of the United States as constituting one sovereign political community; that is, the same people who ordained and established this Constitution (see Preamble).

AMENDMENT XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens

[1] See the present writer's *Commerce Power Versus States Rights*, ch. v (Princeton University Press, 1936).
[2] 11 Pet. 102 (1837).
[3] See especially United States *v.* Darby, 312 U.S. 100 (1937).

of another State, or by citizens or subjects of any foreign State.

Suits against States

This amendment was inserted primarily in order to protect the States against suits for debt, which it does, not only against those instituted "by citizens of another State," or "the citizens or subjects of a foreign State," but also those brought by the State's own citizens, or by a foreign state.[1] Otherwise, the amendment has proved comparatively ineffective as a protection of States Rights against federal judicial power. For one thing, a suit is not "commenced or prosecuted" against a State by the appeal of a case which was instituted by the State itself against a defendant who claims rights under the Constitution or laws or treaties of the United States[2] (see Article III, Section II, ¶1). Nor may an officer of a State who is acting in violation of rights protected by the Constitution or laws or treaties of the United States claim the protection of the amendment, inasmuch as, in so acting, he loses his official and representative capacity.[3] Indeed, as was pointed out earlier, the amendment, as construed today, does not forbid the federal courts from enjoining temporarily a State official from undertaking to enforce a State statute *alleged* to be unconstitutional until it has been finally determined whether the statute is constitutional or not.

AMENDMENT XII

¶1. 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

[1] Hans *v.* La., 134 U.S. 1 (1890); Monaco *v.* Mississippi, 292 U.S. 313 (1934).

[2] Cohens *v.* Va., 6 Wheat. 264 (1821).

[3] Osborn *v.* Bk. of U.S., 9 Wheat. 738 (1824); *ex parte* Young, 209 U.S. 123 (1908).

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.

¶2. 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 elegible to that of Vice-President of the United States.

Election of President

This amendment, which supersedes ¶3 of Section I of Article II, of the original Constitution, was inserted on account of the tie between Jefferson and Burr in the election of 1800. The difference between the procedure which it defines and that which was laid down in the original Constitution is in the provision it makes for a separate designation by the Electors of their choices for President and Vice-President, respectively. The final sentence of ¶1, above, has been in turn superseded today by Amendment XX.

In consequence of the disputed election of 1876, Congress, by an act passed in 1887, has laid down the rule that if the vote of a State is not certified by the governor under the seal thereof, it shall not be "counted" unless both houses of Congress are favorable.[1]

It was early supposed that the House of Representatives would be often called upon to choose a President, but the political division of the country into two great parties has hitherto always prevented this, except in 1800 and 1824. Should, however, a strong third party appear, the election might be frequently thrown into Congress, with the result, since the vote would be by States, of enabling a small fraction of the population of the country to choose the President from the three candidates receiving the highest electoral vote. (See p. 83.)

It should be noted that no provision is made by this amendment for the situation which would result from a failure to choose either a President or Vice-President, an inadequacy which Amendment XX undertakes to cure.

The War Amendments

Amendments XIII, XIV, and XV are the so-called War Amendments. Amendment XIII freed the negro from slavery, Amendment XIV made him a citizen and bestowed upon him civil rights, Amendment XV made him a voter.

[1] U.S. Code, tit. 3, §17.

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.

Slavery Abolished

This amendment has been construed by the Supreme Court in the following language: "This amendment was adopted with reference to conditions existing since the foundation of our Government, and the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery, which, in practical operation, were intended to produce like undesirable results. It was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the Army, militia, and the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers."[1]

On January 11, 1944, the late President Roosevelt in a "surprise message" to Congress demanded the enactment of "a national service law which, for the duration of the war, will prevent strikes, and with certain appropriate exceptions, will make available for war production or any other essential services every able-bodied adult in the Nation." Although the proposal was fruitless, the question of its compatibility with the Thirteenth Amendment was widely debated. If men can be compelled to bear arms against the common enemy, why may they not be compelled to the far less perilous task of producing them? Historically the phrase "involuntary servitude" connotes compulsory labor, while the business of fighting is still perhaps tinctured to some extent with romantic associations of other days. But not only do

[1] Butler *v.* Perry, 240 U.S. 328.

such comparisons wilt under critical scrutiny; to the beliefs of democracy and the facts of Total War they have not the slightest relevance. To be sure, some, perhaps much, of the work compelled would have to be done in privately owned plants; but why should this circumstance alter the case if the wage-scale takes as good care of the laborer's financial interests as the price allowed for the plant's output does of its owner's similar interests?[2] (See also pp. 59 and 90-91.)

SECTION II

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

It should be noted that this amendment, in contrast to the opening section of the Fourteenth Amendment, just below, lays down a rule of action for private persons no less than for the States. In other words, as was the Eighteenth Amendment, it is legislative in character; and accordingly, in enforcing it, Congress may enact penalties for the violation of its provisions by private persons and corporations without paying any attention to State laws on the same subject.[3] Of its own force it invalidates any form of contractual liability smacking of peonage.[4]

AMENDMENT XIV

SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

[2] Following the last war there was a great agitation, both in Congress and outside, favoring the enactment of a law under which on the outbreak of war "a universal draft" both of men and property should take place. Although the proposal came to nothing, it aroused considerable discussion of its constitutional aspects. See especially a thoroughgoing article by Joseph M. Cormack entitled "The Universal Draft and Constitutional Limitations," 3 *Southern California Law Review*, 361-383 (1930); also Hearings before the Committee on Military Affairs of the House of Representatives, 68th Congress, 1st Session, on H. J. Res. 128; H.R. 194; H.R. 4841; and H.R. 8111 (Government Printing Office, 1924).

[3] Clyatt *v.* U.S., 197 U.S. 207 (1905).

[4] Bailey *v.* Ala., 219 U.S. 219 (1910); Taylor *v.* Georgia, 315 U.S. 25 (1942).

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.

Citizenship and Civil Rights

The opening clause of this section makes national citizenship primary and State citizenship derivative therefrom. The definition it lays down of citizenship "at birth" is not, however, exhaustive, as was pointed out in connection with Congress's power to "establish an uniform rule of naturalization." (See pp. 47 and 49.)

"Subject to the jurisdiction thereof": The children born to foreign diplomats in the United States are not subject to the jurisdiction of the United States, and so are not citizens of the United States. With this narrow exception all persons born in the United States are, by the principle of the Wong Kim Ark Case, entitled to claim citizenship of the United States.[1]

The "Privileges and Immunities" Clause

"The privileges or immunities of citizens of the United States" were held in the famous Slaughter House Cases,[2] decided soon after the Fourteenth Amendment was added to the Constitution, to comprise only those privileges and immunities which the Constitution, the laws, and the treaties of the United States confer, such as the right to engage in interstate and foreign commerce, the right to appeal in proper cases to the national courts, the right to protection abroad, and so on; but not "the fundamental rights," which were said still to adhere exclusively to State citizenship.

Following this line of reasoning, which renders the clause tautological, the Court ruled in 1920, in United

[1] 169 U.S. 649 (1898).

[2] 16 Wall. 36 (1873).

States *v.* Wheeler,[3] that the right to reside quietly within the State of one's domicil is not a right which the National Government may protect against local mobs—plainly a most anomalous result. In the recent case of Hague *v.* Committee for Industrial Organization,[4] however, in which a Jersey City ordinance requiring a permit for any assembly in the streets, parks, or public buildings of the city was held void, two of the Justices based their opinion on this clause. The "privilege and immunity" which they found to be infringed was the right of workingmen who are at the same time citizens of the United States to assemble for the purpose of discussing their newly acquired rights under the National Labor Relations Act; and in Edwards *v.* California four Justices agreed in 1941 that a State enactment which sought to exclude from the State indigent persons from the rest of the Union was, as to citizens of the United States, an abridgment of their privileges and immunities as such.[5] As a matter of history, there can be little question that it was the intention of the framers of the clause to transmute all the ordinary rights of citizenship in a free government into rights of national citizenship, and thus in effect to transfer their regulation to the National Government.[6]

Due Process of Law for Accused Persons

"Nor shall any State deprive any person of life, liberty, or property without due process of law": By "State" is meant not only all agencies of State Government but

[3] 254 U.S. 281.

[4] 307 U.S. 496 (1940); cf. Davis *v.* Mass., 167 U.S. 43 (1897).

[5] 314 U.S. 160, where the decision overturning the State statute was based by a majority of the Court on the "commerce" clause. For a temporary flare-up of the "privileges and immunities" clause of Amendment XIV which was soon quenched, cf. Colgate *v.* Harvey, 296 U.S. 404 (1935); and Madden *v.* Ky., 309 U.S. 83 (1940).

[6] Horace Flack, *The Adoption of the Fourteenth Amendment, passim* (Johns Hopkins Press, 1908).

those of local government as well,[7] the latter being, in the contemplation of the Supreme Court only an emanation from the former.[8] While, in a general way, this clause imposes on the powers of the State the same kinds of limitations that the corresponding clause of Amendment V does on the powers of the National Government, there is this conspicuous difference, that it does not subject State criminal procedure to the detailed requirements which the Fifth and Sixth Amendments lay upon the National Government. For this reason the States remain free to remodel their procedural practices, so long as they retain the essence of "due process of law"; in other words, so long as the accused is guaranteed a fair trial in a court having jurisdiction of his case.[9] So, the mere forms of a fair trial will not suffice if the substance is lacking, as it is in a trial which has proceeded to its foreordained conclusion under mob domination;[10] or one in which a plea of guilty or confession was obtained from the accused by misrepresentation or recourse to "third degree" methods, in judging of which matters the Court will go fully into the factual record made in the trial court.[11] Nor ordinarily does a trial in which the accused has not had the assistance of counsel both in the preparation and the presentation of his case meet the requirements of "due process of law."[12] On the other hand,

[7] *Ex parte* Virginia, 100 U.S. 337 (1879); Yick Wo *v.* Hopkins, 118 U.S. 356 (1886). See also Screws *v.* U.S., decided May 7, 1945.

[8] Trenton *v.* N.J., 262 U.S. 182 (1923).

[9] See the cases cited in notes 10-13 following.

[10] Moore *v.* Dempsey, 261 U.S. 86 (1923).

[11] Brown *v.* Miss., 297 U.S. 278 (1936); Chambers *v.* Fla., 309 U.S. 227 (1940); White *v.* Tex., 310 U.S. 530 (1940); Smith *v.* O'Grady, 312 U.S. 329 (1941); Ashcraft *v.* Tenn., 322 U.S. 143 (1944); Malinski *v.* N.Y., decided March 26, 1945.

[12] Powell *v.* Ala., 287 U.S. 45 (1932). Although the State was sustained in Avery *v.* Ala., 308 U.S. 444 (1939), Justice Black's opinion is interesting as showing the care with which the Court will go into the facts of such cases. In the recent case of Betts *v.* Brady, 316 U.S. 455 (1942) a divided Court found that a State is not required in every case to provide counsel for an indigent defendant. The result may have been influenced in some measure by the known high character of the trial judge, who

if a State chooses to dispense with either or both of those ancient muniments of "Anglo-Saxon liberties," indictment by grand jury and trial by jury, the Fourteenth Amendment will be found not to stand in the way, provided the new method of trial guarantees, in the judgment of the Court, a fair trial.[13]

The "Police Power" versus Judicial Review

The "police power" is the power of the State "to promote the public health, safety, morals, and general welfare"; or as it has been more simply and comprehensively described "the power to govern men and things."[14]

Under the present-day interpretation of "liberty," "property," and "due process of law," this power is today confronted at every turn by the Court's power of judicial review. Some statistics are pertinent in this connection. During the first ten years of the Fourteenth Amendment, hardly a dozen cases came before the Court under all of its clauses put together. During the next twenty years, when the laissez-faire conception of governmental functions was being translated by the Bar into the phraseology of Constitutional Law, and gradually embodied in the decisions of the Court, more than two hundred cases arose, most of them under the "due process of law" clause. During the ensuing twelve years this number was more than doubled—a ratio which still holds substantially.[15]

During this later period, moreover, an increasing rigor

acted, as the State law permitted in the circumstances, without a jury. Cf. such recent cases as Williams *v.* Kaiser, 323 U.S. 471 (1945), and Rice *v.* Olson, decided April 23, 1945.

[13] Hurtado *v.* Calif., 110 U.S. 516 (1884); Maxwell *v.* Dow, 176 U.S. 581 (1900).

[14] Charles River Bridge Co. *v.* Warren Bridge, 11 Pet. 420 (1837); the Slaughter House Cases, cited above in note 2; Barbier *v.* Connelly, 113 U.S. 27 (1885), and scores of other cases.

[15] Charles W. Collins, *The Fourteenth Amendment and the States*, 188-206 (Boston, 1912). See also Benjamin R. Twiss, *Lawyers and the Constitution, How Laissez Faire Came to the Supreme Court*, chs. II-VII (Princeton University Press, 1942).

was to be discerned in the Court's standards, especially where legislation on *social and economic* questions was concerned. Prior to 1912 the Court had decided 98 cases involving this kind of legislation. "In only six of these did the Court hold the legislation unconstitutional. From 1913 to 1920 the Court decided 27 cases of this type and held seven laws invalid"; while between 1920 and 1930, out of 53 cases, the Court held against the legislation involved in fifteen.[16]

Narrow versus Broad Judicial Review

The same result appears from another angle when we compare an early case in this field of judicial review with a comparatively recent one. In Powell *v.* Pennsylvania,[17] decided in 1888, the Court sustained an act prohibiting the manufacture and sale of oleomagarine, taking the ground that it could not say, "from anything of which it may take judicial cognizance," that oleomargarine was not injurious to the health, and that this being the case the legislative determination of facts was conclusive. Thirty-six years later we find the Court setting aside a Nebraska statute requiring that bread be sold in pound and half-pound loaves, on its own independent finding that the allowance made by the statute for shrinkage of the loaves was too small. Entering upon an elaborate discussion of the entire process of bread-making the Court pronounced the act "unnecessary" for the protection of buyers against fraud, and "essentially unreasonable and arbitrary."[18] In short, the case furnishes a perfect example of what was above characterized as "broad review," and that in a connection with a case which had no apparent wide-reaching implications of any sort.

The Personal Equation

Commenting upon this general development, the late Professor Kales once suggested that attorneys arguing

[16] Professor (now Justice) Felix Frankfurter, "The Supreme Court and the Public," *Forum*, June 1930, p. 333.

[17] 127 U.S. 678 (1888).

[18] Burns Baking Co. *v.* Bryan, 264 U.S. 504 (1924). See also Weaver *v.* Palmer Bros., 270 U.S. 402 (1926).

"due process cases" before the Court ought to address the justices not as "Your Honors," but as "Your Lordships."[19] Similarly Senator Borah, in the Senate debate on Mr. Hughes's nomination for Chief Justice, declared that the Supreme Court had become, under the Fourteenth Amendment, "economic dictator in the United States";[20] and in the Bread Case, just mentioned, Justice Brandeis, dissenting, characterized the Court as "a superlegislature," while similar views were expressed by the late Justice Holmes shortly before his retirement from the Court (see p. 121).

No doubt there was an element of exaggeration in some, or even all, of these expressions—no doubt, too, it would be rather difficult to indicate very precisely just wherein the exaggeration lay. The Court, of course, has no power to initiate legislation; and even before it can "veto" an act it must await for a case to arise under it. Yet a case is sure to arise sooner or later, and under modern practice sooner *rather* than later. One difference which lawyers are apt to stress between the point of view of a court exercising the power of judicial review and an executive exercising the veto power, is that which is supposed to result from the doctrine of *stare decisis*. A court, it is said, is apt to reflect that a present decision will be a future precedent. But then, executives are apt so to reflect too; while the fact is that in the field of constitutional law the doctrine of *stare decisis* is very shaky indeed.[21]

The really distinctive thing about the Supreme Court considered as a governing body is that its make-up usually changes very gradually, so that for considerable inter-

[19] 12 *American Political Science Review*, 241 (1918).

[20] *New York Times*, February 12, 1930.

[21] See Professor Powell's words in 32 *Columbia Law Review*, 768 (1932); also J. Brandeis' dissenting opinion in Burnet *v.* Coronado Oil and Gas Co., 285 U.S. 393, 405-409 and notes (1932); also J. Jackson's opinion for the Court in Helvering *v.* Griffiths, 318 U.S. 371, note 52 (1943), which brings the subject fairly down to date.

Social Philosophies of the Judges

vals it will be found to be under the sway of a particular "social philosophy," the operation of which in important cases becomes a matter of fairly easy prediction on the part of those who follow the Court's work with some care. The Court which set aside the Income Tax Act of 1894 and which retired the Sherman Act into disuse for some years by its decision in the Sugar Trust Case[22] was also the Court which ten years later in Lochner *v.* New York[23] held void as "unreasonable and arbitrary" an act regulating the hours of labor in bakeries. But another decade, and a "liberal" Court sustained without apparent effort a general ten-hour law[24] and upheld compulsory workmen's compensation.[25] Then from 1920 followed a Court of conservative outlook, a Court prone to take a decidedly astringent view of all governmental powers except its own, and to frown upon legislative projects, whether State or national, which were calculated to curtail freedom of business judgment. The outlook of the present Court, on the other hand, is favorable to governmental activity at all levels and from this point of view the Court has recently revamped our Constitutional Law pretty thoroughly.[26]

Summing up: In consequence of the modern doctrine of due process of law as "reasonable law," *judicial review ceases to have definite, statable limits*; and while the ex-

[22] United States *v.* E. C. Knight Co., 156 U.S. 1 (1895).
[23] 198 U.S. 45 (1905).
[24] Bunting *v.* Ore., 243 U.S. 426 (1917).
[25] New York Central R.R. Co. *v.* White, 243 U.S. 188 (1917).
[26] The closest parallel to the recent sweeping change in the Court's membership is that which occurred during the two years immediately following Marshall's death, when a new Chief Justice and five new Associate Justices came to the Bench. On the "constitutional revolution" which ensued in consequence, see Warren, *The Supreme Court in United States History*, II, ch. II. It should be noted, however, that the "constitutional revolution" which is going on currently was really launched before any change in the Court's personnel. The proof of this is to be found in Volume 301 of the *United States Supreme Court Reports*, with which it is interesting to compare Volume 11 of Peter's *Reports*, exactly 100 years earlier. See further the present writer's *Constitutional Revolution, Ltd.* (Claremont Colleges, Claremont, 1941).

tent to which the Court will recanvass the factual justification of a statute under the "due process" clauses of the Constitution often varies considerably as between cases, yet this is a matter which in the last analysis depends upon the Court's own discretion, and on nothing else.

Due Process of Law and Price Regulation

In the famous case of Munn *v.* Illinois[27] which was decided in 1876, the Court ruled that the State's police power extended to the regulation of the prices set by "businesses affected with a public interest"; and it later held that whether a business was of this character depended on circumstances. Thus the rental of houses in the City of Washington during wartime was held to be such a business, as was the insurance business normally.[28] Later, however, the Court virtually contracted the term to public utilities,[29] holding, as we saw earlier, that their charges were subject to regulation so long as the price fixed by public authority yielded "a fair return on the value of that which is used for the benefit of the public" (see pp. 32-33). Then in Nebbia *v.* New York,[30] which was decided early in 1934, the Court, again altering its approach, laid down the doctrine that there is no closed category of "businesses affected with a public interest," but that the State by virtue of its police power may regulate prices whenever it is "reasonably necessary" for it to do so in the public interest; and on this basis was sustained a New York statute providing for the regulation of milk prices in that State. Commenting at the time on this decision, the late Hon. James M. Beck declared, with some exaggeration, however, that the Court had "calmly discarded its decisions of fifty years," without even paying "those decisions the obsequious respect of a

[27] 94 U.S. 113.
[28] Block *v.* Hirsh, 256 U.S. 135 (1921); German Alliance Co. *v.* Lewis, 233 U.S. 389 (1914).
[29] Wolff Packing Co. *v.* C't of Indust'l Relations, 262 U.S. 522 (1923).
[30] 291 U.S. 502 (1934).

funeral oration."[31] Subsequent decisions further illustrate the new outlook.[32]

Freedom of Speech as a Political Right

During and after the first World War many State legislatures passed acts imposing restraints upon freedom of speech, press, and teaching and learning. In deciding the question whether such measures were within the police power the Court came early to adopt the theory that the word "liberty" of the Fourteenth Amendment covers such freedoms and hence protects them against "unreasonable" State acts. A statute forbidding the teaching of subjects in any but the English language was held void as to private schools,[33] as was also an act which, by requiring that all children attend the public schools, practically forbade their attending private schools.[34] On the other hand, the Court sustained legislation penalizing advocacy of the use of violence to bring about social and political change,[35] though it later qualified its endorsement with the doctrine that for a person to be validly held under such an act his inflammatory words must have come near to inciting to actual violence—the "clear and present danger" doctrine, in short.[36] Nor may people be punished for participating in a meeting under the auspices of an organization which is charged with advocating violence as a political method, so long as the meeting itself was orderly and did not advocate illegal action.[37] Likewise, a statute which forbade in all circumstances the carrying of a red flag as a symbol of opposition to government was set aside,[38] and likewise one which, as

[31] *Congressional Record*, March 24, 1934, p. 5480 (unofficial paging).
[32] Highland Farms Dairy *v.* Agnew, 300 U.S. 608 (1937); Townsend *v.* Yeomans, 301 U.S. 441 (1937); Olsen *v.* Neb., 313 U.S. 236 (1941).
[33] Meyer *v.* Neb., 262 U.S. 380 (1923).
[34] Pierce *v.* Society of Sisters, 268 U.S. 510 (1925).
[35] Gitlow *v.* N.Y., 268 U.S. 652 (1925); Whitney *v.* Calif., 274 U.S. 357 (1927).
[36] Herndon *v.* Lowry, 301 U.S. 242 (1937).
[37] DeJonge *v.* Ore., 299 U.S. 353 (1936).
[38] Stromberg *v.* Calif., 282 U.S. 359 (1930).

interpreted by the highest State court, made punishable the joining of an organization teaching the inevitability of "the class struggle."[39] Nor may a State authorize a previous restraint upon scandalous and defamatory publications by the device of authorizing its courts to enjoin them as "nuisances";[40] and by the same token a municipality may not require a license for the peaceable distribution of books, pamphlets, and handbills.[41] Indeed, a municipality may not, with the object of keeping the streets from being littered, penalize the distribution of such matter to passers-by in the streets, the Court being of the opinion that "any burden imposed upon the public authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of freedom of speech and press."[42]

Freedom of Speech as a Right of Organized Labor

The cases just summarized treat freedom of speech and press primarily as a *political* right. Certain other decisions of recent date treat it as an adjunct of the "rights of labor." A commencement in this direction was made in the Hague Case,[43] before mentioned (see p. 181), the decision in which was rested by two of the Justices on the "due process" clause of Amendment XIV. But the really creative cases for this significant development are Thornhill *v.* Alabama,[44] decided in 1940, and American Federation of Labor *v.* Swing,[45] decided in 1941. In the former the Court, speaking by Justice Murphy, set aside an Alabama statute which, as applied by the courts of that State, forbade the peaceful picketing of the premises of anyone engaged in a lawful business. "In the circum-

[39] Fiske *v.* Kan., 274 U.S. 380 (1927).
[40] Near *v.* Minn., 283 U.S. 697 (1931).
[41] Schneider *v.* Irvington, 308 U.S. 147 (1939).
[42] Lovell *v.* Griffin, 303 U.S. 444 (1938). Cf. Valentine *v.* Chrestensen, 316 U.S. 52 (1942), and Jamison *v.* Tex., 318 U.S. 413 (1943).
[43] Hague *v.* Com. for Indust'l Organization, 307 U.S. 496 (1940).
[44] 310 U.S. 88.
[45] 312 U.S. 321.

stances of our times," said the Justice, "the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution."[46] In the Swing Case the same doctrine was applied against an injunction by the courts of Illinois which was based on the rule of common law of the State "forbidding resort to peaceful persuasion through picketing" when there was no immediate employer-employee relationship. The case thus implies that the Court will undertake to recast the common law of the several States defining the purposes for which laborers may strike in combination without incurring the danger of being prosecuted for "conspiracy."[47] But in order to receive the protection of this new conception of "liberty," picketing must not be "set in a background of violence."[48] Nor are "continuing representations unquestionably false" constitutionally safeguarded, albeit a little "loose language" now and then, provided it is dissociated from violence, is a different matter.[49] One must not expect the Court to "tithe mint, anise, and cummin" in such matters.

In affixing to picketing the "freedom of speech" label, the Court has given this term not only a new application but a new extension. As Justice Douglas, a thoroughgoing champion of this recent development, remarked in an opinion written in 1942, "Picketing by an organ-

[46] 310 U.S. at 102. The Thornhill Case was immediately followed by Carlson *v.* Calif., 310 U.S. 106, in which a county ordinance was set aside for the same reason.

[47] See also Carpenters and Joiners Union *v.* Ritter's Cafe *et al.*, 315 U.S. 722 (1942). The Swing Case and the Cantwell Case, discussed below, are interesting as being the first cases in which the Court ever held a rule of common law not to be "due process of law." Formerly conformity with the common law was deemed *la crème de la crème* of due process. Cf. American Railway Express Co. *v.* Ky., 273 U.S. 269 (1927), and cases there cited. This remarkable feature of the Swing and Cantwell Cases seems to have escaped the attention of the Court.

[48] Milk Drivers Union *v.* Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).

[49] Cafeteria Employers Union *v.* Los Angeles, 320 U.S. 293 (1943).

ized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."[50] Furthermore, the picketer's audience is frequently an importuned one; and when it is, the picketer's right is an interference with the rights of other people, not a complement thereof, as is the right of persons addressing those who come to hear them. A comparable phenomenon appears in the field of religious liberty as it is delimited in recent decisions of the Court. (See pp. 192-195 below.)

The Court Repeals The Sherman Act as to Labor

Taken in conjunction with the contemporary decisions in the Apex and Hutcheson Cases,[51] by which the

[50] Bakery and Pastry Drivers *v.* Wohl, 315 U.S. at 776 (1942).

[51] Apex Hosiery Co. *v.* Leader, 310 U.S. 469 (1940); United States *v.* Hutcheson, 312 U.S. 219 (1941). In Hunt *v.* Crumboch, decided June 18, 1945, the Court held that the Sherman Act was not violated by the refusal of a labor organization to admit to membership the employees of an interstate trucking company, although the actual and intended effect of the refusal was to prevent the company from continuing to serve its patrons who had closed shop contracts with the union, and thereby to force the company out of business. Said J. Jackson, in a dissenting opinion for himself, the Chief Justice and J. Frankfurter: "With this decision, the labor movement has come full circle. The working man has struggled long, the fight has been filled with hatred, and conflict has been dangerous, but now workers may not be deprived of their livelihood merely because their employers oppose and they favor unions. Labor has won other rights as well, unemployment compensation, old-age benefits and, what is most important and the basis of all its gains, the recognition that the opportunity to earn his support is not alone the concern of the individual but is the problem which all organized societies must contend with and conquer if they are to survive. This Court now sustains the claim of a union to the right to deny participation in the economic world to an employer simply because the union dislikes him. This Court permits to employees the same arbitrary dominance over the economic sphere which they control that labor so long, so bitterly and so rightly asserted should belong to no man." While the Chief Justice's and J. Frankfurter's discontent at this decision does them credit, it must be remarked that having been respectively the spokesmen for the Court in the Apex and Hutcheson Cases, their claim on one's sympathy is not great. The opinions in both of those cases rest on strained interpretations of past decisions and legislative history. See also United States *v.* Local 807, 315 U.S. 521 (1942), where it was held that a racketeer is not a "racketeer" in the sense of the Anti-Racketeering Act of June 18, 1934 (U.S. Code, tit. 18, §420a) if he is a labor

Anti-Trust Act was substantially repealed as to organized labor, the picketing cases exhibit the Court setting up as a sort of superlegislature in the field of labor activities. Instructive too is a comparison of these decisions with those in which a generation ago the Court thrust forward the "due process" clause as a shield and buckler of the right of employers to the unrestricted use of their economic superiority in bargaining with labor,[52] for thus is illustrated the political quality, in a broad sense, with which much of constitutional law has always been infused and probably will always be.

Religious Freedom

Another "liberty" over which the Court has in recent years sought to spread a protecting wing in the name of the "due process" clause of Amendment XIV is religious freedom. It cannot be said, however, that the results it has so far achieved by these endeavors are characterized by self-consistency, stability, or a conspicuous adherence to common sense. The Court got off to a bad start in 1940 in the leading case of Cantwell *v.* Connecticut.[53] Three members of the sect calling itself Jehovah's Witnesses were convicted under a statute which forbade the unlicensed soliciting of funds on the representation that they were for religious or charitable purposes, and also on a general charge of breach of the peace by accosting in a strongly Catholic neighborhood two communicants of that faith and playing to them a phonograph record which grossly insulted the Christian religion in general and the Catholic church in particular. Both convictions were held to violate "the constitutional guarantees of speech and religion," "the clear and pres-

organizer. The opinion was written by Hon. J. F. Byrnes, who at the moment occupied a seat on the Court.

[52] See especially Adair *v.* U.S., 208 U.S. 161 (1908); and Coppage *v.* Kan., 236 U.S. 1 (1915).

[53] 310 U.S. 296.

ent danger" rule being invoked in partial justification of the holding, although it is reasonably inferable from the Court's own recital of the facts that the listeners to the phonograph record exhibited a degree of self-restraint rather unusual in the circumstances. Two weeks later the Court, as if to "compensate" for its zeal in the Cantwell Case, went to the other extreme, and urging the maxim that legislative acts must be presumed to be constitutional, sustained the State of Pennsylvania in excluding from its school children of the Jehovah's Witnesses, who in the name of their beliefs refused to salute the flag.[54] The subsequent record of the Court's holdings in this field is singularly erratic. A decision in June, 1942, sustaining the application to vendors of religious books and pamphlets of a non-discriminatory license fee[55] was eleven months later vacated and formally reversed;[56] shortly thereafter a like fate overtook the decision in the "Flag Salute" Case.[57] In May, 1943, the Court found that an ordinance of the city of Struthers, Ohio, which made it unlawful for anyone distributing literature to ring a doorbell or otherwise summon the dwellers of a residence to the door to receive such literature, was violative of the Constitution when applied to distributors of leaflets advertising a religious meeting.[58] But eight months later it sustained the application of Massachusetts' child labor laws in the case of a nine year old girl who was permitted by her legal custodian to engage in "preaching work" and the sale of religious publications after hours.[59]

[54] Minersville School Dist. *v.* Gobitis, 310 U.S. 586 (1940).
[55] Jones *v.* Opelika, 316 U.S. 584 (1942).
[56] Same *v.* same, 319 U.S. 103; Murdock *v.* Pa., 319 U.S. 105 (1943).
[57] West Virginia State Bd. of Educ. *v.* Barnette, *et al.*, 319 U.S. 624 (1943); see also Taylor *v.* Miss., 319 U.S. 583.
[58] Martin *v.* Struthers, 319 U.S. 141 (1943).
[59] Prince *v.* Mass., 321 U.S. 158 (1944).

Freedom to Worship Becomes Freedom to Proselytize

The Court, one suspects, has not thought its problem quite through, if indeed most of these cases presented a problem. In this connection a statement by Justice Douglas in Murdock *v.* Pennsylvania appears to be especially significant. "This form of religious activity," that is, proselytizing by the distribution of tracts, etc., he there asserts, "occupies the same estate under the First Amendment as do worship in the churches and preaching from the pulpits."[60] In other words, the right of people to resort to their own places of worship and listen to their chosen teachers stands on a constitutional level with the right of religious enthusiasts to solicit funds and peddle their doctrinal wares in the streets, to ring doorbells and disturb householders, and to accost passersby and insult them in *their* religious beliefs! If, as is generally understood, one man's right to swing his fists stops just short of where another man's nose begins, a somewhat similar rule must be presumed to hold in the field of religious activities. As Justice Jackson sensibly suggests in his dissenting opinion in the Murdock and Struthers Cases, the Court ought to ask itself what would be the effect "if the right given these Witnesses should be exercised by all sects and denominations."[61] Unfortunately, in United States *v.* Ballard (see pp. 149-150) Justice Jackson himself takes leave of common sense to indulge some high-flown doubts that were evidently suggested to him by a perusal of William James's *The Will to Believe.*[62]

All in all the perils against which the Court has been protecting religious liberty since 1940 seem to be rather fanciful for the most part. Aside from the flag salute re-

[60] 319 U.S. at 109.

[61] 319 U.S. at 190.

[62] 322 U.S. at 92-95. For a more sympathetic treatment of some of the above decisions, see Francis H. Heller, "A Turning Point for Religious Freedom," 29 *Virginia Law Review*, 440-459 (January, 1943). Mr. Heller states that 171 leading newspapers promptly condemned the decision in the Gobitis Case and only three or four approved it.

quirement, the measures it has passed upon conform to well established patterns of State action which were never previously drawn into question. At least, the Court could safely have left the issue to define itself somewhat more clearly. The infringements upon liberty which evoked the First Amendment were more substantial; their intention and effect were never in doubt.

Due Process of Law as "Jurisdiction"

In two classes of cases "due process of law" has the meaning of *jurisdiction*, the general idea being that a State has normally no right to attempt to exercise its governmental powers upon persons and property situated beyond its boundaries.

Hence, in the first place, a State court has no jurisdiction to pronounce judgment in a purely personal action against a defendant who is resident in another State and who neither appeared voluntarily to contest the action nor was personally served with the proper papers within the first State.[63] But an action concerning land situated within a State is within the jurisdiction of the courts thereof because the *res* is, even though the owner resides within another State and has not been personally summoned. A suit for divorce, once regarded as *in rem*, is today *sui generis*, leaving the law on that subject in confusion.[64] (See pp. 131-132.)

Again, the Court recognizes the right of a State to require that "foreign" corporations (those chartered by other States), as a condition *sine qua non* of doing business within its borders, name a resident representative upon whom papers may be served at any time in connection with causes of action arising within the State;[65]

[63] Pennoyer *v.* Neff, 95 U.S. 714 (1877).

[64] Cf. Atherton *v.* Atherton, 181 U.S. 155 (1901); Haddock *v.* Haddock, 201 U.S. 562 (1906); Williams *v.* N.C., 317 U.S. 287 (1942); same *v.* same, decided May 21, 1945.

[65] Lafayette Ins. Co. *v.* French, 18 How. 404 (1855), is the leading case.

while more recently it has given its sanction to laws making a similar requirement of non-residents desiring to operate motor vehicles within a State.[66]

State Jurisdiction to Tax

The second class of cases referred to apply the jurisdictional principle in the field of taxation. All realty is, of course, within the taxing jurisdiction of the State where situated. Tangible personalty, or "movables," on the other hand, were once deemed attached to the person of the owner ("*mobilia personam sequuntur*"), and hence to be taxable at the place of his residence, but in the philosophy of the Court this is no longer so. Today such things are taxable under the "due process" clause only where they have "taxable *situs*"—a point not always easy to determine.[67] As to intangibles, the Court sought for a time, in an effort to eliminate "double taxation" of inheritances, to confine the power to tax them to the State where the decedent resided,[68] but has latterly been forced by the wealth of expedients devised to avoid taxation altogether which sprang up in the wake of this rule, to abandon it.[69] And State income taxation is frequently "double," or overlapping.[70] The State in which a man is resident may tax him on his total income, while other States may tax him on such portions of it as accrued to him from property situated, or business carried on, within their respective limits; but, of course, such taxes must

[66] Hess *v.* Pawloski, 274 U.S. 352 (1927); Wuchter *v.* Pizzutti, 276 U.S. 13 (1928). C. J. Taft's opinion in the latter case is valuable for its exposition of the law on substituted service.

[67] Union Refrigerator Transit Co. *v.* Ky., 199 U.S. 194 (1905), was long the leading case, but its authority has been gravely shaken by the recent decision in Northwest Airlines, Inc. *v.* Minn., 322 U.S. 292 (1944).

[68] Frick *v.* Pa., 268 U.S. 473 (1925); Blodgett *v.* Silberman, 277 U.S. 1 (1928); Farmers Loan & T. Co. *v.* Minn., 280 U.S. 204 (1930); Baldwin *v.* Mo., 281 U.S. 586 (1930); First Nat'l Bk. *v.* Me., 284 U.S. 312 (1932).

[69] Curry *v.* McCanless, 307 U.S. 357 (1939); Graves *v.* Elliot, 307 U.S. 383 (1939); Tax Com's'n *v.* Aldrich, 316 U.S. 174 (1942).

[70] Guaranty Trust Co. *v.* Va., 305 U.S. 19 (1938).

not be more onerous upon non-residents than upon residents.[71]

The "Equal Protection" Clause as a Restraint on State Power

"Equal protection of the laws": This clause was originally intended for the benefit of the negro freedmen; but in the famous case of Yick Wo *v.* Hopkins, decided in 1886, its protection was extended to Chinese residents of the United States, and at about the same time corporations were also declared to be "persons" within the meaning of the amendment.[72] The clause does not automatically rule out legislative classifications. Indeed, substantially all legislation involves classification of some sort.[73] What the clause appears to require today is that *any* classification of "persons" shall be reasonably relevant to the recognized purposes of good government; and furthermore, that there shall be *no* distinction made on the sole basis of race or alienage as to certain rights. Thus, it is reasonable as a measure for protecting game to deny aliens the use of shotguns, but it is not reasonable to deny them the right to work for a living.[74] Again, it is reasonable to provide, in the interest of minimizing racial antagonisms, that white and colored people shall travel in separate cars and attend separate schools, provided there is no pronounced disparity between the quality of the ac-

[71] Shaffer *v.* Carter, 252 U.S. 37 (1920). A State may tax dividends declared outside its jurisdiction by a "foreign corporation" to the amount of the dividends which were earned within the State by the corporation. Wisconsin *v.* J. C. Penney Co., 311 U.S. 435 (1940).

[72] Yick Wo *v.* Hopkins, 118 U.S. 356 (1886); Santa Clara County *v.* So. Pac. R.R. Co., 118 U.S. 394 (1886). Cf. Justice Miller's language in the Slaughter House Cases, 16 Wall. 36 (1873).

[73] See e.g., Missouri, Kan. and Tex. R. Co. *v.* May, 194 U.S. 267 (1904), and Lindsley *v.* Natural Carbonic Gas Co., 220 U.S. 61 (1911). Also, compare Buck *v.* Bell, 274 U.S. 200 (1927), and Skinner *v.* Okla., 316 U.S. 535 (1942). In the former a sterilization statute applicable to mental defectives in State institutions was sustained; in the latter a similar act applicable to triple offenders was held void.

[74] Patsone *v.* Pa., 232 U.S. 139 (1914); Truax *v.* Raich, 239 U.S. 33 (1915).

commodations afforded the two races.[75] On the other hand, the two races may not be segregated by public authority as to their places of abode; and, of course, neither may be denied the generally recognized civil rights, the right to own and possess property, to make contracts, to serve on juries,[76] etc.

The Clause as a Guide to Law-Makers and Interpreters

Furthermore the clause is not merely a restraint on legislative power, but affords it a guiding principle. Hence the provisions of the recent New York Civil Rights Law, which prohibit any labor organization from discriminating, by reason of race, color, or creed, in the admission or treatment of members, have been held, as applied to postal clerks, violative neither of the Fourteenth Amendment nor of any powers or legislation of the National Government. Likewise, it supplies a principle which the *national courts* must follow in the interpretation of the Railway Labor Act, with the result that a collective bargaining agreement discriminating against negro firemen must be held violative of the act.[77]

Corporations as "Persons"

As was just remarked, corporations are "persons" within the meaning of the Fourteenth Amendment, and so are entitled to the "equal protection of the laws."[77] But for a "foreign" corporation to be entitled to equal treatment with the corporations chartered by a State it must be "subject to the jurisdiction thereof."[78] The importance, moreover, of this reading of the term, the historical validity of which has been disputed,[79] is much less than is sometimes supposed. It does not mean that the

[75] Plessy *v.* Ferguson, 163 U.S. 537 (1896); Missouri *v.* Canada, 305 U.S. 337 (1938); Mitchell *v.* U.S., 313 U.S. 80 (1941).

[76] Buchanan *v.* Warley, 245 U.S. 60 (1917); Strauder *v.* W.Va., 100 U.S. 303 (1879).

[77] Railway Mail Assoc. *v.* Corsi, decided June 18, 1945; Steele *v.* Louisville & N. R. Co., 323 U.S. 192 (1944).

[78] Santa Clara County *v.* So. Pac. R.R. Co., 118 U.S. 394 (1886); Hanover Fire Ins. Co. *v.* Carr, 272 U.S. 494 (1926).

[79] See the interesting dissenting opinion of Justice Black in Connecticut Gen. L. Ins. Co. *v.* Johnson, 303 U.S. 77 at 83 (1938), and references there given.

law may not exact special duties of corporations, but it does mean that such duties must bear some reasonable relation to the fact that they are corporations or to the nature of the business in which they are engaged. Thus, in view of the special dangers to which the railroad business exposes the public, railroad companies may be required to stand the heavy expense of elevating their grade crossings.[80] On the other hand, a railroad may not be required to carry selected commodities at a loss.[81]

It ought to be added that the clause is least effective as a restraint on the taxing power of the States. Almost any classification made in a tax measure will be sustained by the Court, whether it is relevant to the business of raising revenue or proceeds from some ulterior motive.[82]

As we saw above, the term "State" in this clause means any agency whereby the State exercises its powers. It thus includes any State or local official when acting under color of his office;[83] and in deciding whether a State has violated the above provisions, the Court is always free to go behind the face of the law and inquire into the fairness of its actual enforcement.[84] This rule, originally laid down in Yick Wo *v.* Hopkins, received more recent illustration in one of the Scottsboro Cases, where an indictment returned by a grand jury of whites in a county of Alabama in which no member of a considerable negro population had ever been called for jury service, was held void, although the Alabama statute gov-

[80] Chicago & Alton R.R. Co. *v.* Tranbarger, 238 U.S. 67 (1915), and cases there cited.

[81] Northern Pacific Ry. *v.* No. Dak., 236 U.S. 585 (1915).

[82] See State Tax Com's'n'rs *v.* Jackson, 283 U.S. 527 (1931); and Great Atlantic and Pacific Tea Co. *v.* Grosjean, 301 U.S. 412 (1937), and cases cited there.

[83] *Ex parte* Virginia, 100 U.S. 347 (1879); Screws *v.* U.S., decided May 7, 1945.

[84] Yick Wo *v.* Hopkins, 118 U.S. 356 (1886); Reagan *v.* Farmers Loan & T. Co., 154 U.S. 390 (1894); Tarrance *v.* Fla., 188 U.S. 519 (1903).

erning the matter contained no discrimination between the two races.[85]

SECTION II

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.

SECTION III

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 IV

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

[85] Norris *v.* Ala., 294 U.S. 587 (1935). To the same effect are Hale *v.* Ky., 303 U.S. 613 (1938); Pierre *v.* La., 306 U.S. 354 (1939); and Smith *v.* Tex., 311 U.S. 128 (1940).

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.

These sections are today, for the most part, of historical interest only.

SECTION V

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

Congressional Protection of Civil Rights

The full extent of the powers of Congress under this section, in the regulation and protection of civil rights, has never been conclusively determined. In the famous Civil Rights Cases,[1] decided nearly half a century ago, the Court held void an act of Congress forbidding inns, railroads and theaters to discriminate between persons on the ground of race, the basis of the decision being the proposition that the prohibitions of the opening section of the Fourteenth Amendment were intended to reach only positive acts of State authorities derogatory of the rights protected by the amendment—not acts of private individuals or acts of omission by the State itself. In the case of Truax *v.* Corrigan,[2] on the other hand, which was decided in 1921, the Court declared that the same clauses require a certain minimum of protection from the State for all classes and persons. Following this later pronouncement, it would seem, should a State conspicuously fail in providing security of person or property as regards any class within its borders, Congress, under the above section, might validly interpose with legislation calculated to remedy the defect. For "*equal* protection of the laws" implies normally *some* effort at least to enforce the laws.

[1] 109 U.S. 3 (1883). [2] 257 U.S. 312 (1921).

Nor is it only the "equal protection" clause which Congress is empowered to implement by "appropriate legislation," but all the "provisions of this article." The outstanding legislation having this purpose was first enacted in 1866 and, as since amended, appears today as Section 20 of the United States Criminal Code.[3] It reads thus:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both."

After lying dormant for many years this provision was resuscitated and reanimated in 1941 by the decision in the Classic Case (see p. 12); and has more recently received in Screws *v.* United States[4] an application which promises for it a notable career in the future. Speaking for the Court, Justice Douglas recited the circumstances of the case as follows:

"This case involves a shocking and revolting episode in law enforcement. Petitioner Screws was sheriff of Baker County, Georgia. He enlisted the assistance of petitioner Jones, a policeman, and petitioner Kelley, a special deputy; in arresting Robert Hall, a citizen of the United States and of Georgia. The arrest was made late at night at Hall's home on a warrant charging Hall with theft of a tire. Hall, a young negro about thirty years of

[3] U.S. Code, tit. 18, §52. See also §88.
[4] See note 83 above.

age, was handcuffed and taken by car to the court house. As Hall alighted from the car at the court house square, the three petitioners began beating him with their fists and with a solid-bar blackjack about eight inches long and weighing two pounds. They claimed Hall had reached for a gun and had used insulting language as he alighted from the car. But after Hall, still handcuffed, had been knocked to the ground they continued to beat him from fifteen to thirty minutes until he was unconscious. Hall was then dragged feet first through the court house yard into the jail and thrown upon the floor dying. An ambulance was called and Hall was removed to a hospital where he died within the hour and without regaining consciousness. There was evidence that Screws held a grudge against Hall and had threatened to 'get' him."

Screws and his co-defendants were indicted under Section 20 for having, under color of the laws of Georgia, "willfully" caused Hall to be deprived of "rights, privileges, or immunities secured or protected" to him by the Fourteenth Amendment—the right not to be deprived of life without due process of law; the right to be tried, upon the charge on which he was arrested, by due process of law and if found guilty to be punished in accordance with the laws of Georgia.

While the conviction of Screws and the others was reversed on the ground of prejudicial error in the course of their trial, the indictment was held to fall within the terms of Section 20, and a new trial was ordered. In view of the latitudinarian construction which has been given the term "liberty" in Amendment XIV, this decision extends the protection of Section 20 to a wide range of rights against "willful" impairment by State or local officials.

AMENDMENT XV

SECTION I

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.

Negro Suffrage

While the right to vote may not be denied "on account of race, color, or previous condition of servitude," it may be denied on other grounds, such, for instance, as that of illiteracy; and, in fact, most of the Southern States have imposed such tests, which, in their practical application, usually abridge the right of the negro to vote very materially. One of these devices, the so-called "grandfather clause," was pronounced void thirty years ago, and all of them render a State liable to have its representation in Congress reduced (see Amendment XIV, Section II), though actually this penalty has never been imposed.[1]

In a series of cases originating in Texas some years ago the Court successively held that negroes could not, under the "equal protection" clause of the Fourteenth Amendment, be excluded by State law from voting in the Democratic primaries in that State; nor by the State Executive Committee of the party itself under authority delegated by State law; but that they might be so excluded by a State election official who was charged by State law with certain duties in connection with primary elections, where the act of exclusion was in virtue of a resolution of a State party convention,[2] and hence was not, so the Court ruled, State action within the meaning of either the Fourteenth or the Fifteenth Amendment. In a recent case, however, this last ruling and the extremely dubious distinction it drew between State and party action were

[1] Williams *v.* Miss., 170 U.S. 213 (1898); Guinn *v.* U.S., 238 U.S. 347 (1915).

[2] Nixon *v.* Herndon, 273 U.S. 536 (1927); Nixon *v.* Condon, 286 U.S. 73 (1932); Grovey *v.* Townsend, 295 U.S. 45 (1938).

set aside. Today the law is that the right to vote which is protected by the Fifteenth Amendment embraces the right to vote in primary elections,[3] a holding which had already been foreshadowed in the Classic Case (see pp. 12-13). And where the right to vote is protected by the amendment, it is protected against onerous procedural requirements which effectively handicap its exercise while purporting to recognize it.[4]

SECTION II

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

Not since 1876 has the National Government exercised any real power under this section, nor would public sentiment today sanction such action.

AMENDMENT XVI

Recent Amendments

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.

Income Taxation

The occasion of this amendment was pointed out earlier (see p. 25). The term "income" in the above has been defined by the Court as meaning "gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets."[1]

Furthermore, any gain not accruing prior to 1913 is taxable income for the year in which it was realized by sale or conversion of the property to which it had accrued; while corporate dividends in the shape of money or of the stock of another corporation are taxable income of the stockholder for the year in which he received

[3] Smith *v.* Allwright, 321 U.S. 649 (1944).
[4] Lane *v.* Wilson, 307 U.S. 268 (1939).
[1] Eisner *v.* Macomber, 252 U.S. 189 (1920).

them, regardless of when the profits against which they were voted had accrued to the corporation.[2] But a stock dividend issued against a corporate surplus is held not to be "income" in the hands of the stockholder, since it leaves the stockholder's share of the surplus still under the control of the corporate management.[3]

While Congress's power to tax incomes is relieved by this amendment from the rule of apportionment, it still remains subject to the "due process" clause of Amendment V, which would forbid any obviously arbitrary classification for this purpose. Thus an act of Congress which taxed incomes of Republicans at a higher rate than those of Democrats would, presumably, be invalid. But incomes of corporate persons may be taxed on a different basis than those of natural persons, and large incomes may be, and are, taxed at progressively higher rates than smaller incomes. Also, Congress may, in order to compel corporations to distribute their profits and thereby render them taxable in the hands of stockholders, levy a special tax on such accumulated profits in the hands of the corporation, without transcending its powers under the Sixteenth Amendment,[4] or violating the Fifth Amendment.

The question has been occasionally mooted whether the separate incomes of a husband and wife may be taxed as one joint income and so, in effect, at a higher rate than incomes of the same size of unmarried persons, the tax being "progressive." Some years ago the Court over-

[2] Lynch *v.* Hornby, 247 U.S. 339 (1918).

[3] Eisner *v.* Macomber, cited above. Helvering *v.* Griffiths, 318 U.S. 371 (1943), which maintains the rule laid down in Eisner *v.* Macomber, is based immediately on U.S. Code, tit. 26, §115 (f) (1), and the ambiguous endorsement there given the rule. Moline Properties, Inc. *v.* Com's'n'r of Int. Rev., 319 U.S. 436 (1943), further supports the rule by its endorsement of the corporate entity concept, which is basic to the decision in the Eisner case.

[4] Helvering *v.* National Grocery Co., 304 U.S. 282 (1938); Helvering *v.* National Steel Rolling Mills, Inc., 311 U.S. 46 (1940).

turned a Wisconsin tax of this description on the ground that the "due process" clause of Amendment XIV forbade the taxation of one person's income or property by reference to those of another person. Three Justices, however, including the present Chief Justice, dissented in an opinion by Justice Holmes, which argued that such a tax was constitutional, first, in the light of "a thousand years of history," the reference being to the common law doctrine that the income and property of the wife were at the disposal of the husband; secondly, because husbands and wives do actually get the benefit of one another's income; thirdly, as a means of avoiding tax evasions. The second and third reasons, at least, are persuasive that such a classification for purposes of income taxation would not be so utterly unreasonable as to fall under the ban of the Fifth Amendment, which, it should be remembered, does not contain an "equal protection" clause.[5]

Does the amendment enable Congress to reach incomes derived from State and municipal bonds by a general income tax? By the logic of recent decisions, Congress has this power regardless of the Amendment, which obviously does not take it away (see pp. 23-24).

AMENDMENT XVII

Popular Election of Senators

¶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.

¶2. 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 em-

[5] Brushaber *v.* Union Pac. R.R. Co., 240 U.S. 1 (1916); Hoeper *v.* Tax Com's'n of Wis., 284 U.S. 206 (1931).

power the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

¶3. 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.

This amendment, as was noted before, supersedes Article I, Section III, ¶1.

AMENDMENT XVIII

SECTION I

The "Experiment Noble in Purpose"

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.

SECTION II

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

SECTION III

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.

This section was no proper part of the amendment but was really a part of the Congressional resolution of submission, and was rightly so treated by the Supreme Court.[1] How, indeed, could an inoperative amendment operate to render itself inoperative?

The entire amendment was repealed in 1933 by the Twenty-first Amendment (see below, p. 211). Some of

[1] Dillon *v.* Gloss, 256 U.S. 368 (1921).

the questions, however, which were raised under the Fourth, Fifth, and Sixth Amendments by the efforts to enforce National Prohibition are still of interest and are treated in earlier pages of this volume (see pp. 140-141, and 155-156).

AMENDMENT XIX

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.

Woman Suffrage

This amendment, which consummates a reform that had been long under way in the States, was passed by the House on May 21, 1919, and by the Senate on June 4, 1919. It was ratified by the required number of States in time for the Presidential election November, 1920. An objection that the amendment, by enlarging the electorate without a State's consent, destroyed its autonomy and hence exceeded the amending power, was overruled by the Court by pointing to the precedent created by the adoption of the Fifteenth Amendment.[1]

AMENDMENT XX

SECTION I

The "Lame Duck" Amendment

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.

SECTION II

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.

[1] Leser *v.* Garnett, 258 U.S. 130 (1922).

SECTION III

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.

SECTION IV

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 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.

SECTION V

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

SECTION VI

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.

This, the so-called Norris "Lame Duck" Amendment. was proposed by Congress March 2, 1932, to the legislatures of the several States, and was proclaimed by the Secretary of State February 6, 1933, having then been ratified by 39 States. By October 15, 1933, it had been ratified by all the States.

Without supplementary legislation by Congress these provisions are only partially efficacious for their purpose. By section 7 of Article I all bills, resolutions, and so forth, which are intended to have the effect of law must be laid before the President for his approval, and presumably the requirement would still hold if there were only an acting President. So in the absence of either there could be no legislation. If, therefore, Congress should fail to exercise the powers which Amendment XX confers upon it with respect to a situation in which "neither a President-elect nor a Vice-President-elect shall have qualified" *and taken office*, it would then be too late—the legislative power would be paralyzed. Nor does the above language make it clear whether a President who qualified at some date after "the term fixed for the beginning of the term of President"—fixed i.e., by the Amendment—would hold only until the end of that term, or for the full four years which are stipulated in the opening paragraph of Article II. So far, however, except for certain minor chronological adjustments required by Sections I and II above, Congress has not acted to perfect the Amendment.[1]

AMENDMENT XXI

SECTION I

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

The Experiment Discontinued

SECTION II

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.

[1] *The President, Office and Powers*, 58. See U.S. Code, tit. 2, §§1 and 7; tit. 3, §§5a, 11b, 11c, 17 and 41. (The Adjustment Act of June 5, 1934.)

SECTION III

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.

This amendment was proposed by Congress February 20, 1933, to conventions to be called in the several States, and was proclaimed to be in effect December 5 of the same year, having been ratified by 36 States, a record for celerity.

Decisions interpreting the amendment to date fall into two general categories: decisions which assert the unlimited character of State power within the precincts marked out by Section II; decisions which define those precincts with greater particularity. On the one hand, the Court has said, the amendment authorizes a State to impose a license fee upon the importation into it of liquor from without;[1] to discriminate as to what liquors it shall permit to be imported;[2] to retaliate against such discriminations;[3] and in general to legislate, unfettered by the "commerce" or any other clause of the Constitution, respecting liquor introduced into it from without.[4] On the other hand, the amendment does not, the Court holds, enable a State to regulate the sale of liquor in a national park over which it had ceded jurisdiction to the United States;[5] nor does it disable Congress from regulating the importation of liquors from abroad;[6] and when a State seeks to control the passage *through* it of liquor coming from another State and destined for a

[1] State Bd. of Equalization *v.* Young's Market Co., 299 U.S. 59 (1936).
[2] Mahoney *v.* Joseph Triner Corp., 304 U.S. 401 (1938).
[3] Indianapolis Brewing Co. *v.* Liquor Control Com's'n of Mich., 305 U.S. 391 (1938).
[4] Ziffrin *v.* Reeves, 308 U.S. 132 (1939).
[5] Collins *v.* Yosemite Park and Curry Co., 304 U.S. 518 (1938).
[6] James & Co. *v.* Morgenthau, 307 U.S. 171 (1939).

third State, it is no longer exercising any power granted it by the amendment, but its customary police power. Its regulations, therefore, must be "reasonable" in the judgment of the Court, and may be set aside by Congress under the "commerce" clause.[7]

Child Labor

The following amendment was proposed to the legislatures of the several States by Congress on June 2, 1924, and is still pending:

SECTION I

The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

SECTION II

The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

The case of Coleman *v.* Miller,[1] dealt with in earlier pages, arose in connection with this proposal (see pp. 139-140).

[7] Duckworth *v.* Ark., 314 U.S. 390 (1941); Carter *v.* Va., 321 U.S. 131 1944).

[1] 307 U.S. 433 (1939).

THE CONSTITUTION

PREAMBLE

WE, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, 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 I

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

SECTION II

[1] The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

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

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

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

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

[5] The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

SECTION III

[1] The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

[2] Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make tem-

porary appointments until the next meeting of the legislature, which shall then fill such vacancies.

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

[4] The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

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

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

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

SECTION IV

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

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

SECTION V

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

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

[3] Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the journal.

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

SECTION VI

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

[2] No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall

have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

SECTION VII

[1] All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

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

[3] Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representa-

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

SECTION VIII

[1] The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

[2] To borrow money on the credit of the United States;

[3] To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

[4] To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

[5] To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

[6] To provide for the punishment of counterfeiting the securities and current coin of the United States;

[7] To establish post offices and post roads;

[8] To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

[9] To constitute tribunals inferior to the Supreme Court;

[10] To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;

[11] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

[12] To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

[13] To provide and maintain a navy;

[14] To make rules for the government and regulation of the land and naval forces;

[15] To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

[16] To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

[17] To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;

[18] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

SECTION IX

[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.

[2] The privilege of the writ of habeas corpus shall not

be suspended, unless when in cases of rebellion or invasion the public safety may require it.

[3] No bill of attainder or ex post facto law shall be passed.

[4] No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

[5] No tax or duty shall be laid on articles exported from any State.

[6] No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another.

[7] No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

[8] No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state.

SECTION X

[1] No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money, emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, or grant any title of nobility.

[2] No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be

for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

[3] No State shall, without the consent of Congress, lay any duty of tonnage, keep troops and 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

[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:

[2] Each State shall appoint, in such manner as the legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an Elector.

[3] The Electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of 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 ma-

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

[4] The Congress may determine the time of choosing the Electors and the day on which they shall give their votes, which day shall be the same throughout the United States.

[5] No person except a natural-born citizen, or 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.

[6] In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

[7] The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

[8] Before he enter on the execution of his office he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the Constitution of the United States."

SECTION II

[1] The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

[2] He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

[3] The President shall have power to fill up all va-

cancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION III

He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION IV

The President, Vice-President and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

SECTION I

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION II

[1] The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of

the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects.

[2] 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.

[3] The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION III

[1] Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. 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.

[2] 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 I

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION II

[1] The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

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

[3] No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim to the party to whom such service or labor may be due.

SECTION III

[1] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

[2] The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so con-

strued as to prejudice any claims of the United States or of any particular State.

SECTION IV

The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the Ninth Section of the First Article; and that no State, without its consent shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

[1] All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation.

[2] This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the

land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

[3] The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

AMENDMENT I

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

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 offense 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.

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 defense.

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.

AMENDMENT XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

AMENDMENT XII

[1] 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 the President.

[2] 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.

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 II

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

AMENDMENT XIV

SECTION I

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 II

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.

SECTION III

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 IV

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 V

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

AMENDMENT XV

SECTION I

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 II

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

AMENDMENT XVI

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.

AMENDMENT XVII

SECTION I

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.

SECTION II

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.

SECTION III

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.

AMENDMENT XVIII

SECTION I

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.

SECTION II

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

SECTION III

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.

AMENDMENT XIX

SECTION I

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.

SECTION II

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

AMENDMENT XX

SECTION I

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.

SECTION II

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.

SECTION III

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.

SECTION IV

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 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.

SECTION V

Sections I and II shall take effect on the 15th day of October following the ratification of this article.

SECTION VI

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 I

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

SECTION II

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.

SECTION III

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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This table of reports shows abbreviations used:

REPORTER	ABBREVIATION	NUMBER OF VOLUMES	PERIOD COVERED
Dallas	Dall.	4	1790–1800
Cranch	Cr. or Cranch	9	1801–1815
Wheaton	Wh. or Wheat.	12	1816–1827
Peters	Pet.	16	1828–1842
Howard	How.	24	1843–1860
Black	Bl. or Black	2	1861–1862
Wallace	Wall.	23	1863–1874
United States	U.S.	91–	1875–

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