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Justice John Marshall Harlan: Lectures on Constitutional Law, 1897-98

Brian L. Frye

University of Kentucky College of Law, brianlfrye@uky.edu

Josh Blackman

South Texas College of Law

Michael McCloskey

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Justice John Marshall Harlan: Lectures on Constitutional Law, 1897–98

Edited by Brian L. Frye, Josh Blackman** & Michael McCloskey****

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* Assistant Professor of Law, University of Kentucky College of Law; J.D., New York University School of Law, 2005; M.F.A., San Francisco Art Institute, 1997; B.A., University of California, Berkeley, 1995. Professor Frye thanks the Institute for Humane Studies, which partially funded his research on this project. Special thanks to Zach Cato and C.J. Ryan for research assistance.

** Assistant Professor, South Texas College of Law; President, The Harlan Institute.

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LECTURE 1: OCTOBER 14, 1897

One thing I wish to say to you before beginning with the examination and explanation of the Constitution, is that I must assume that each of you has some time or other in your life read the history of England and the history of the United States. If you have done neither, the sooner you do so the better. This I must assume in order to complete in the short time of space allotted to me, that you have at least a general knowledge of your country, as well as of the country from which our institutions and laws have been derived.

You well understand that there is little or no scope for originality in anything that I can present to you as to our Constitution. The whole thing seems to have been fully covered by treatises and judicial opinions. These later must be our guides in ascertaining what that instrument means. The decisions here alluded to are of course principally those of the Supreme Court of the United States. No other judicial tribunal can speak with the same authority as it can. Now, do not understand me to say that every possible question has been determined. From the very nature of things, as our civilization advances and broadens, new phases of questions supposed to have been settled will arise and often present difficulties of a very serious character.

All that I mean to say is that most every position relating to the powers of the federal government have been defined in their scope, so that all that remains to be done is to apply the rules to new phases of old questions. The man who knows nothing of the form of government under which he lives does not deserve to enjoy its blessings and privileges. He is derelict in his duty as a citizen, and of all other persons the lawyer is least excusable.

I have often been astounded to meet with lawyers who have actually never read the Constitution of the United States, although it can be read within the time that is wasted at a street corner some afternoon discussing the last game of baseball or the last prize fight. They may have examined particular clauses, but have never read the entire instrument so as to comprehend in a general way the system of government ordained by it. They have a vague, loose idea of what may and what may not be done under the Constitution, and they have not a knowledge which comes from an actual examination or a serious thought. Good lawyers have been heard to accord powers to the general government which everyone knows that it does not possess, and deny powers that it has and must have if it is to exist at all.

Now, I beg you that that this may not be said of any member of this

law class that he allow this week to pass without reading the Constitution. Some knowledge of the principles underlying the government under which we live ought to be possessed by every person who owes duties to that government, or upon whom its laws operate, or who depends upon it for protection of his life, liberty, and property. Freedom and free institutions cannot long be entertained by a people who do not understand the nature of the government under which they live.

It is a peculiar fact that many of our graduates of universities are better informed about the history and laws of ancient nations than they are of the government under which they live. Gentlemen go to Europe carrying with them diplomas of the highest excellence in literature and ancient history and of the classics who cannot explain to a foreigner of some education any of the principles upon which our system of republican government rests. If they are asked why Congress does not pass a general divorce law operating throughout the entire United States, or fix a uniform punishment for the crime of murder, these gentlemen of such high attainment could not tell, if their lives depended on it, why Congress had no power to enact such legislation.

Now, it is essential to a clear understanding of our Constitution to know something of the circumstances under which those who framed it were placed. There are words in our Constitution which are susceptible of different constructions, but their meanings are ascertained by knowing the circumstances which then existed and the laws and customs which went before. We ought to know what principles of government existed at the time and before that time, what right of life, liberty, or property existed and which went before the time when the colonies achieved their independence. Every lawyer knows that the meaning of a rule of law is best ascertained by taking the history of the rule, back through the line of legislation and adjudications, up to the time when it was first enacted.

So, you see, we will have to look at the history of the mother country. Many men do not like the phrase "the mother country," because they regard it to be, and always to have been, hostile to this country. In a sense, they are right. They treated our forefathers very badly during the time preceding the war for independence, as well as during that war, and even down to the war of '61, in a manner such as we do not always recollect with pleasure. She has not always treated the daughter as a loving mother ought to treat her children, but it must be said with frankness that the child has not always been as dutiful as it ought to have been.

It will not serve a good purpose here to enter upon inquiries whether in all the crises the one country or the other has been most in the wrong. What most concerns us is that more than at any time in past history of these

two great nations, they stand closer together than they ever did before, and it is to be hoped that nothing will occur to disunite them. We will be asked at all times to take the part of our own country, and so we ought to. The man who does not love his country is worse than a heathen. But the fact is that most of this country was once under the domination of England.

The English and the Americans speak the same language and have in a large degree the same customs and laws. And they are the leaders of the Anglo-Saxon people of the world and what destiny awaits the Anglo-Saxon race if they are united upon any matter affecting the prosperity of nations. Their will can be made paramount. And moreover, they are the custodians of the principles of liberty, which must prevail to the end, that men shall enjoy that freedom of speech and action which is essential to the security of life, liberty, and property.

The mother country was once the strongest. And although she may yet claim to be the strongest, yet one of her greatest men, now dead—I allude to Mr. Gladstone—said quite a number of years ago:

There can hardly be a doubt as between America and England of the future, that the daughter at some not very distant time, whether fairer or less fair, will be stronger than the mother, and it is with particular interest that I think of what change in the world the destinies may yet have in store for these two nations born to command.¹

Now, I direct your attention to this first, because it is important that we know what went before the Revolutionary period when our forefathers established our Constitution. What models had they? What did experience tell as to the operation of particular principles of government? Now, it is common knowledge that, at the time when our forefathers were driven into the rebellion, the English government consisted of three departments, or branches of government, representing in theory the monarchical, aristocratic, and public or democratic elements, and I shall not make any statements of the early history of England out of which they arose. That belongs to the study of the history of England.

Suffice it to say that long before the establishment of our Constitution, the rights of the people, the King, and of Parliament were clearly defined.

¹ W.E. Gladstone, *Kin Beyond Sea*, 127 N. AM. REV. 179, 181 (1878) (“The England and the America of the present are probably the two strongest nations of the world. But there can hardly be a doubt, as between the America and the England of the future, that the daughter, at some no very distant time, will, whether fairer or less fair, be unquestionably yet stronger than the mother.”).

It is true now, as it was essentially true at the close of the last century, that the King or Queen reigned, and that while in theory the House of Lords possessed as much power as the House of Commons, the real power by which England was then controlled resided in the House of Commons. In form, the King appointed the ministers and through them the operations of the departments were conducted, but in fact those ministers were designated by the House of Commons.

Now, let me explain to you what a “Vote in the House of Commons for a Want of Confidence” is. You often see this phrase in the newspapers. You, of course, know who the present Prime Minister of England is: Lord Salisbury, who has somewhat in the English system of government the position occupied by the President of the United States.² He is the responsible head of the executive branch of the government, and that gracious lady, called the Queen of England, whether at her estate in Scotland, or on the Isle of Wight, or near London, although greatly respected by all her people, has very little to do in point of fact with the ruling of the English people. And if she attempted to lay her hand on the operation of the government of England, if she would say this, that, or the other thing shall be law, this, that, or the other thing shall or shall not be done, Lord Salisbury would resign his position and tell her to find somebody else to accept the position of Prime Minister of England. And she would not find anybody else that had any manhood or self-respect in him among the public men of England that would take that position.

This is all preliminary to the description of a vote of confidence in the House of Commons. Now, what does that mean? The House of Commons is composed of men that are elected and are supposed to represent the will of the people of England. Now today, great events are transpiring in different parts of the world that are to affect not only one country, but the whole civilized world. The map of the world is being reformed, so to speak. Great things are now going on in Asia. The old decayed empire seems about to be divided up in some way. Russia is going free from Europe and is making for land on the Pacific Coast, and she is supposed to have large influence with the governing power in China. Germany is looking in that way, so is France, and a great many people are inquiring as to what Lord Salisbury intends to do as far as the English interests are concerned. Does he intend to stand still till Russia gets it all? Way over in

² Robert Gascoyne-Cecil, 3rd Marquess of Salisbury, was Prime Minister of the United Kingdom from 1885–86, 1886–92, and 1895–1902. *History: Past Prime Ministers*, GOV.UK, <https://www.gov.uk/government/history/past-prime-ministers/robert-gascoyne-cecil> (last visited May 19, 2013).

the center of Africa there is a scene of dispute between England and France, and Englishmen are inquiring, what is Lord Salisbury going to do? Is he going to let the Frenchmen stand there, or is England going to control the Sudan and the navigation of the Nile?

Now, suppose any measure arose in the House of Commons involving one or the other of the plans of Lord Salisbury, and one of the Members of this House should condemn Lord Salisbury and Lord Salisbury's purpose, and this condemnation took the form of some measure and a vote taken upon it, and the House of Commons votes to sustain that measure and condemn Lord Salisbury. That is a vote of a want of confidence.

What is the result? What would occur? Why, if a vote of want of confidence occur one night, by the next day at noon Lord Salisbury would have hunted up the Queen and tendered the resignation of himself and his ministry. What would the Queen do? I read to you that the ministers were appointed by the House of Commons, although not by vote. The Queen would send for the leader of the majority in that context. He is presumed to represent the will of the people of England, and she tells him to form a new ministry. Well, he will go to a Member of the House of Lords and say, "I want you to administer Naval Affairs," and so on. He would form the cabinet and would become Prime Minister, practically the President of England, and he would stay in as long as the House of Commons supported him.

I ought not to pass this point without contrasting the difference between that form of government and ours. We have a President of the United States, elected for four years. No vote of want of confidence of either Senate or House can turn him out. He has his cabinet and no one of them can be disturbed by any act of Congress, except by impeachment, no matter what vote of censure be made, either by Senate or House. It cannot disturb the cabinet. And therefore, in that instance, the application and management of the English government responds more quickly to the prevailing sentiment of the people than ours, but it is not for that reason any better or stronger than ours.

You will find gentlemen across the waters, especially in France, who will speak contemptuously of our form of government. They say it is a mode which cannot last. All the powers are in the possession of the party in power and seeds of dissolution are sown at each election. But this fact is in the very illustration that I have given. In that you have proof of the wisdom and forethought of the men who framed our Constitution and our government.

We are free. There is security of life, liberty, and property here. It is the only government on the face of the Earth where man and man are equal

before the law, and with all that large liberty we are stable and strong. There will be government after government overturned and overturned in England and in France, perhaps, and in Germany and elsewhere, by the passions and combinations of the people, while this government is strong and steadfast, because in our fundamental law we have placed checks upon ourselves. We recognize the fact that we need to be restrained.

What I have said justifies the statement that England is governed by a cabinet. This system works a close union between the executive and legislative departments of the English government.

I will stop here long enough to say that England has not got a Constitution. There are a series of statutes and customs and judicial decisions, all put together, which constitute the English Constitution. But this country is the only one on the face of the Earth that has a written fundamental law that is above Presidents and Congresses, and even above the people who made it, whereas what is called the English Constitution may be unmade any day by Parliament by a statute.

Now, that system works a close union between the legislative and the executive departments, so that an English writer referring to it says this close union of the executive and legislative powers is effected by means of a body of men from the legislative branch, selected to be the executive power, a committee, a hinge which joins these two powers of government. In its origin, it belongs to one; in its functions, it belongs to the other. It is an absorption, a fusion of the two.³

Now, I told you before that when a vote of want of confidence was taken, the Lord Premier would resign. But he may say, "The House of Commons does not represent the real will of the people, and I will dissolve Parliament, and appeal to the people in this measure." Now there is an election, and if the people sustain the vote of the House of Commons, that is the end of it. Lord Salisbury would have to resign.

Mr. Gladstone said if we wish really to understand the manner in which the Queen's government is carried on, we must prepare to examine with a sharper contrast the power of the American President. His ministers are the servants of his office. The intelligence which carries on the

³ WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 50 (2d ed. 1873) ("The English system, therefore, is not an absorption of the executive power by the legislative power; it is a fusion of the two. Either the Cabinet legislates and acts, or else it can dissolve. It is a creature, but it has the power of destroying its creators. It is an executive which can annihilate the legislature, as well as an executive which is the nominee of the legislature. It was made, but it can unmake; it was derivative in its origin, but it is destructive in its action.").

government has its main seat in him. The responsibility for failures falls upon him, and it is around his head that success sheds its glow.⁴

The American government consists of three powers distinct from each other: the legislative, the executive, and the judicial. The English government is likewise so described, but in the English government there is found a fourth power entering into and sharing the work of the other three, and charged with the duty of holding them in harmony. This is the ministry.

Yet, it is not a distinct power. This fourth power is parasitical and lives no separate existence. One portion is formed in fact from the House of Lords, the other from the House of Commons. These form the council of the Queen, and upon them rests all responsibility. It is a hinge that connects the King or Queen and the House of Lords or House of Commons. Upon it is concentrated the whole strain of the government. In every free state and in every republic, someone must be responsible, and the question is who shall it be. In the British Constitution, it is the ministry and the ministry exclusively.

Now, this may be further illustrated by one or two points to which I will call your attention very briefly. You will observe from what has already been shown that the House of Commons can in some way or other place its hands upon every department of the British government. The principle underlying our government is a separation of the branches of the government. Now they have got those three departments in England, but they are interwoven and connected. The House of Lords is even the Supreme Court of England. Now what might happen in England?

I once asked a great English judge, now dead. He expressed a hope that someday they would have in his country a court like the Supreme Court of the United States, which could speak finally without there being any power of revision. Their highest court there is the House of Lords. I said to him—it was during the lifetime of Mr. Gladstone—I asked that great judge what the courts of England could do if Parliament were to pass an act authorizing the sale of Mr. Gladstone's estate for cash to the highest

⁴ Gladstone, *supra* note 1, at 193–94 (“But if we wish really to understand the manner in which the queen’s Government over the British Empire is carried on, we must now prepare to examine into sharper contrasts than any which our path has yet brought into view. The power of the American Executive resides in the person of the actual President, and passes from him to his successor. His ministers, grouped around him, are the servants, not only of his office, but of his mind. The intelligence which carries on the Government has its main seat in him. The responsibility of failures is understood to fall on him; and it is round his head that success sheds its halo.”).

bidder and putting the proceeds into the treasury of England. I asked him, could that act be declared void? “No,” said he, “the judges in the highest court of England would have to respect that statute, because the highest power of the English people is represented in Parliament. No court in England would dare say that that statute was void.” Said he, “How is it in your country?” “Well,” said I, “in America every man’s right of property is protected by the fundamental law that is over every power in the country. The government of the United States and the states combined could not lay their hands on my property and take it for public use without paying me for it.” And that any court could step between the legislature and me and protect my property. An act such as I spoke of would not stand a minute in any court in America, be it ever so humble. This illustrates the difference between the two systems of government.

LECTURE 2: OCTOBER 21, 1897

The subject of my talk the last evening was mainly in a general way to bring to your minds some knowledge of the fundamental characteristics or features of the English form of government, in order that you might see what was before the men who framed our present form of government when the Constitution was established. Something in addition now to what was said on that evening on that line.

The Anglo-Saxon policy, as it obtained in ancient England, was local or self-government. We hear a great deal about local government in this country—home rule. It is a very old idea in England, not exactly as we have it. That was shown in the political and territorial conventions, in which the body of the inhabitants has a voice in managing their own affairs, although subsequently the freedom of localities was undermined or impaired and the power of the ruling class instilled in its place. Yet, as early as 1485, there were essential checks upon royal and governmental authority.⁵

Probably I am doing you a service as I pass along to say to you that Hallam's *Constitutional History of England* is a very valuable book for you to read.⁶ You will call it dry. It is dry to anybody except a lawyer. If you do not read it too rapidly, but read it slowly, you will see that we have no book that will take its place.

Now, what were some of the principles that were established before this government of ours was organized? The King could not levy any new tax upon his people, except by the grant of Parliament. Queen Victoria today cannot levy any tax by her mere fiat, her word. It has got to be done by Parliament, and she, of course, assents to its action upon the subject.

This Parliament way back yonder, many years before our government was established, consisted of two Houses, in one of which were Bishops and persons called "hereditary peers." And then there was the House of Commons, the lower or "common" house as it was called. Now, the assent and approval of Parliament was necessary for every new law, whether of a general or temporary nature.

Now, there was another principle that we understand today, because it pervades all of our system, federal and state. No man could be committed

⁵ On August 22, 1485, Henry VII seized the crown of England from Richard III and founded the Tudor dynasty, which began the transition from a feudal to a bureaucratic government. See 1 HENRY HALLAM, *THE CONSTITUTIONAL HISTORY OF ENGLAND: FROM THE ACCESSION OF HENRY VII TO THE DEATH OF GEORGE II* 10–14 (Paris, Chapelet 1827).

⁶ See *id.*

to prison, but by a legal warrant specifying his offense, and by a usage nearly tantamount to constitutional right he must be speedily brought to trial. The Queen of England cannot take up or detain the meanest subject at her mere will or pleasure. It is one of the privileges that no man shall be restrained of his liberty but by the law of the land.

You hear the phrase “Magna Charta.” Do all of you know what Magna Charta means? You certainly do not know what it means unless you have read some history of England. Way back in the year 1215, now nearly 700 years, the barons of England and some of the bishops met and demanded certain things to be done by the King of England. They made that demand of King John. They compelled him to give his assent to Magna Charta, the great charter. That was the basis of the liberties which the people of England enjoy today.

That is another illustration, which often happens in the history of the human race when great results are attained, when the mighty in the land, the strong and the powerful, rise and resist aggression upon their rights. This was an illustration of the willingness of the mighty in the land, in England—not the poor and humble and the oppressed, but the mighty—to resist the King because he was oppressing them. And when they wrung Magna Charta from King John, they wrung something from him that was of benefit to every human being of every condition of society in England.

Now, the same views that were expressed by this charter were once expressed by the celebrated author Thomas Erskine in defending Hallam’s book.⁷ This was a lawyer, and it is true in the history of all the Anglo-Saxon race, and many other races, that it is the lawyer that has stepped forward and has put himself in the way of arbitrary power to defend the rights of man. And this lawyer, once an officer in the Navy of England, but studying law after he had had that service, was in his lifetime known as the most celebrated author of England.

There he stood in the presence of all the Judges of the King’s Bench, stating to them that if a man were to commit a capital offense in the face of all the judges of England, their united authority could not put him on his trial. They could file no complaint against him, even upon the records of the Supreme Criminal Court, but could only commit him for safe custody, which is equally competent to every Justice of the Peace. The grand jury alone could arraign him, and in their discretion might likewise discharge him by throwing out the bill, and the names of all your lordships as

⁷ R v. Shipley, (1784) 99 Eng. Rep. 774 (P.C.) 781–82. Erskine revised Hallam’s *Constitutional History*.

witnesses on the back of it.

The fact of guilt or innocence on a criminal charge was to be determined in a public court, and in the county where the offense was alleged to have occurred. Public court, not a Star Chamber—whenever that occurred, it occurred only by tramping the laws of England underfoot. And not tried by one man, or two men, or three men, but by a jury of twelve men, from whose unanimous verdict no appeal could be made. Civil rights, so far as they depended upon the subject of fact, were subject to the same mode of decision.

We have preserved in our fundamental law this right of trial by jury. The officers and servants of the Crown, violating the personal liberty or other rights of the subject, might be sued in an action for damages to be assessed by a jury, or in some cases were liable to criminal process. In other words, the King, moving along the streets of England, might tell his subjects to arrest that man and put him in jail. Well, that man who imprisoned him could be sued, and it would be no justification for him to say that he did it by order of the Crown. The courts would answer that the King had no authority to give such directions.

Now, these principles were at the very foundation of the liberties of England when our fathers emigrated from that country. The people were free, in the best sense of the word. In these principles, the men and women who had fled from persecution in England had been trained.

This continent, you will remember, was effectively discovered in 1492. I say “effectively discovered,” for while the evidence is abundant that the shores of New England were visited by Norsemen as early as the eleventh century—the indications are that this is true, but they did not remain long—no European population was landed upon our shores until after the discovery of Columbus, now nearly 500 years ago. And one of the curious features about the fame of great discoverers, and other men, is that there is definite doubt today where Columbus is buried. They are quite sure that he is buried down here in Havana. They say that before they evacuate Havana they will take his remains to Spain. But people over in San Domingo say that there is no doubt that he is buried there. But perhaps it is not of great importance where he is buried. I don’t suppose they will find anything remaining of him now, except the fame and memory of his achievement.

Now, in the beginning of the seventeenth century the Pilgrims landed, and thenceforth there was a tide of immigration to the shores of America that made it apparent to the mother country that the American Colonies were destined to become an important part of the British Empire.

I cross over the first century of the life of the colonies, because that

period is covered by histories which I assume you have read or will consult. The people of the New England Colonies early discovered the necessity of union among themselves for their protection against hostile Indians and against the Dutch in New York. It is a curious commentary upon that saying that both of the candidates for the Governor of New York today are proving that they are descended from the Dutch.⁸

The men who came over on the Mayflower had learned what arbitrary power was and what liberty was. They recognized the fact that real lasting freedom consisted not so much in the absence of actual oppression, as in the existence of constitutional checks upon the power of government. Referring to the planting of the seeds of voluntary government here, it was said recently by a very distinguished gentleman that it is like a grain of mustard seed, which when it is sown in the earth eats less than all the seeds that feed in the earth, but when it is sown it groweth up and becometh greater than all the others, shooting out great branches so that the fowls of the air may lodge under the shadow of it.⁹ Now, before these Pilgrims left the deck of that famous ship, they signed articles which were to be the basis of their system of government.¹⁰

Now, just before they landed, they kept a journal in which entries were made in brief form as to what occurred from day to day. An entry of December 20, 1621 contained six words, but they were of momentous character. The people who had turned their backs upon their native lands, their friends, their kindred, and what were deemed the pleasures and the enjoyments and the comforts of civilized life, and put themselves into this little vessel and braved the dangers of the Atlantic Ocean, came to this wild

⁸ In the 1898 election, the Republican candidate for Governor of New York was Theodore Roosevelt and the Democratic candidate was Augustus Van Wyck. *Timeline: Life of Theodore Roosevelt*, THEODORE ROOSEVELT ASS'N, <http://www.theodoreroosevelt.org/life/timeline.htm> (last visited May 19, 2013).

⁹ 2 LYON G. TYLER, *THE LETTERS AND TIMES OF THE TYLERS 537* (Da Capo Press, 1978) (1885) (“On the soil of Virginia, there at Jamestown, twenty miles from Sherwood Forest, the first permanent English settlement had been made in the continent of America. That settlement had been the mustard seed from which the great tree of the Union had sprung, with its huge branches stretching through so many climes, and till now the lodging place of the birds of brotherly love.”). Tyler and Harlan allude to the parable of the mustard seed. *Mark* 4:30–32 (King James) (“And he said, Whereunto shall we liken the kingdom of God? or with what comparison shall we compare it? It is like a grain of mustard seed, which, when it is sown in the earth, is less than all the seeds that be in the earth: But when it is sown, it groweth up, and becometh greater than all herbs, and shooteth out great branches; so that the fowls of the air may lodge under the shadow of it.”); *Luke* 13:18–19; *Matthew* 13:31–32.

¹⁰ MAYFLOWER COMPACT of 1620.

land in order that they might worship Almighty God according to the dictates of their consciences, and have a government or an organization that paid some regard to the natural rights of man. What was that entry, just six words? “On the Sabbath day we rested.”¹¹

Well, I say, that tells a great deal. And it contains a principle which we might well take into our minds today, for if in the experience of the last two or three hundred years you point me to any people anywhere on the earth which have no Sabbath, I will point you to a people that have the seeds of destruction in their social organization. It is not everyone in our own country that respects the Sabbath day—which ought to be respected—but generally it is. You cannot go into any city in America today, even in the largest, and go down its thoroughfares on Sunday, without you see evidence everywhere of respect for that holy day. Places of business closed, people at their churches, or at any rate they are resting in the largest sense of the word. I know there are some who would like to introduce into this country of ours some of the European notions of the Sabbath day. Whether they are to succeed in that is yet to be seen.

“On Monday,” the diary reads, “we sounded a harbor and found it a very good harbor for our shipping. And we marched also into the land”—and the Anglo-Saxon is apt to do that if you give him a chance—“and found divers corn fields and little running brooks and places very good for situation. We returned to our ship again with good news to the rest of our people, which did much comfort to their hearts.”¹²

Now, the important thing to observe about this, aside from what I have said, is that these people did not come here with the expectation of founding a nation independent of the mother country, but they came as loyal subjects of England to found an English colony. Now, the first law which was ever entered by the Plymouth Colony on its records was the one recognizing the right of trial by jury. Here are the very words: “It was

¹¹ EDWARD WINSLOW & WILLIAM BRADFORD, MOURT’S RELATION OR JOURNAL OF THE PLANTATION AT PLYMOUTH 59 (Henry Martyn Dexter ed., Boston, J.K. Wiggin 1865) (1622) (“[A]nd here wee made our Randevous all that day, being Saturday, 10. of December, on the Sabboth day, wee rested, and on Munday, we sounded the Harbour . . .”). Sunday, December 10, 1621 on the Julian calendar became December 20, 1621 on the Gregorian calendar. See Al Van Helden, *The Gregorian Calendar*, THE GALILEO PROJECT (1995), <http://galileo.rice.edu/chron/gregorian.html>.

¹² WINSLOW & BRADFORD, *supra* note 11, at 59 (“[A]nd on Munday, we sounded the Harbour, and found it a very good Harbour for our shipping, we marched also into the Land, and found divers corne fields, and little running brookes, a place very good for situation, so we returned to our Ship againe with good newes to the rest of our people, which did much comfort their hearts.”).

ordained on the 21st day of December, 1623, in the court then held, that all criminal nature, and all matters of trespass and debts between man and man should be tried by a verdict of twelve honest men to be impaneled in a jury.”¹³

Now, as early as 1631, the project for a confederation among the New England colonies was discussed. There has been much discussion as to the colony which first originated this project of union. John Quincy Adams claimed this honor for the Plymouth Colony.¹⁴ Others claimed it for Connecticut. In 1643, the colonies of Plymouth, Connecticut, and Massachusetts established a colony.¹⁵ Each colony, however, retained its distinct and separate jurisdiction and control over its domestic affairs and laws. It was an organization which had union upon its face, general welfare in words, and a form of combination, but it was not a government that could reach out and enforce its own authority.

You will see when examining this part of our early history that while to the government of the United Colonies of New England was entrusted sovereign power in some of its matters, there was wanting that essential, the power in some peaceful mode to enforce its authority. A government that has not the necessary power to enforce its authority is necessarily a government that cannot last long. You will observe also that that government was committed to one legislative body.¹⁶ You will see when we get along what were the notions upon that subject of the men that established the Constitution.

What do you think would be the condition of this country if all the

¹³ RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND: LAWS 1623 TO 1682, at 3 (David Pulsifer ed., AMS Press 1968) (1861) (“It was ordained 17 day of [December] Ano 1623 by [the Court] then held that all Criminall facts, and also all [matters] of trespasses and debts betweene man [and] man should [be tried] by the verdict of twelve Honest men to be Impanelled by Authority in forme of a Jury upon their oaths.”).

¹⁴ John Quincy Adams, *The New England Confederacy of 1643*, in 9 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 211 (3d Ser., Boston, Charles C. Little & James Brown, 1846) (“The New England confederation originated in the Plymouth colony, and was probably suggested to them by the example which they had witnessed, and under which they had lived several years, in the United Netherlands.”).

¹⁵ See THE CONFEDERATION OF THE COLONIES OF NEW ENGLAND, 19 MAY, 1643, reprinted in 1 FEDERAL AND UNIFIED CONSTITUTIONS: A COLLECTION OF CONSTITUTIONAL DOCUMENTS FOR USE OF STUDENTS 50 (Arthur Percival Newton ed., 1923). The United Colonies of New England, or New England Confederation, existed from 1643 to 1684 and consisted of the colonies of Massachusetts, Connecticut, Plymouth, and New Haven.

¹⁶ The New England Confederation was primarily a mutual defense agreement. The Articles of Confederation provided for a governing body of eight Commissioners, two from each member colony. One of the Commissioners served as President of the Confederation, and action required the vote of six Commissioners. See *id.* at 52–54.

legislative power of this government was committed to one house and legislature? Suppose we had alone a Senate of the United States, or suppose we had alone a House of Representatives to make laws. Well, observe also that there was absent from this system a feature that we have now got in the existence—which is vital to the stability of any free government—a judicial department for all the country covered by the authority of that government.

The passage of the Stamp Act caused the feeling for union. Our forefathers did not care anything about the little stamp required by that act. They did care about the principles that were involved in it, because they had no say-so in the legislature whatsoever. Then came the Congress of 1765 and after awhile the Articles of Confederation, under which the Revolutionary patriots lived during the struggle for independence. But before these articles were formed every effort was made to come to an agreement with the mother country.

The forms of government were not uniform in all the colonies. New Hampshire, New Jersey, New York, North Carolina, and Georgia for a long period had what are called provisional governments. Then there were proprietary governments, and of that class were Maryland, Pennsylvania, and Delaware. There were charter governments, and to that class belonged Massachusetts, Rhode Island, and Connecticut.

Notwithstanding the difference in the forms of government, the people throughout them all were firmly agreed upon certain leading principles. Upon what principle of justice could Englishmen claim the safeguards established in England for the security to life, liberty, and property, and deny the same rights to Englishmen resident in the American colony? And there was no time in the history of the colonies when the people did not demand the same rights that were accorded to Englishmen residing in England.

The Declaration of Rights was formulated by the Continental Congress of 1774.¹⁷ It is in substance the platform, so to speak, upon which the colonies went before the civilized world into the Revolutionary War. And they formulated a bill of rights, if I may so describe it. One of them is that the foundation of English liberty and of all free governments is a right in the people to participate in their legislative council. And as the English Colonies were not represented in the British Parliament, they were entitled

¹⁷ DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (1774), reprinted in 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 63 (Worthington Chauncey Ford ed., 1904).

to the free and exclusive legislation in their colonies in all cases of taxation and internal policy. The colonies were under the control of the Continental Congress when the war began. It began in fact in 1775, though the Declaration was not until July, 1776.

The Bill of Rights promulgated by Virginia prior to the Declaration of Independence, adopted June 12, 1776 by a convention that met at Williamsburg, in that commonwealth.¹⁸ We all speak—and quite naturally—of the Declaration of Independence and regard it—and properly—as our political Bible.

But in my judgment equal admiration and praise is due to the Virginia Bill of Rights. It embodies all the ideas that were established after several hundred years of trial for the vindication of the inalienable rights of man, and in no document (I state this without qualification) to be found in all the history of the Anglo-Saxon race have those ideas been more clearly expressed than in the Virginia Bill of Rights. There is scarcely a word in it that was not necessary. It contains sixteen propositions, every one of which embodies a vital political truth which ought to be cherished by every free man, and it was the work of one man. That is, one man was the author of it.

You have all been to Mount Vernon, the home of Washington. Just adjoining it, below it, is a plantation on which there is a residence called Gunston Hall. There lived in the building—the one that is there now—a planter, not educated as a lawyer as far as anybody has ever heard, having no ambition for political life, living there practically in the wilderness on his plantation. The only education probably he had—and that of course was first-class—was from some of those men who came over at that time from Scotland and Ireland, and private tutors along the Potomac.

At any rate, this gentleman did not, as far as we know, go to any college or university, but was simply a planter, but a student and a reader. And as a result of his reflection and study, he was able to pen this document. It is early observable from the history of that day that he was looked upon with great respect and reverence by all who knew him. And it was said of him that there was such majesty in his appearance that whenever he appeared in any public assembly in Virginia, no matter what it was, instantly, as by common consent, everybody recognized him as the first man there, unless George Washington was present.

¹⁸ VIRGINIA BILL OF RIGHTS (1776), *reprinted in* DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606–1863, at 206 (Howard W. Preston ed., New York, G. P. Putnam's Sons 1886).

He went to this convention. The very day after he arrived at Williamsburg, he was put on the committee to frame this Bill of Rights. There is no doubt about his authorship of it. The original is in existence in the city of Richmond, and wholly in his handwriting.¹⁹

Now, I repeat that no man of the present day—I do not care how great a scholar he is—no scholar or statesman can take that document today and better it by leaving out one word, or putting in another word, or changing a word. And in its sixteen propositions, you will not find absent a single idea that we today regard as essential to freedom in this country. And this came from a man of large fortune, what some would call an aristocrat of that day. He had five thousand acres of land in his plantation here on the Potomac, four or five hundred men in his employ, a large estate for that day.

¹⁹ Harlan refers to George Mason (1725–92). *See id.*

LECTURE 3: OCTOBER 23, 1897

Do you remember, what is the first thing in the Constitution?

The Preamble.

What is the object of the Preamble?

Its object is to state what was the existing evil and what was intended to be remedied by it.

Will you read 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 defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.²⁰

Do you discover in that any evidence of the grant of power?

No. It is a declaration of purposes for which the Constitution is ordained.

In that phrase, "We the People of the United States," who do they represent? Who are the people of the United States? Does it mean the same thing as if it had said, "We the states"?

The power which ordained and establishes the Constitution was the people of the United States.

In what way do the people of the United States do this? Did the people of all the original thirteen states meet in a mass meeting?

No, by representation in convention assembled.

But those men in convention did not ordain and establish the Constitution. They agreed on the instrument. Now, they submitted it to somebody. To whom did they submit it?

To the people of the different states.

How was the action taken?

The people of the several states acting separately within their state accepted this Constitution, and then when it was accepted, it was voiced not by the people of the individual states, but the voice of the people of the United States.

There is a peculiar force in these words, "We the people of the United States." Now, if you go back to the Articles of Confederation under which the people in the colonies lived before this Constitution was adopted, you will find these words: "Articles of Confederation and perpetual Union

²⁰ U.S. CONST. pmb1.

between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.”²¹ They were Articles of Confederation of the states, and what occurred appears on the very face of that instrument.

Article I. The stile of this Confederacy shall be “The United States of America.”

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

Article III. The said states hereby severally enter into a firm league of friendship with each other—you do not find the word “league” in the present Constitution—for their common defence.²²

While the purpose was to create a perpetual union between the States, there was no power invested or put in the Congress of the Confederation that would enable it to assert the authority in which the people of all these states were interested. It was in substance a partnership between states, with a right in each state to leave that union whenever it saw proper, to say, “I am tired of this league.”

More than that, if a state got an order from the old Confederation to furnish a given amount of money to the common treasury of the common government, there was no authority to compel it to pay that money. There was no authority in the Congress convened under the Articles of Confederation to lay a tax on anybody or anything. It could not raise a dollar of money.

It was a government which could declare everything and could do nothing. It was a government which could appoint Mr. John Adams, for instance, as Minister Plenipotentiary to the Government of Great Britain, but it was not a government which had power to raise money to pay the expenses of Mr. Adams while in London. It could borrow if anybody chose to lend, but it could not raise a tax.

Each of these states reserved their complete sovereignty under the old Articles of Confederation. And you will now and then meet with a man who says that the only sovereign in this country is the state. You will meet with a man who talks as if he had been asleep half a century, and has

²¹ ARTICLES OF CONFEDERATION of 1781, pmbl.

²² *Id.* arts. I–III.

known nothing of what has intervened in the meantime. And he will tell you that the United States are not a sovereign, that the only sovereign in this country is the state in which he lives. And he will probably say that in the event of any conflict between an act of Congress, for instance, and an act of the State, he will say that the act of the State is the law of him, and not the act of Congress, even if it be consistent with the Constitution of the United States.

Well, do you say, "I will obey my State, no matter what the nature deserves; no matter what the authority of the Constitution may say?" And he will say that he is under an obligation to respect the law of the State, although it may be inconsistent with the Constitution of the United States. When a man talks in that way in these days, it shows how profoundly ignorant a man may be without making much effort.

Every judge of every court in this country, federal and state, takes an oath to support the Constitution of the United States and the laws of Congress that are consistent with it. He is not bound to support an act of Congress that is unconstitutional. But an act of Congress that is constitutional, that is within the limits of the Constitution, he does swear to support.

If you turn to this Constitution, you will find that it says this Constitution and the laws of the United States made in pursuance thereof are the supreme law of the land.²³ Just stop there. There might be some chance for contention.

Every member of every state legislature in this country takes an oath to support this Constitution as the supreme law of the land. Every justice of the peace in the United States, between the two oceans, takes an oath to support this Constitution as the supreme law of the land.²⁴ What, therefore, is to be thought of a man sitting on the bench of a state court, for instance, who has an oath upon his seal to support the Constitution of the United States as the supreme law of the land, anything in the constitution or the law of any state to contrary notwithstanding, who will say that he will enforce this law of the state and respect it, even if he believes it in opposition to the Constitution of the United States?

²³ U.S. CONST. art. VI, cl. 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 . . .").

²⁴ *Id.* art. VI, cl. 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 . . .").

We ought to take care in the study of this instrument that we are not misled by either one of two classes of men in this country. And there are some of both kinds.

There are some who believe that it is competent for the government of the United States, through Congress, to do anything, pass any law which appertains to the general welfare. Who think that the government, by the Congress of the United States, is competent to govern anything that may be acquired by legislation at all. Who shut their eyes to the idea that there are states in this country. And who forget that the government created by this instrument is not a government of all powers, but limited to the extent of powers to be exercised. That class of man is a dangerous man, if in public life.

Still, there is another class of men, equally dangerous. There are those who look upon the government of the United States, and who subordinate all the interest of the United States to the whim of the notion of the state in which they live.

These are two extremes. The framers of this instrument have not intended to create a government in which would be settled all the powers of legislation. Still less, that they ever intended to minimize or destroy the powers of the state. This Constitution, as you will find when you look at it closely, proceeds with the idea that there are certain matters that concern all the states, and all the people of all the states, equally, which are to be handled by the government of this instrument; and that there are others, of a purely local state character, with which this government has nothing to do. [The government] for national purposes [is] limited in its powers to those purposes, and state government with full control over domestic matters.

Now, on the face of this Preamble, the phrase, “We the People of the United States,” gives the key to this instrument, in part.²⁵ This is a government not created in the form of a law. It is not a government created by the states in their corporate capacity, but a government that applies the office to the will of the people of the United States. When this Constitution went into operation, it represented the will of the people of all of the states, acting within their states when they accepted the Constitution; but when it became the law of the United States, it spoke the will of all the people of the United States.

The fact that it did so was one of the objections to its adoption. Patrick Henry called upon Mr. Madison and others and said, “By what authority do

²⁵ *Id.* pmbl.

you say, ‘We the People of the United States?’”²⁶ It was replied that, “We say ‘We the People of the United States’ because it is the people of the United States when we accept the Constitution. We are not speaking the will of the states, but the will of the people of the United States.”²⁷

What did they mean by it? What object did they have in view? Why did they want this Constitution? In order to form a more perfect union.

We had a union already, but we want a more perfect union. We want one that can sustain itself. We want a union that can speak by authority. We want a union that is strong enough to maintain itself against all powers that can be brought against it.

And the wisdom of it was illustrated very shortly after the government of the United States. After the government was incorporated, Washington was President, Hamilton Secretary of the Treasury. The first Congress passes what was then called an excise law, which was a very distasteful one to some of the good people of Western Pennsylvania.²⁸

Thereupon arose a rebellion. It is known in the history of those times as the Whisky Rebellion.²⁹ They said they would not obey that law, that Congress had no right to pass it. Nobody should come there to enforce that

²⁶ Patrick Henry, Speech at the Convention of Virginia (June 4, 1788), in 2 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, ON THE 17TH OF SEPTEMBER, 1787, at 47 (Jonathan Elliot ed., Washington 1828) [hereinafter 2 THE DEBATES] (“[W]hat right had they to say, *We, the people?* My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, [W]ho authorized them to speak the language of, *We, the people*, instead of, *We, the states?*”).

²⁷ James Madison, Speech at the Convention of Virginia (June 6, 1788), reprinted in 2 THE DEBATES, *supra* note 26, at 95 (“Should all the states adopt it, it will be then a government established by the thirteen states of America, not through the intervention of the legislatures, but by the people at large. In this particular respect, the distinction between the existing and proposed governments is very material. The existing system has been derived from the dependent derivative authority of the legislatures of the states; whereas this is derived from the superior power of the people.”).

²⁸ Excise Act of 1791, ch. 15, 1 Stat. 199 (1791) (“An act repealing, after the last day of June next, the duties heretofore laid upon Distilled Spirits, imported from abroad, and laying others in their stead; and also upon Spirits distilled within the United States, and for appropriating the same.”).

²⁹ See generally WILLIAM HOGELAND, THE WHISKEY REBELLION (2006) (discussing the political factors leading up to the Whiskey Rebellion); THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION (1986) (analyzing the Whiskey Rebellion in terms of the greater ongoing “inter-regional confrontation”); Richard H. Kohn, *The Washington Administration’s Decision to Crush the Whiskey Rebellion*, 59 J. AM. HIST. 567 (1972) (evaluating how the Executive decided to use the militia to crush the rebellion).

law. And they held public meetings. And they said in substance, “Now if any federal officer comes here to enforce that law, we will make it hot for him.” And they did. The officers created under that law who went there to enforce it, in some instances were run out of the country, in some instances were put in danger of their lives, so that they could not enforce it.

Well, there it was. There the issue was squarely presented. “Have we got a government that can enforce the laws of that government?” was the question propounded by every statesman. “Has Congress the power to pass this law?” And nobody doubted that. If Congress has got the power to pass this law, and it is in force, the executive branch of the government is under a duty to enforce it. They have sent their agents there to enforce it.

Now, the issue is presented, who is the strongest? Is the government of the United States to bow down to these mobs of western Pennsylvania? Mr. Washington, of course, had the wisdom to see that if at the very beginning of the government that was tolerated, there was an end of the government and the Constitution was a failure.

Well, what did Washington do? He called upon the Governor of Pennsylvania to put down that mob so that the laws of the United States could be enforced. But the Governor, perhaps expecting to be a candidate for re-election, did not do it. He said he could not do it.

Well, if that was the nature of it, why serious consequences were going to follow. But that wasn't the end of it. There was power given by Congress in other legislation to call forth the militia of the United States when necessary to enforce the laws. And Washington called upon the states of Virginia, Maryland, and Pennsylvania for the militia. And he got it. And he put them under the command of Whitehorse Harry Lee of the Revolution. And they started for western Pennsylvania. And Washington himself went part of the way. And when the troops from the United States got inside the rebels' lines, the rebels disappeared.

Washington gave them to understand, and they knew he meant what he said, “I have sworn to support the Constitution and I cannot under my oath see you defy the laws of the United States, and you must quit your nonsense and obey these laws.”³⁰ And they were obeyed.

³⁰ Proclamation of August 7, 1794, 6 ANNALS OF CONG. 2796–98 (1796) (“I, George Washington, President of the United States, do hereby command all persons being insurgents as aforesaid, and all others whom it may concern, on or before the first day of September next, to disperse and retire peaceably to their respective abodes. And I do moreover warn all persons whomsoever against aiding, abetting, or comforting the perpetrators of the aforesaid treasonable acts; and do require all officers and other citizens, according to their respective duties and the laws of the land, to exert their utmost endeavors

That was the result of a Constitution brought into existence, not by states, but by the people of the United States, creating a government that gave the power not only to live, but the means with which to protect its existence.

About forty years after that, there was a little trouble in South Carolina.³¹ Another internal revenue law was passed,³² and South Carolina said, “We don’t recognize your power to pass this law. We won’t permit this act of Congress to be exercised within the limits of the state of South Carolina.” And the South Carolina legislature passed an act of nullification which, in substance, said “This statute shall not be enforced in the state of South Carolina.”³³ And they were backed by that man of marvelous ability, John C. Calhoun, in that belief.

But there happened to be in the White House at that time another man who had all the courage and promptness of Washington, and his name was Andrew Jackson. He had taken an oath to support this Constitution, and he issued his proclamation, addressed primarily to the people of South Carolina, saying that this law, as long as it is upon the statute books, is to be enforced.³⁴ I have got behind me all the authority of the Constitution, the whole power of this country. I have got the army of the United States and the militia of the United States. Don’t you stand in the way of the authority of the United States. This Constitution and laws made in

to prevent and suppress such dangerous proceedings.”)

³¹ Harlan refers to the Nullification Crisis. In 1828, Congress enacted a high tariff on manufactured goods. Act of May 19, 1828, ch. 55, 4 Stat. 270 (1828). Many states, including South Carolina, opposed the tariff. When President Andrew Jackson took office in March 1829, they expected him to reduce the tariff. On July 14, 1832, Jackson signed the Tariff of 1832, which reduced the tariff on some goods. Act of July 14, 1832, ch. 227, 4 Stat. 583 (1832). Led by Vice President John C. Calhoun, South Carolina created a Nullification Convention on October 20, 1832, which passed the Nullification Ordinance declaring the tariffs of 1828 and 1832 unconstitutional and unenforceable. South Carolina Ordinance of Nullification (1832), *reprinted in* SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE UNITED STATES 1776–1861, at 268 (William MacDonald ed., 1924) [hereinafter SELECT DOCUMENTS]. On December 28, 1832, Calhoun resigned as Vice President and became a Senator from South Carolina. Calhoun and Senator Henry Clay negotiated a compromise tariff act, which Congress passed on March 2, 1833. Act of March 2, 1833, ch. 55, 4 Stat. 629 (1833). On March 14, 1833, the Nullification Convention repealed the Nullification Ordinance. See 2 WILLIAM M. MEIGS, THE LIFE OF JOHN CALDWELL CALHOUN 29–31 (1917).

³² Act of July 14, 1832, ch. 227, 4 Stat. 583 (1832).

³³ South Carolina Ordinance of Nullification (1832), *reprinted in* SELECT DOCUMENTS, *supra* note 31, at 268.

³⁴ Andrew Jackson, President of the U.S., Proclamation to the People of South Carolina (Dec. 10, 1832), *reprinted in* SELECT DOCUMENTS, *supra* note 31, at 273–83.

pursuance of it are supreme, the law being there yet. We do not intend to submit for a moment to the thought that it is within the power of any one state of the union the power to defy the laws of the Constitution. And this law shall be enforced. And every man who stands in the way of its enforcement will be punished according to the law.³⁵

And the promptness of Andrew Jackson caused that rebellion to disappear without bloodshed. And it was because he had a government by this Constitution that spoke in the name—upon authority of—the people of the United States. And they illustrated those words, “In order to form a more perfect union.” Not a union on paper, not a union in words, but a union in fact and law, and a union behind which stood the whole power of the people of the United States.

Now, another object was “to establish justice.” What did that mean? The people said, we will put in form a government that can establish justice, a government that does not rest on justice is not a government. We will create a government now that can, within certain limits, establish justice between all the people of the country.

“To insure domestic tranquility.” Well, how does it do that? How does this government do that? We will see when we go a little further along a clause under which, if necessity requires it, or if the Governor or legislature of a state requires it, the government of the United States may put the whole power of this union behind the governor or legislature of this state to keep the peace.³⁶ There is power under this Constitution to prevent the people of two states from being at war with each other. New York and Pennsylvania may quarrel as much as they choose on paper, but if New York and Pennsylvania should set about with their organized militia to make war against each other, this union established by the Constitution of the United States could step in between them.

In order to “provide for the common defense.” If Texas should be invaded by a foreign power, Texas does not have to stand alone, upon its own resources. Texas, after it came into the union, became a part of the United States of America, a part of the union, so that under this Constitution an assault by a foreign power upon any one state of this union is an assault upon all, and the common government of it will go for its defense. If we want to fortify all the seaport towns of this country between

³⁵ Andrew Jackson, Proclamation of January 16, 1833, *reprinted in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1173, 1173–1195 (New York, Bureau of Nat'l Literature 1897).

³⁶ U.S. CONST. art. IV, § 4.

the Atlantic and Pacific Oceans, as I hope they will be one of these days, there is a power in the United States to do it at the expense of all.

“To promote the general welfare.” There are certain things that concern the people of all the states that can be handled only by the government of all the states. We the people of the United States ordain and establish a government which can take care of the general welfare of the United States, not the welfare of each locality, and not that the government of the United States is to interfere with the local and domestic affairs of the country, but there are things which cannot be handled by any one state, and if any one state should handle it, it might do it against the wishes of another state government, and as to matters of that sort, that relate to the whole country equally, we have put up this government for the purpose of caring for this. The recital of that general object in this preamble is a recital simply of one of the objects for which the Constitution was formed.

“To secure the blessings of liberty to ourselves and our posterity.” Did any government ever have before it a nobler object than that?

You put these subjects together. “To form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.” These are objects that might well have exercised the care and aroused the interests of the men in this country, and they constitute the foundation upon which this government rests, to secure those ends and objects this Constitution is ordained and ordained for the United States of America.

There was once in the Supreme Court of the United States, and probably the greatest judicial contest this country has ever witnessed looking at the consequences of it, that arose out of the words “We the people of the United States.” Along in the fifties, a case for into the Supreme Court of the United States which involved the question whether or not the colored man, African in descent, could be or was a citizen of the United States. He brought a suit in federal court, and as the jurisdiction of the federal court depended upon the citizenship of the party, the inquiry was, could this colored man be a citizen of the United States.

That is the case of *Dred Scott and Stanton*.³⁷ Chief Justice Taney wrote the opinion for the majority, and in that opinion he said that that class of people did not constitute a part of the political unit designated in the

³⁷ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

Constitution as the people of the United States.³⁸ He said that according to the prevailing opinion of the people of this country at the time that Constitution was adopted, the black man of African descent had no rights, no political rights, which the white race was bound to respect.³⁹

Well, immediately there arose in this country an excitement which it had not seen in all its history before outside the Revolution. Taney was denounced throughout the whole of the North, with very few exceptions. It was charged upon him that he said that the black man had no rights that the white man was bound to respect. Well, he didn't say that. He did say that according to his understanding of the history of the period when the Constitution was adopted that that was the prevailing opinion at that time, and that the men who adopted that Constitution did not intend by the phrase "We the people of the United States" to include the colored man of African descent.

There was an excitement at that time that you at this day can scarcely understand. It broke up political parties. It destroyed the political parties of that day. The judges of the courts were abused. Out of this came the Republican Party of today. [Applause]. I am not talking about politics, but about the Constitution of the United States. And that excitement inaugurated in the fifties continued down to the campaign of 1860. Out of which came the great contest of that year, and Mr. Lincoln, as candidate of the Republican Party, being elected as President of the United States. That was followed by the Civil War of 1861.

Well, now, I am not going to discuss that war, but only say that one of the results of that war was the extirpation from our social organization, etc., in respect of which that controversy arose, and now there cannot be any dispute as to who constitute the people of the United States who ordained and established the Constitution. Now it is a constitution, not a league. It is an instrument that constitutes. It is an instrument that creates. It is an instrument that builds up from the very bottom.

The Articles of Confederation were not of constitution, but this is.

³⁸ *Id.* at 423 ("And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States.").

³⁹ *Id.* at 407 ("They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.").

This constitutes a government, and the only one on Earth that rests on the consent of the governed. A government and the only one on the Earth where the heads of it and all the branches of it are governed by a written instrument that says, thus far you may go and no farther, that says to one branch of the government, you may handle this subject, to another, you may handle these subjects, to another branch, you may do this. But it says to all that the law for you and for every human being in this country is this written instrument, which is a power of attorney from the people of the United States to this government. The men who talk about this being an unlimited government; a vast centralized government.

This government thus ordained and established has its orbit prescribed by this fundamental law. It cannot go beyond it. It has got no power. And every other power remains to the government of the respective states with the people of the states, and therefore the true friends of a national government of this country are those who claim for that national government the powers that are granted for it, when such belong to it, and who at the same time recognize it as the just powers of the state. And the truest state's rights man in this country is the man who, while claiming for his state the rights that belong to it, still that gives to the United States government all that this instrument gives to it.

You will find cranks everywhere. They do no harm. They keep the atmosphere stirred, but so far up to this time there has never been a crisis in which the sober common sense of the people has not been equal to the emergency and of maintaining to the government all its just powers but standing by the just rights of the states. Now, so much for the preamble to this instrument. That is the outline, we the people in order to accomplish these ends, put this government on its feet. Well, what is this government?

Article I. Article I says, "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."⁴⁰ What is that power? The power to make laws. The legislature does not declare what the laws are. The courts do that, the judiciary.

"All legislative powers." There is no word plainer than the word "legislative." Now, a man reading that sometimes, if he had large ideas about Congress, he would emphasize the word "all," and he would give in an undertone some of the words following. If it stopped with the word "all" it could be said that a government had been created that could legislate on all things.

⁴⁰ U.S. CONST. art. I, § 1.

“All legislative powers herein granted.” In a subsequent article, powers which are granted are enumerated.⁴¹ Therefore, reading the two articles together, it means that no legislative powers are granted to the government of the United States, except those herein enumerated. And they shall be vested, not in a commission, not in a cabinet, not in a court, but they shall be vested—not *may* be—in a Congress of the United States, a sort of adjunct, and invest that with legislative power, because the absolute command of this instrument is that the legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

⁴¹ *Id.* art. I, § 8.

LECTURE 4: OCTOBER 30, 1897

We gave our attention at the last meeting to the preamble of the Constitution of the United States. After the meeting, one of the students asked me whether the preamble was a part of the Constitution of the United States. Well, plainly it is just as much a part, as a preamble to a statute is a part of the statute.

The purpose of the preamble to a statute is to state the evils which it was proposed to remedy by the statute, as well as the object for which the statute was enacted. So, the preamble to the Constitution states what was the evil pre-existing and what was the remedy to be applied. It is to be inferred from the preamble that in the judgment of the men who framed the Constitution we needed a more perfect union. It was necessary to establish justice. It was necessary to insure domestic tranquility. It was necessary to have a government that would provide effectively for the common defense, a government that would also promote the general welfare, and a government that would secure the blessings of liberty to ourselves and our posterity.

Now, in order to accomplish those objects the People of the United States ordained and established the Constitution of the United States of America. That preamble does not contain any grant of power. That is, Congress may not say that we do this or we do that by virtue of any power granted by the preamble to the Constitution. That, you ought not to forget, is not a grant of power, but simply states the objects for which the government was established.

Now, one thing in addition to what was said at the last meeting as to this preamble. I called your attention to its opening words, "We the People of the United States do ordain and establish this Constitution." "The People" were not mentioned in the Articles of Confederation. Those Articles of Confederation read thus: "Articles of Confederation and perpetual Union between the states of Newhampshire, Massachusetts-bay Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia."⁴² They were articles of confederation between the states in their corporate capacity. This Constitution is an instrument brought into existence and established by the People of the United States, and right on the face of the two instruments, at the very outset, you will find words that distinguish the present form of government

⁴² ARTICLES OF CONFEDERATION of 1781, pmb1.

from the government which existed under the Articles of Confederation.

Now, I had gone so far as to call your attention to Article I of the Constitution. Let me say to you, that before the adoption of this Constitution, the suggestion was made by [Montesquieu] in his *Spirit of Laws*, that liberty could be best preserved by a government that had three departments with their powers divided.⁴³ But nowhere on the Earth at that time had that suggestion been carried into effect, nor is there any government existing anywhere in the world today in which that principle is carried into effect in the same way as it is in this country.

There are three departments of government in England: the legislative, the executive, the judicial. The executive department is represented by the Queen, the legislative by Parliament, the judicial by the courts, but they are not separate and distinct as they are here. The Cabinet of Great Britain today rules Great Britain. The Premier of the British Government today is a member of the House of Lords.⁴⁴ I believe, probably with one other exception, all other members of that Cabinet are members of the House of Parliament. So that there are representatives of the legislative branch of the government administering the executive functions of the British government.

The House of Lords today, which is a part of the legislative branch of the British government, is the ultimate court of last resort in Great Britain, so that cases go from the other courts of Great Britain to the House of Lords. Every member of the House of Lords, whether a lawyer or not, has the technical legal right to participate in the determination of cases that come before them, but practically, only those members who are lawyers attend upon the judicial cases, except those that are specially designated as members of the law bureau of the House of Lords. Now, when you come to our government, it as peculiar as contrasted with other governments in that particular.

I had next to call your attention to Article I. If you will turn, if you please, to that Article, Section 1, that we may get a bird's-eye view of it, if

⁴³ 1 BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS*, Book XI, ch. 6 (Neill H. Alford, Jr. et al. eds., Legal Classics Library 1984) (1751); see also 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 517 (Boston, Hilliard, Gray & Co. 1833) ("Every government must include within its scope, at least if it is to possess suitable stability and energy, the exercise of the three great powers, upon which all governments are supposed to rest, viz. the executive, the legislative, and the judicial powers.").

⁴⁴ In 1898, the Prime Minister of the United Kingdom was Robert Arthur Talbot Gascoyne-Cecil, 3rd Marquess of Salisbury. *History: Past Prime Ministers*, supra note 2. He was the last Prime Minister to head his administration from the House of Lords. *Id.*

I may so express it, of our form of government. Now, understand that all the powers of government belong either to the legislative branch, the judicial branch, or the executive. You cannot think of any power of government that is not one or the other.

“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.”⁴⁵

May Congress invest any other branch of the government with legislative power? Could the Congress of the United States invest the Supreme Court of the United States with the power to legislate? The legislative power is the power which makes laws. Could Congress invest the Supreme Court of the United States with the power to make a law? Why, clearly not. First, this government has no power except what is granted. With that, everybody agrees. Then, this article says, all legislative powers herein granted shall be vested in a Congress of the United States, and that Congress shall consist of a Senate and House of Representatives. Congress cannot organize any other body in this country and invest it with legislative power, because this says all legislative power herein granted shall be vested in a Congress of the United States, and that shall consist of a Senate and House of Representatives. Could Congress establish a third branch of the legislative power of the government, call it, if you choose, a House of Lords? No. Why? Because this instrument says it shall be vested in a Senate and House of Representatives, and that excludes everybody else in this country from exercising legislative power.

Will you turn to your copy of the Constitution, to Article II, Section 1, and read that section:

*“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”*⁴⁶

Now, could this executive power be vested in anybody else other than the President?

No, sir.

Well, why?

Because the Constitution says it shall be vested in a President of the United States.

Now, what do you understand is the executive power? What does it

⁴⁵ U.S. CONST. art. I, § 1.

⁴⁶ *Id.* art. II, § 1.

mean, the President of the United States shall exercise the executive power of the United States? It rests with him to see that the law is executed. The President does not make a law. He has no more power to make a law than you have, but he has power to execute it, to see that it is executed, not perhaps in every way, but in the way prescribed by law.

We have read the article which shows the branches of the government in which are vested legislative and executive powers of the country. What is the other power of the government of the United States that is provided by the Constitution?

The judicial power.

Article III, if you please. Read the first section.

*“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”*⁴⁷

What do you understand is the judicial power of the United States?

The power of interpreting the laws.

Well, yes, that is true so far as it goes. But do not disputes often arise that do not involve a construction of the acts of Congress which must be determined? Suppose, for instance, A holds a note of B, and the citizenship of the parties is in different states, and the suit is brought in a court of the United States, the amount being sufficient, and a question arises in that case of general commercial law. It does not depend upon any act of Congress. There is no act of Congress upon the subject, but there is a dispute between A and B. Now, the judicial power of the United States extends to that case.

The judicial power means the power which is called into existence to determine disputes between individuals or between individuals and corporations, sometimes between states, and that power is vital to the existence of society. Suppose there were no tribunal in which the dispute between A and B could be settled. A claims a piece of land that is in possession of B, and B says, “This is my land.” Well, B is not going to get out of it simply because A claims it. How is A to get it? He must bring suit. If his citizenship is in one state and B’s is in another where the land is, when the value is sufficient, a court of the United States may decide that dispute. We will see after a while when we get along in the regular order to what class of cases the judicial power of the United States extends, but if it is a case of which a court of the United States may take cognizance, then it is a case in which a tribunal has the power to interpret it.

⁴⁷ *Id.* art. III, § 1.

Now, observe also that it is not all judicial power that is invested in courts of the United States. It is the judicial power of the United States that is invested in a Supreme Court and in the inferior courts that the Congress may establish. The power means the power that courts may exercise in cases to which the power of those courts extend. It is not every case about which the courts of the United States can render a judgment. It is only a certain class of cases, and what those cases are we will know and understand better when we come to study the article about the judiciary.

Now, will you turn to Article VI of the Constitution, commencing with that clause, "This Constitution." And before you read, let me recall to all of you gentlemen of the class the thought heretofore expressed as to the supremacy of the government of the United States and its tribunals, not in respect to all matters, but in respect to the matters committed to that government.

You will now and then come across a man who will tell you that the Constitution of my state is my law. I will obey my state, and I will stand by my state whatever the government of the United States may say. When my state speaks, that is the law for me. My allegiance is due to it, and my allegiance to my state is above my allegiance to the United States.

Now, how far that is true will depend upon what the question is, what the subject is. If it is a matter that belongs by the Constitution to the government of the United States to determine, and not the state, then our allegiance is to the government of the United States in that matter and not to the states. Now see whether that is not absolutely so from the clause which the gentleman will read.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁴⁸

It is not every law of the Congress of the United States or statute of the Congress of the United States that is the supreme law of the land. Now and then the Congress of the United States passes a statute which the courts say is not law, which the courts say transcends the power which Congress has, and therefore that which purports to be an act of Congress is not a law. Nothing can be a law in this country which is in violation of the Constitution of the United States.

⁴⁸ *Id.* art. VI, cl. 2.

Does not that law so say? “This Constitution and the Laws of the United States which shall be made in Pursuance thereof,” that is, the acts of Congress which do not transcend the Constitution, that are within the range of the power which Congress of the United States has. Those laws, not laws that violate the Constitution, and all treaties made under the authority of the United States, shall be what? Shall be the law of the United States or to the People of the United States if my state says so? No. “Shall be the supreme Law of the land.”

What do you mean by “the land”? Why, it is the whole of the United States, and the law, not in part, but the supreme law of the land. Supreme above everything else. But that is not all. “And the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.” If, therefore, turning to the Constitution of a state you find anything in there that is contrary to the Constitution of the United States, that is not law, and no judge is bound to respect it as law, for this instrument, which is the supreme law of the land, says it shall be respected, anything in the Constitution or laws of any state to the contrary notwithstanding.

Now, can anything be plainer than that? Is not that as plain as that two and two make four? And have we not a right to say, in good humor of course, at this day when a man says that the Constitution of his state is above the Constitution of the United States, that he is a fair candidate for the lunatic asylum? But that is not all. Turn to the closing paragraph of Article VI of the Constitution and read that.

*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.*⁴⁹

Do you discover in that clause any authority in a Senator or Representative of a state legislature to make a mental reservation, or a judge of a state court to make a mental reservation when he takes an oath to support the Constitution that he will not support that Constitution if his state tells him to the contrary?

No sir.

⁴⁹ *Id.* art. VI, cl. 3.

No, it is absolutely without qualification or condition. Let me repeat, as probably the strongest way in which I can bring out the purpose of the framers of this instrument, to establish a national government for national purposes, which was supreme within the limits of those purposes, which could enforce its authority with all the power granted to it by the instrument. The strongest mode in which I can put that question to you is when I tell you what perhaps I have told before, that every justice of the peace in every state in this union, before he enters upon the discharge of his duties, takes an oath to support this Constitution of the United States, and when he takes an oath to support the Constitution of the United States he takes an oath to regard that Constitution as the supreme law of the land, anything in the Constitution or laws of any state notwithstanding, and therein lies the peculiarity of our form of government.

I remember once when lecturing before some law students in the City of Chicago, I observed a gentleman sitting on my right, and he attended several days in succession, dressed, as I believed at the time, in the garb of a minister of the gospel, and at the close he introduced himself to me, that he was an Englishman, a member of the established church, and assigned on duty in this country in one of the churches in the city of Chicago, and he said to me, "Did I understand you to say that it was within the power of a justice of the peace in this country to declare an act of Congress of the United States void and unconstitutional?" "Well," says I, "if you so understood me, you understood me exactly as I meant to say." "Well," he says, "that is extraordinary, for," says he, "in my country no court can say that an act of Parliament is void." "I understand that perfectly well. You have got no written Constitution in your country. You have got what you call a Constitution, but it exists in customs and usages and traditions and acts of Parliament, and your Parliament can in ten lines wipe out all the guarantees of life, liberty, and property. If your Parliament were to attempt to do that your people would turn them out in order to maintain what they regard the fundamental rights, but as a matter of law your Parliament can do it. But in this country there is no supreme power except in the Constitution of the United States. That instrument is the written power of attorney from the People of the United States to every branch of the government, and it is the law for all. The President can no more violate that Constitution than I can; the Congress of the United States can no more violate the Constitution than I can, and an act of Congress passed by the unanimous vote of both houses and sustained by the President is not worth the paper upon which it is written if it is in violation of the Constitution of the United States. While I would not advise a justice of the peace to declare an act of Congress void and unconstitutional, he has the right to do

so, and if he has clear convictions he ought to do so. An appeal will lie from his decision to some other court and finally get to the Supreme Court of the United States.”

And now thus you see the legislative, the executive, the judicial power of the United States is put into three coordinate branches. Each can say to the other, you shall not interfere with the exercise of my authority, and when the dispute comes it gets into a court of justice the way it is provided for, and decided by the judicial branch of government, which decides disputes.

There is no reason under our form of government for any riot, rout, or breach of the peace about a dispute in reference to one's property or in reference to his personal rights. If the dispute involves no federal question, it can be decided by the judiciary of the state. If it involves a federal question, a right under the Constitution of the United States, it can ultimately get to the Supreme Court of the United States and there be determined.

It is not possible under our system for any man to be deprived of a right given to him by this Constitution without his being able to have that determined by the federal judiciary. It may involve only ten dollars. It may involve only a man's homestead worth but a few hundred dollars. The Supreme Court of a state may decide it against the man and arrest him upon an act of the legislature of the state, but if the man whose house is taken, whose property is taken, whose personal rights are invaded has just grounds to say that this is done in violation of rights secured to him by the Constitution of the United States, he can under existing legislation we have had since the foundation of the government take a writ of error from the highest court of the state to the Supreme Court of the United States to have it determined.

He will say, I have got this right secured to me by the Constitution of the United States, and if he has, and the Supreme Court of the United States says that it is such a right, it can protect that right. That court, composed only of nine judges in the midst of a population of seventy millions of people, can say that this man, living in the farthest confine of the state of Texas, is protected in this, that, or the other right, and it is done. The whole power of seventy millions of people are behind him to see that that right is protected, and when they have so declared and decided it is the duty of the President of the United States, if the executive power has to be called into question, to stand by that decision and enforce it.

These gentlemen across the waters talk with contempt of this form of government that we have got here, and speak of this crude democracy that we have got in this country and does not understand the law, but the more

they look into it and understand it, the more they will find, the more you will find, that nowhere else on the Earth is there the like protection of life, liberty, and property that exists in this country against whatever power.

Let me carry you back to Article I and examine the words of the Constitution as we find them there. "All legislative powers herein granted." Those herein granted, we will see a little further on, shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

There is a legislative power invested in the Congress of two branches, a Senate and House of Representatives. Well, the question probably will come into your minds, why have two branches of the legislature? Why have two branches of Congress? What is the use of two branches? Why not have only one?

We have learned by experience, by history, that of all forms of despotism that ever existed on the Earth, the worst despotism is the despotism of a mere majority. In form they have got in England today two branches of Parliament, but in fact, for most purposes, they have got only one. The House of Commons controls England today. When the House of Commons shows its teeth, to express it familiarly, the House of Lords may not be scared at the first showing, but if the House of Commons repeats it a second or third time, the House of Lords trembles and they fall in with the will as expressed in that one House of Commons.

In our country we have got no form of government that can be turned upside down every few weeks if the people choose to do so. We have got a House of Representatives that expresses the will of the people immediately, it may be said, but we have also got a Senate. We have got a Senate which represents, not the popular will in the ordinary sense of those words, but the dignity and the equality of states.

Delaware said, and other small states said, we will not go into this government if we are to go in there at the mercy of a majority of the states. We want our equality as a state preserved and recognized. We do not know today what would have become of this country but for that feature. There are some men even in this day, flippant in tongue, who say Delaware is a nuisance, Rhode Island is a nuisance. What an outrage, they say, that the little state of Delaware and the little state of Rhode Island, and the little state of Maryland should have an equal voice in the Senate of the United States with the imperial state of New York.

Well, there are many sides to that question. What we want in this country, and we have got it in this Constitution, is a check upon hasty legislation. What would become of us if we were at the mercy of the great and powerful states? What would become of our institutions and our

liberty if every question that affected life, liberty, and property in this country was to be turned by the majority vote?

Go to the great city of New York. Why, some men have said that it was more European than American. A good deal of truth in it. The contests in great states of this country have turned upon the votes of great cities, and those great cities have a majority of men, or enormous percentage of men, not born and reared under our institutions, not born and reared under the institutions of other countries like England that understand what life, liberty, and property mean, but born under despotisms, who have been in the habit all their lives of bowing to titles and powers that did not know what liberty was, and who come to this country mistaking liberty for license and license for liberty.

Now, the men who framed this Constitution thought that the liberties of this people depended in the long run on the preservation of the states of this union as much as upon the preservation of the union, and I say here what I have often said before to students of this school, that the truest friend of national rights in this country is the man who respects the just rights of the states, and the truest friend of the states is the man who respects the just rights of the nation.

This Senate was organized and made a part of the legislative branch of the government. It represented the dignity and equality of the states, and by their long term of office the Senators would stand between the excitement and confusion of the moment of the House of Representatives just fresh from the people. It is easy to be seen upon studying the history of the Congress of the United States, that time and again in its history the Senate has stood as a breakwater against the passions and temper and the excitement of the period, and held off the conclusion of matters presented to Congress for determination until it could be turned over in the mind of the people, and be discussed on the stump and in the paper, and in either branch of Congress until the whole subject has been fully aired and considered until the conclusion is reached.

Now, there are evils, of course, arising out of it, but these are not evils chargeable to the existence of a separate branch, each independent. The House of Lords is not entirely independent of the House of Commons by usage, but the Senate is independent of the House of Representatives.

Now, the suggestion has been often made that the present mode of electing Senators is mischievous and ought to be changed. Well, that is simply a suggestion as to the mode of selection of Senators and does not change the fact that we ought to have two branches of the national legislature.

It has occurred undoubtedly from the present mode of electing

Senators that men have been enabled to manipulate a small legislative body and get seats in the Senate of the United States who ought not to be there, and when they are, are mere bags of money with no qualifications for the place, ought never to have been there, but as I repeat that is an objection to the mode of the selection and not to the fact that we have a Senate and House of Representatives, two distinct branches of the legislature, having power independent of each other, and enabled to regard fully the rights of the people.

LECTURE 5: NOVEMBER 6, 1897

We had reached at our last meeting an examination of Section 1 of Article I of the Constitution, relating to legislative powers of the government of the United States, and I asked you to remember particularly the fact that not all legislative powers were granted, but only the legislative powers herein granted—granted in the Constitution—that were vested in a Congress of the United States.

Now, some additional observations. A hundred years ago the question was very much debated among the statesmen of the world as to whether it was wise or unwise to invest the powers of the government in a single legislative assembly, and those who were of opinion that a single legislative assembly was the wisest were not without distinction—some of them.

That was the state of things in Pennsylvania before the adoption of the present Constitution, and I believe it was the case in Georgia in its early history, and among the great men of the world who thought that was a wise thing, to put the whole assembly in one legislative body, were such men as Lincoln, and that was the view even of Benjamin Franklin.⁵⁰ That was the view of Mackintosh, the English historian, a rare genius, and of very large learning, and that was the view of those who established the French Constitution in 1791, but the history of that government under that Constitution demonstrated the unwisdom of that course.⁵¹ We find the question very largely discussed by Chancellor Kent in Volume I of his Commentaries at page 280. He represents the view that is given in our Constitution, and that was the view too of John Adams.⁵²

Now, whatever might have been thought of it at that time, nothing is more certain than that there is today a concurrence of opinion among the

⁵⁰ Benjamin Franklin, *Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania* (1789), in 10 *THE WRITINGS OF BENJAMIN FRANKLIN* 54, 56 (Albert Henry Smyth ed., 1907). In 1789, Pennsylvania, Georgia, and Vermont had unicameral legislatures. Georgia adopted a bicameral legislature in 1789, Pennsylvania adopted a bicameral legislature in 1790, and Vermont adopted a bicameral legislature in 1836. Roger Kersh et al., *“More a Distinction of Words Than Things”: The Evolution of Separated Powers in the American States*, 4 *ROGER WILLIAMS U. L. REV.* 5, 22–23 (1998).

⁵¹ JAMES MACKINTOSH, *VINDICIAE GALLICAE AND OTHER WRITINGS ON THE FRENCH REVOLUTION* 22 (Donald Winch ed., Liberty Fund Inc. 2006) (1791).

⁵² 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* *222 (Oliver Wendell Holmes, Jr. ed., Boston, Little, Brown & Co. 1873) (“The division of the legislature into two separate and independent branches, is founded on such obvious principles of good policy, and is so strongly recommended by the unequivocal language of experience, that it has obtained the general approbation of the people of this country.”).

statesmen of this country that the existing system is the best one, the safest one for the liberty of the country. As I said to you last Saturday night, there was not a single state in the Union which today did not have two houses of the legislature, two branches, and if the question was submitted to the people of the United States today, "Shall we change our system so as to put the legislative in one body?" I do not think there is a single state in the Union would agree to it.⁵³ I doubt whether there is in the country today any statesman who does not recognize the wisdom of the present system.

Now, there are many various rules as to the mode of filling these two legislative branches. Nobody suggests the alteration, I believe, of the mode of selecting members of Congress, except as to qualifications of people who may vote for members of the lower house of Congress. And men will suggest, but there are very few, however, that the principle of the equality of the states in the Senate is wrong. Some of them say it is all wrong that a little state should have as much power as a large one, and some suggest that the present mode of electing Senators is not the best one. Well, all those are aside of the question now before us. Nobody suggests, that I know of, that the Senate be abolished. They suggest that it be modified and the mode of electing Senators changed, but not the abolition of the Senate itself.

You may ask yourself, why would not it be safe to have the whole legislative power of the government of the United States invested in one body? What is the necessity of having two bodies? Well, in the first place, you may know and do know from experience that now and then there spreads over the country, I do not know why or how, schemes for the supposed amelioration of the present condition of men. Proposals of legislation to do this and do that, and they apparently have possession of the popular mind for the time, and if those questions were to come up for decision in a single legislative body, why, it would take that legislative body by storm, as we say. A man who is not prudent outside of the House of Representatives would not be apt to be prudent when he got inside of it.

The presence of the Senate of the United States is a security, some security against the hasty action on the part of the House of Representatives. And the existence of two bodies prevents the accomplishment of private ends. And many things would pass the House of Representatives that do not now pass if they supposed that was the end of it, so far as the legislative branch of the government was concerned, but

⁵³ In 1934, Nebraska amended its constitution and adopted a nonpartisan, unicameral legislature. NEB. CONST. art. III, § 1.

they put to themselves the question, Will that go through the Senate? What will the Senate say about it? It has heretofore spoken on that subject. If we pass it, it will be useless. It will be a loss of time. And when men vote on a measure in the House of Representatives they are aware of the fact that it has to undergo the scrutiny of another body of men, and those who are not candidates for re-election as soon as they get here.

About the time that a Member of the House of Representatives gets warm in his seat, before he has learned the ways of legislation, before he knows anything at all about committee business, before he has learned how he is to get the ear of the Speaker so as to be heard, why the time has rolled around that he will be a candidate for re-election, and he is thinking about the next election. A Senator is elected for six years, and he has, therefore, a sense of security. He is in a condition where he may say, I am not going to be carried off my feet by this excitement; it won't last; this thing would not do, and we will amend that bill, and the Senate does amend it and sends it back and the House does not agree to the amendment. Then they have a committee of conference and they finally agree upon something.

We sometimes hear an outcry about the Senate. Say it is an old foggy body; they care nothing about the popular will. Well, the longer we live in this country of freedom, the more we will find it necessary to put checks upon ourselves, to put some restrictions upon our faculties and capacities for legislation, and the existence of these two legislative bodies, each independent, results in there being checks upon hasty legislation.

Now, all this is apart from those considerations that you often hear presented about the wrong sort of men we are electing to the Senate of the United States, the mode of electing. Well now I quite agree that they could be improved. I do not know as I express anybody's views but my own, that there are some evils in the existing mode of electing Senators.

This is becoming a vast nation—seventy million of people now—and it will probably be two hundred million in the lifetime of the youngest man here; we do not know. They are coming to us from every part of the world, and we do not know where we will be after a while. One of the results of such a condition of things undoubtedly is the aggregation of enormous power here, of enormous wealth, which will make itself felt, does make itself felt; does sometimes put into the Senate of the United Statesmen who have no business there; have not the first qualification to be a Senator; got nothing to recommend them; that they are tools of somebody.

That evil could be remedied in part if the system was adopted which is pursued in some of the states, political parties making their nomination for Senators so that when a man is put up as a candidate by a political party for the Senate of the United States he has got to show himself; the people have

an opportunity to see him. It is not so easy for vast combinations to manipulate the elections of a large state so as to control the election of a hundred and more candidates, whereas it may be possible for them to control the votes of small legislative assemblies when they elect a Senator; send a man here to represent them instead of to represent the country at large.

But all this is apart from the question. Can we do without a Senate of the United States? Can we do without the House of Representatives? In England they have got two branches of the legislature. The one is almost omnipotent: the House of Commons. The general tendency of the legislation in the House of Commons is toward larger liberty and against castes and titles, but while men in England have regretted the condition of the House of Lords there, nobody there desires, that I ever heard of, to abolish the House of Lords unless they put some other body in place of it.

I have heard English statesmen express the earnest hope and wish, that they had in England a Senate like the Senate of the United States or a second branch of the legislature that was thoroughly independent of the other, that has as much right under the Constitution as the other branch to legislate. The House of Commons now and then gets mad because the House of Lords does not follow in its wake, and they scare their House of Lords, but the House of Representatives cannot scare the Senate, nor the Senate scare the House of Representatives in this country. They are both entitled under the Constitution to think for themselves.

Well you may say that may delay the legislation that ought to go through. Well I am not aware that this country has ever suffered from the want of legislation. We may rest assured that when the time comes and there is an absolute overwhelming necessity for united action on the part of the two branches of Congress it will come. And because the House may think today it has go to pass this measure, and the Senate differs with them, and Congress adjourns without any legislation upon the subject, it does not follow that the country is hurt by it, but it does follow, and that is important, that the country has time to think about this matter; have it discussed in the newspapers for and against so that ultimately sound and safe conclusions may be reached, and for those conclusions we are indebted to the fact that we have two branches, two independent branches of the legislature.

Now we come to look at the personnel of those two branches. First, the House of Representatives. Of what is that composed? In popular parlance that is called Congress, but the Congress, technically speaking, represents both branches. "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.”⁵⁴

Why chosen every second year? Why not every year? Why for the plain reason that if they were chosen every year we would have no time to attend to anything except the election of members of Congress. But why not every five years? Well now every five years would be too far off in a sense in view of the object they have in view, and that was to have one branch of Congress which may be said to be immediately from the people and often returning to the people, so that when a man is elected to the House of Representatives he is said to come fresh from the people. He knows the will of the people; he knows what the people want. Got a fresh body of people every two years, come right up from their constituents, full of the ideas that their people want. That is the most numerous branch of the legislature representing immediately the popular will. They are elected by the people of the several states.

Well, who are the people of the several states? For the purposes of the election they are defined in the next clause. “And the electors.” Now that means a great deal more than it appears on its face, and in my judgment more than the framers of the Constitution ever dreamed of. It was a very important question as to who could vote for the members of the lower house of Congress. Shall Congress prescribe the qualifications of members of the House of Representatives? They say, they are Representatives of the Congress of the United States. Why should not the Constitution prescribe the qualification of the electors?

Well it was said in reply to that, you have got a great many states to deal with, and they all have their peculiarities about the qualification of voters. Some people may vote in one state and the like may not be able to vote in another state, and if you put in the qualification of the electors you will run counter to the notions of the people of some of the states. Therefore, all things to consider, the wisest thing will be to let every man vote in a state who is qualified by the laws of that state to vote for the Members of the most numerous branch of the state legislature. That was a rule that applied to all the country alike. It left to each state to say who should vote for a Member of Congress. Now whoever can vote for the members of the most numerous branch of the legislature of the state can in that state vote for a Member of Congress.

A territory out West here is made into a state. It has got 75,000 or

⁵⁴ U.S. CONST. art. I, § 2, cl. 1.

100,000 people to start with; it wants to build up; the state wants to have its lands occupied; instead of having one Member of the lower house of Congress, we want to have half a dozen or a dozen, and to do that we must have a population, and in order to have a population we must encourage the people to come here and settle. Well now what happens?

In nearly every western state up to a few years ago, and it may be in some of them even to this day, that a man may land at the City of New York, fresh from Europe; he does not know a word of our Constitution or language; he cannot read a single word in the Constitution; he cannot speak a word of our language; he has gone out to those western states, and they have provided by their Constitution and laws, most of them in their early stages, that any man may vote for a member of the lower house of the state legislature as soon as he has declared his intention to become a citizen of that state.

It is competent for the state under this Constitution to admit a man to the right to vote for a member of their state legislature within thirty days after he has landed on our shores, and many of them did it; many a man, fresh from Europe, has in the western states gone to the polls when a Member of Congress was elected, when he had not been here for six months, and voted for a member of the lower branch of the legislature of that state and for a Member of the House of Representatives to come here and make laws for the whole of the United States, and that is simply because he is qualified in the state in which he lives to vote for a member of its state legislature, and being thus qualified he is entitled to vote for a Member of the lower house of Congress. And that may occur today.

I do not believe that was contemplated or thought of by the men who framed the Constitution. The idea that a man shall vote for a Member of the lower house of Congress to make laws for the whole United States without being a citizen is a law that ought not to be tolerated; it ought to be remedied; we have made our citizenship too cheap; we have not guarded the elective franchise in this country for members of the national legislature as it ought to have been guarded. The policy of this country today is largely controlled by the big cities, where are gathered people from every country on the Earth, and people who do not understand the spirit of American institutions; people that have come to manhood under other institutions; and who have come to this country with the idea that real freedom meant not liberty regulated by law but license. There is not much danger to the future of this country, in my judgment, outside of the large cities of the country that dominate the states, whose votes turn the vote of the state, and in turning the votes of a few states have decided the politics of this country for years to come.

Now in my humble judgment, though I may be old-fashioned, but in my judgment no man ought to have the power to control the destiny of this country at the ballot-box unless he be a citizen of the United States. Let me read these words again to see that I do not misinterpret them. "And the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." Whoever, therefore, in any state is entitled by the constitution of laws of that state to vote for a member of the most numerous branch of the legislature of that state is, by virtue of that fact, entitled to vote for a Member of the lower house of Congress.

As to the qualifications of a Representative, "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."⁵⁵ Now let us take that clause. A man to be eligible to the lower house of Congress must have attained the age of twenty-five years. Well why twenty-five years? Why not twenty-one?

Well, they proceeded upon the idea that a man at the age of twenty-one did not know quite as much as he ought to know; that he had not experience in public affairs quite enough, and that he ought to be at least twenty-five to have the experience, and that it would be no harm if he were young, if he had a few years after he reached his majority, and knew something about work, and about the country in which he lived.

Now when must he be twenty-five years of age? When he is elected; when he is voted for, when the certificate is given, or when he takes his seat? Well it suffices if he is twenty-five years of age when he takes his seat.

A gentleman is now living in Kentucky who was elected to the Congress of the United States some ten months, eight or ten months, before he was twenty-five years of age.⁵⁶ He was not twenty-five years of age when the Congress met of which he was a member. He did not apply for admission at the beginning of Congress. He waited until he was twenty-five and was then sworn in. I do not know if any question was made at that time about his age.

I think that a fair interpretation of the instrument is, that when the poll

⁵⁵ U.S. CONST. art. I, § 2, cl. 2.

⁵⁶ John Young Brown (1835–1904) was elected as a Democrat to the 36th Congress in 1859. *Brown, John Young*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000933> (last visited May 25, 2013).

closed on the day of election, it means that the man ought then to be twenty-five years of age when he is voted for, but there is room for the other construction. It has never been judicially decided. It might have been judicially decided if that gentleman had demanded his pay for the whole of the term for which he was elected, but he did not do that, I believe, so there was no opportunity to raise a question.

“And seven years a citizen of the United States.” Now under the clause just before, a great many men coming to the poll vote for members of Congress that were not citizens of the United States, but the men elected must be a citizen of the United States. Not necessarily a native citizen of the United States, but that he must be seven years a citizen of the United States.

That seven years was prescribed so as to make it quite sure that the man who has become a citizen of the United States had seven years of experience in that capacity, and that additional guarantee that he has in that time become weaned from his own country, and was in a position where he could give all his thoughts, all of his time, all of his influence to the country of which he had become a citizen.

And he should, when he is elected, be an inhabitant of the state where he is chosen. Now there comes in an interesting thought, that is: May the people in the City of New York elect as a member from that district a man residing in the city of Buffalo? Yes. It is only required that he shall, when elected, be an inhabitant of the state in which he shall be chosen. An inhabitant of the state, not of the district, in which he shall be chosen.

I do not remember that there has been any instance, unless it be once or twice in the City of New York, where a man has been chosen who was not an inhabitant of the district in which he was chosen. There are always a large number of men in each Congressional district of this country who are willing to serve the people in that capacity, and they would never submit to an outsider from that district being a candidate or being elected, and yet it is much to be desired that local custom and rule could be broken through sometimes.

Occasionally there is a man in public life who goes down before the popular storm among his own constituents, and who is retired to private life, and the country loses his services merely because he was unwilling to surrender his honest convictions to the prevailing temper in his district, and the boss at home has turned him down. He has probably been here at Washington and he has startled that boss with proof of the idea that that man has got a conscience; that he respects his oath; he respects himself in his own convictions; that he cannot be driven this way and that way as he may get orders from the boss at home.

Well now a man of that spirit is an instrument that is a very ugly one for a boss, and the boss at home will see to it that he does not come back. He must have a man here in Congress that will do his bidding, and that man is left out at the next election. Well now if the people of some other district, recognizing the ability of the man, shall say, represent us, you live in the same state with us, we will elect you, we will send you to Congress.

Now the English are better off in that regard than we are. The English people would have lost the services of Mr. Gladstone during the larger part of his life if he could only have gotten into the House of Commons from the district in which he lived. When his most distinguished services were performed, he was elected to the House of Commons by a district in Scotland.

His most famous campaign was in the district embracing Edinburgh, Scotland. They wanted him, and the people of his own locality did not want him. Well at the last election the leader of the Liberal Party in the House of Commons was defeated in the district in which he lived, but his party did not wish to lose his services, and somebody gave way for a time, and that district elected him.⁵⁷

There are many men today that have been lost to the country practically; the country lost their services simply because the temper of the times in their particular district was against them. Had some other district picked them up and sent them back to the Congress we should have had them.

Representatives and Direct Taxes. Come now to see how many men can get into the House of Representatives; what representation each state is entitled to.

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,

⁵⁷ In 1867, the Second Reform Act broke Gladstone's South Lancashire constituency into South East Lancashire and South West Lancashire. Representations of the People Act, 1867, 30 & 31 Vict., c. 102, sch. D, 117 (Eng.). In 1868, Gladstone stood for both South West Lancashire and Greenwich, losing in South West Lancashire and winning in Greenwich. Gladstone never represented Edinburgh. *Mr. Gladstone's Defeat in Lancashire—His Election for Greenwich*, N.Y. TIMES, Nov. 27, 1868, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F70F17FC3B541B7493C5AB178AD95F4C8684F9>.

three fifths of all other Persons.⁵⁸

I will postpone at this time any comments upon the words “direct taxes” and will speak of that at another time.

Now, that clause was the subject of serious debate and concern. The whole population of the United States is represented in the United States, and each state has representatives according to its numbers. Well, what numbers? How do you get at it? Who is to be included and who is to be excluded?

Now, it is to be determined by adding to the whole number of free persons—the census will show how many free persons—that is, it means persons who are not owned by anybody. When this Constitution was adopted there were persons in many of the states that were in a sense chattels, slaves, and were owned.

“Including those bound to service for a term of years.” In a sense a slave, in a sense not free, but you are to count them. Who are you to exclude in the computation?

“Excluding Indians not taxed.” That is, in some of the states there were Indians that were not taxed because they were not a part of the people of the United States. Exclude them.

“Three-fifths of all other persons” are to be included. Who are they? The word “slave” is not in this Constitution, although we had slaves when the Constitution was adopted. The “other persons” there were slaves. That is what is meant.

The people from the North said, well why should slaves be included at all? They cannot vote. They are not free. You of the South hold them in slavery. Why should you have a representation based on them? It is not just because they cannot vote. They have no wish you are bound to respect, so they ought to be excluded altogether.

Well from the men of the South. They are property, but they are persons also in some sense. We cannot kill a slave willfully and maliciously without being guilty of murder. We can be punished for the murder of a slave as well as we can for the murder of a white man. They are persons in other senses, and all things considered, it is but just we should have some representation on their account.

Well finally they reached a compromise, and stated to the people of the United States, after counting how many people you have in your state, you may include three-fifths of all other persons. Now I have been talking to

⁵⁸ U.S. CONST. art. I, § 2, cl. 3 *amended by* U.S. CONST. amend XIV, § 2.

you for a moment about the Constitution as it was when it was adopted, and not the Constitution as it now is. Now turn, if you please, to Article 14 of the Amendment to the Constitution.

“Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State.”⁵⁹ The old Constitution read, “counting the whole number of free persons and three-fifths of all other persons.” Now you are to count the whole number of persons in each state, excluding Indians not taxed. Therefore, one of the results of that amendment was that after the war and slavery was abolished, the South got the benefit of the colored people in their representation in Congress, that is they got an increased representation.

But look now to the succeeding clause.

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.⁶⁰

In other words, if any state abridged the right to vote to any of its people of the male persuasion, they should to that extent lose in the basis of representation. The object of that was to remove from the state that had formerly held slavery any temptation in any way by any device to affect the right of the colored man to vote. In that way they secured to him the right to vote. I suppose that they would lose to that extent in the basis of representation, leaving out some of those words.

“But when the right to vote at any election shall be denied to any of the male inhabitant of such state of twenty-one years of age and citizens of the United States are in any way abridged, except for participation in rebellion or other crime, the basis of the representation shall be reduced in proportion” &c. Therefore, if a state denies the right, as they might as far as the Constitution of the United States is concerned, if the state restrict the right to vote to people who can read and write, and therefore denied the

⁵⁹ U.S. CONST. amend. XIV, § 2.

⁶⁰ *Id.*

right to vote of people who could not read and write, to that extent they would lose in the representation. And that is right. If he cannot vote, therefore he is not represented in the political representation of the state.

Now let us go along a little farther. You will see in that other clause it provides for an enumeration of the people, and the number of people that there shall be in each representative district. Of course, that is changed now. "The Number of Representatives shall not exceed one for every thirty Thousand."⁶¹ Now in some of the districts I believe it is seventy five thousand.

Now "[t]he House of Representatives shall choose their Speaker and other Officers, and shall have the sole Power of Impeachment."⁶² Well you think it is very extraordinary that it was necessary to state in this Constitution that the House of Representatives should have the privilege of choosing their speaker. You would ask yourself the question, if the House did not choose the Speaker, who would? Why should that be put in?

Well, the meaning of it is this; that in England the Speaker of the House of Commons today is chosen with the consent of Her Majesty, the Queen. She does not refuse her consent; she would not do it in this day, but she could, and in law and in theory the House of Commons cannot choose now its speaker except with the consent of the Queen.

Well this was put in to let it be understood that no such power rested anywhere in this government as to put a veto on the House of Representatives in choosing their speaker. The President of the United States has no more to do with the choosing of the Speaker of the House of Representatives than the Emperor of Germany has. If he should attempt to interfere in any way he would be regarded as impertinent. The House of Representatives is its own master in that respect.

And it was to place beyond all controversy any suggestion to come from whatever source that any power in this country legislative, executive, or judicial could control the representatives of the people from choosing their own Speaker. They can put him in, and they can put him out, but he is now getting so large that a gentleman here at my elbow suggests that the Speaker is now a Czar.

Well I do not say that, but he is a great power in the government today. No one other than the President exercises the power that he does. He organizes all committees of the House. That House is so large that a man is lost for a time unless he has exceptional ability, if he be not put upon a

⁶¹ U.S. CONST. art. I, § 2, cl. 3.

⁶² U.S. CONST. art. I, § 2, cl. 5.

good committee.

Perhaps that is necessary; perhaps it is necessary in the enormous amount of business to be transacted there, that he should have this power, but great as you see, gentlemen, his power to be, and is, he cannot stay there except with the consent of the Representatives. They can turn him out. If any day the Speaker of the House of Representatives should become distasteful to that body, they could turn him out and put somebody else in his place, and that is another illustration of the power for conservative results, for the safety of the people is put in the hands of each Representative. It is not possible under this Constitution in view of the distribution among the several branches, it is not possible for any man, whatever his position, to set the tyrant or despot over this country, or any part of it, for any given length of time.

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The Supreme Court of the United States has no jurisdiction except that conferred by the Constitution of the United States and acts of Congress. No case could get there at all about a contested election in the House of Representatives in any way that would decide that question conclusively.

If A contests B's seat as a member of the House of Representatives, it belongs alone to the House of Representatives to settle that question. No matter how they may settle it, they may settle it wrongly; it may be perfectly clear on the very face of the case that the House of Representatives has decided that question upon purely partisan, political grounds, there is no authority of the government, including the judiciary, that could interfere with that matter.

The House of Representatives is the judge of the election and qualification of its members; the Senate is the judge of the election and qualification of its members. If the House of Representatives should by a resolution, however wrong, however against law, declare the seat of A vacant, that is the end of the matter. You cannot appeal to any power on the subject. Neither the President, nor the courts, because the Constitution says each House shall be the judge of the election and qualifications of its own members.⁶³

Now there is one way in which the question as to whether a Member was validly elected might get before the courts. Suppose a man were elected, that is, received a majority of the votes before he was twenty-five years of age for a Member of Congress. He didn't take his seat immediately. He waited until he was twenty-five years old and then took his seat, and he would come on a particular day, on the day those matters are usually attended to, and ask for his pay. He might claim pay from the beginning of the Session, although he was not sworn in until two or three months afterwards.

The officer of the House having charge of those matters would say, "I cannot pay you. You were not qualified to take your seat on the first day of the Session. You could not have taken your seat lawfully, even if the House had admitted you. Therefore, I won't pay you only from the day you took your seat, from the day you were twenty-five years of age."

Well how would the man get his pay? Well he would have to bring suit against the proper officers, and then the court might decide the question of law as to whether he was competent to be elected at the time he

⁶³ *But see* Powell v. McCormack, 395 U.S. 486 (1969).

was elected, and they might decide he was, and therefore he ought to be paid, but that would not give him his seat as a matter of law. The court could not by any means compel the House of Representatives to admit a man.

Who would process go against? If directed to the Speaker, he would say: "I am not the House of Representatives. I am only the Speaker." Would you put the process on the whole two hundred or three hundred men of the House? You could no more do that than you could put a process upon all the members to compel them to vote on any measure.

And this was done wisely by the framers of the Constitution. I say wisely, speaking as a general rule, and yet there are regulations that might be made upon that subject that would be conducive to the ends of justice. It has too often occurred in the history of the House of Representatives that the committees to whom were referred the claims of contesting members to seats have decided those questions upon purely partisan grounds. If a majority of the House want Mr. A admitted, why the committee would report generally in his favor, and he would be admitted. The members would close their ears to the fact, at least so it has been stated and so I believe is the case.

There is a mode in England which might very well be introduced in this country. There is a provision there by which if a man is returned to his seat in the House of Commons in violation of law, there is a statute that if a man has been elected by fraud or by perjury, the election shall be void, and he shall not be entitled to take his seat, and it is in the power of a single voter to bring a suit in the courts to determine whether he can lawfully take his seat, and that judgment is final under the law of England, but we have no tribunal in this country to determine questions of that sort as against either branch of Congress.

Now the last clause of the Constitution referred to was that one which declared that the House of Representatives shall choose their Speaker and other officers, and I called your attention to the fact that as self-evident as that seems to us, as natural as that seems to us, there was a reason for it, arising out of the history of the government of England, where in strict law the House of Commons cannot choose anybody as Speaker to whom the Queen should object. He is chosen with the consent of the Queen. She does not withhold her consent in these modern days; she would not do it no matter who is elected, but in point of law she has to give her consent before he becomes the Speaker, and this was inserted to prevent the possibility of such a thing happening in this country.

Now we come to the third section as to the organization of the Senate of the United States. Read Section 3 of Article I,—first clause—of the Constitution. “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.”⁶⁴

Now what would you say as to the power of any state to pass a statute providing for the election of Senators by popular vote?

I should say that would be a good thing.

What would you say as to the power of the state to pass such a law?

They would have the power, I think, under the Constitution.

Well, how can that be? Look at that clause again, speaking of the Senate, not *may* be composed, but *shall be* composed of two Senators from each state, chosen by the legislature thereof for six years. Now, if it is to be composed of persons from each state chosen by the legislature thereof, why of course the state could not alter that because, as I have read to you heretofore, this Constitution is the supreme law of the land, and the legislature cannot change that. If a Senator should be elected by popular vote, he would not be a Senator chosen by the legislature thereof.

There is a very strong conviction in this country that the Constitution might very well be amended in that regard so as to give the people of any state power, if they saw proper, to elect their Senators by popular vote instead of by the legislature.⁶⁵ There are a great many reasons in favor of that in the light of what we have seen in this country.

As I have said to you heretofore, I believe there are aggregations of power in this country in a few hands in particular localities far beyond anything dreamed of by the men who framed the Constitution, and when those aggregations of power want a particular man elected, or want a particular man defeated, they have only to deal with the number of men who constitute our legislature, they have the power very often to defeat a very worthy man, or the power to elect somebody who has no particular qualifications for the place, but will come here to represent them, and that has occurred. I will not call names, and got no names in my mind when I make the statement, but there is a wide belief that in the past twenty or thirty years there have been men in the Senate of the United States that were not there to represent the whole country, and didn't represent the whole country, but represented particular interests, were there for that

⁶⁴ U.S. CONST. art. I, § 3, cl. 1.

⁶⁵ The Seventeenth Amendment, ratified in 1913, provided for the popular election of Senators. U.S. CONST. amend. XVII.

purpose, put there for that purpose.

I remember not a great while ago reading in the papers what purported to be the words of witnesses before a legislative committee, inquiring into circumstances attending the election of a Senator from a particular state, and there were men before that committee that stated without hesitation that a particular railroad corporation had contributed money in their election in different counties.⁶⁶ What business has a railroad corporation to contribute its funds; what business has it in its corporate capacity to be bothering itself with the election of Senators? Of course when they did, they had a purpose in doing it; certain interests they wanted guarded. They wanted their man at the post of danger to watch for their interests.

I read only two or three years ago a statement by a distinguished lawyer, still alive, living in the city of New York, who stated as of his own knowledge that a particular corporation—railroad corporation I believe—contributed fifty thousand dollars to one of the political parties in a certain contest there. And nothing is more certain in these days than that these aggregated interests are exercising a deleterious influence upon these legislative bodies.

Here is a state, for instance, in which there is a boss on one side, and a boss on the other, representing the two political parties. Some man jumps up in the legislature and he proposes some legislation that will affect a particular corporation. Well those men having the charge of affairs of this corporation will go to one of these bosses and say, “We don’t want to go up here to the legislature and bother with things of that sort. There will be talk if we go there. Here is fifty thousand dollars. Now stop it. Take your own way about it, but stop it,” and then go to the boss on the other side and give him money and tell him to stop that legislation, and the two bosses notify their henchmen in the legislature that the bill must not pass, and it gets into a committee and the bosses having spoken and both agreeing on that, you never hear of that bill any more—it is not passed. All those they want to

⁶⁶ Harlan may be referring to the Credit Mobilier scandal of 1872. *See generally* JOHN THOMAS NOONAN, BRIBES 460–500 (1987). In 1864, the United States chartered the Union Pacific Railroad in order to complete a transcontinental railroad west from the Missouri River. *See id.* at 463–64. In 1864, officers of Union Pacific formed Credit Mobilier of America and used it to defraud the United States by padding construction contracts. Union Pacific induced the United States to continue covering the inflated charges by allowing Congressmen to purchase shares in Credit Mobilier at a discount. *See id.* at 464–66. The *New York Sun* broke the story in 1872, prompting Congress to form a committee that investigated thirteen Congressmen, two of whom were censured. *See id.* at 478.

pass, they will put in the hands of the bosses and they go through, even against the protests of good men, and to the injury of the country.

Now it is things of that sort that are making the impression upon the minds of this country that one of the remedies against it is not to have Senators elected by the legislature but by popular vote, so that the political parties will put up the right sort of men, a man that is not simply a money-bag, but a man that has got some sense, a man that has knowledge of public affairs, not a man that lives in New York all the time, but claims a residence somewhere else in order that he may be qualified for Senator, but one of their own people whom they see, and they see him all over the state; he appears before the people; they see what manner of man he is; they see how he looks, how he talks, and the average judgment of the men in the community in which a man lives is a pretty sound one.

We make a mistake if we imagine that nobody be a judge of good sense unless he be an educated man or a professional man. The average man knows something about the capacity of men who offer to serve them, and the average judgment of the average community as to whether a man is an honest man and will be an honest servant is better than that of men who live in closets, and live in books, and never go out in the world and see the people.

Therefore, I shall not be surprised if we do come to the conclusion, when a state shall see proper, to elect the Senators by popular vote. If any man has had anything to do with public life he will tell you that the average judgment of a mixed crowd anywhere in this country, and where they hear the question discussed, is a very sound one.

The people may be mistaken for a time. They may be carried away by prejudices and excitement on a particular occasion. All that may occur, just as we individually will get out of temper and make ourselves ridiculous, but in due time they will see the right of the thing and do what is right, and the great thing in our system of government here that does not exist anywhere else, that of all our freedom our Fathers had the wisdom to put checks upon us, checks upon hasty legislation, in the organization of two branches of the legislature; checks upon mere majorities, which in temper and passion may sweep away all the landmarks.

That cannot be done under our form of government, and one of the best safeguards this Constitution provides is in this clause wherein it establishes a second branch of the legislature to consist of two Senators from each state. Little Delaware has got as much power in the Senate of the United States as the great state of New York. Some think that ought not to be. Why ought not it to be? If it were not that way, Delaware would

not have assented to the Constitution. Other small states would not have assented to it.

The object of that part of the Constitution was to preserve the dignity and equality of the states. Did you ever stop to think what would be our condition if we had no states; if state lines were wiped out and we had one vast country here, all power concentrated in Congress, with no local communities to determine their own local matters? Did you ever stop to think what might be the condition of this country?

France has got that today. She has a republic in name, but she has got no states. Her legislative department has complete legislative power, all they want to exercise. That is not our condition. We have not got a vast centralized government whose power on every subject reaches from one end of the country to another.

The larger field upon which legislation will operate is outside of the government of the United States. We have got no vast and centralized government of the United States, and no power to go beyond certain things. The states handle all other matters. They regulate the subject of marriage and divorce and all police matters. And the object of this clause was to preserve that system.

And while the House of Representatives, with members elected every two years, coming fresh from the people, represent the people, here is a branch of the legislature that represents the states, and each one of them having an equal vote, so that this body was intended as a check upon the more numerous branch of the legislature.

“[T]wo Senators from each State, chosen by the Legislature thereof.”⁶⁷ Not for one year, but for six years to give the Senator some assurance that he is not going to be displaced the next day or two. Let the Senator feel when he takes his seat that he is safe there for six years anyway, and he therefore is emboldened to think for himself, to think what is best for his country, to be an honest man and not be always hunting about to find what is the popular whim of the hour.

And whenever a measure is proposed in the House of Representatives, that body is bound to think, will this pass the Senate? Will the Senate agree to this without amendment? Put this in a shape now so that we will not lose the time, not have this bill come back for amendment, and we have got to take into account the Senate of the United States, a body of men who are there for six years, and each Senator having one vote.

⁶⁷ U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII.

Now, immediately after the first Senate was assembled, the Constitution required that they should be divided as nearly as might be into three classes. One class to serve for two years, one class for four years, and the last class for six years. Now what was the meaning of that?

Why, there was great wisdom in it. It was to make it certain that at every regular session of the Congress of the United States there should be a Senate, two-thirds of whom had been there before; one-half of that two-thirds had been there a given time, and the other half a less time, but both had been there. They had become familiar with legislation. New, fresh blood—one-third—comes in at every Congress. It gives permanency to the body, and it gives the country whatever confidence would come from the fact that two-thirds of that body at all times were men who had had some experience in public affairs.

If vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof can make temporary appointments until the next meeting of the legislature. Congress meets the first Monday in December. A Senator dies in January. Well, the governor of that state, if the legislature is not in session, will make an appointment, which will be good until the legislature meets.

Well, the legislature meets and they proceed to fill the vacancy, but they do not do it. The session closes without the vacancy being filled. Does the man who has been appointed by the governor go out, and is the seat vacant? I believe the ruling of the Senate has been that it did. The appointment only lasts until the meeting of the legislature.

“No Person shall be a Senator who shall not have attained to the Age of thirty Years.”⁶⁸ Why thirty instead of twenty-five? It is upon the idea that a man thirty years old knew more than a man of twenty-five, and ordinarily he does, and that additional five years gave a little more assurance of sound judgment and reflection, and as years are added to every man’s life he becomes a wiser man. He learns to think twice before he speaks, and as representing a state—one of the States of this Union—he ought to be at least thirty years old.

“And nine Years a Citizen of the United States.”⁶⁹ The idea was that until he had been that long a citizen of the United States, we could not be quite sure that he would not give up his citizenship and go back to his own country. Every man loves his native land, and the man who does not is not much of a man. We are not to be surprised that a man coming to us from

⁶⁸ U.S. CONST. art. I, § 3, cl. 3.

⁶⁹ *Id.*

Europe should think of his native country. We love our native land, and we like to go back to the county where we were born—that county is dear to us—and look at the schoolhouse in which we went to school. We like to meet our schoolmates. Our affections and hearts go out to that place.

This Constitution proceeded upon the idea that the man from Germany, or some other foreign country, would not cease to love his country. But if he should come here and had been nine years a citizen of the United States, why we could afford to trust him in the Senate of the United States.

He must also when elected be an inhabitant of the state from which he shall be chosen. There has been some evasion of that clause, particularly within the last ten or fifteen years. Men sometimes claim to be an inhabitant of a state and get into the Senate who pass very little time in the state. They are elsewhere; they are doing business elsewhere and their interests are mostly elsewhere. This means a real inhabitant of the state.

“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”⁷⁰ Of course, the question was one of much consideration as to how the Senate was to be presided over, and a lucky suggestion was made that they had better give the Vice-President something to do. Let the states stand there with their equal number, and have a man to preside over them who does not belong to any state, that is, does not represent any state, and keep order and not vote only in case of necessity. It is an ugly situation for anybody to be equally divided.

Now there is another provision that exists: “The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.”⁷¹ If the President should die, the Vice-President would act as President, and the senators would elect one of their members as President Pro Tempore.

Now, there are questions that aroused a great deal of discussion. Suppose a President died; a Vice-President died; who became President? Why, the President Pro Tempore of the Senate. Now, it often occurred that the President was of different politics than the President Pro Tempore of the Senate.

Now, that was an ugly state of things. If the people had elected a man President and sustained the party to which he belonged, why that party

⁷⁰ U.S. CONST. art. I, § 3, cl. 4.

⁷¹ U.S. CONST. art. I, § 3, cl. 5.

should have the control of the White House. If the President and Vice-President should die, and a man of opposite politics came into authority, the verdict of the people at the polls would be reversed.

Now, that has been remedied by a statute passed a few years ago, so that now a political party in the minority has no interest to be subserved by the death of the President or the death of the Vice-President, because now if the President dies the Vice-President succeeds of the same party. If the Vice-President dies, why the President pro tempore would not become President. The Secretary of State becomes President. If he dies, the Secretary of the Treasury, and so on each head of a department in the order in which those departments were established.⁷²

Now, it is absolutely certain when a political party triumphs at an election that party shall have control of the government for four years. So that a political party out of power and wanting to be in power has got no interest in anybody dying. No contingency of that sort can arise.

“The Senate shall have the sole Power to try all Impeachments.”⁷³
What do you mean by impeachment?

That is bringing some charge against the actions of the party in violation of his authority.

Well, for what may an officer of the United States be impeached, and which of them may be impeached?

The Senators and the Representatives may be impeached. The President and Vice-President. All of the executive officers may be impeached.

There is a little doubt as to whether a Senator can be impeached, although the other part of your answer is correct.

“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.”⁷⁴ Exactly what is the meaning of high crimes and misdemeanors the Constitution does not determine.

The question has been raised as to whether a Senator is a civil officer. He is elected by a State. A member of the House of Representatives is

⁷² The Presidential Succession Act of 1886, ch. 4, 24 Stat. 1, provided that the members of the Cabinet would succeed the President and Vice-President—according to the order in which the cabinet departments were created—rather than the President Pro Tempore of the Senate and Speaker of the House of Representatives.

⁷³ U.S. CONST. art. I, § 3, cl. 6.

⁷⁴ U.S. CONST. art. I, § 4.

elected by his district, but he represents his state. It is in the power of either body to take cognizance of it. If it come to the knowledge of the House of Representatives that since the last adjournment a particular member of the House had been guilty of larceny, it could not send him to penitentiary or declare his seat vacant.

Impeachment is a proceeding in the form of a prosecution. The Senate tries impeachments. The House files the articles of impeachment. The House is the grand inquest of the nation to inquire. The Senate cannot impeach anybody by itself. When the House files articles of impeachment they present them to the Senate, and then the Senate is constituted a quasi-court. It hears evidence; it hears arguments; hears the articles and charges made by the representatives of the people.

Now, where to try it. If the President of the United States is put on trial, the Chief Justice presides. Only once has a President been tried and that was Andrew Johnson. And you will know that no man shall be convicted of impeachment except by two-thirds of the members present. It puts it out of the power of a political party to put a man out upon a bare majority.

Andrew Johnson was impeached by the House of Representatives for alleged high crimes and misdemeanors, and he was tried by the Senate, Chief Justice Chase presiding. There was a majority against him in the Senate, but there were not two-thirds, and that happened which the framers of the Constitution thought would probably happen, that there would be some in that body that might not be influenced by party, and without casting any reflections upon the motive of the men who voted in favor of impeachment, looking from this time back to that, and reading the history of that period, I am safe in saying that nine-tenths of the people of the country are prepared to say that it was very fortunate for the stability of the government that the articles of impeachment were not sustained, and they were not sustained because there were members of the party who would not be carried away by temporary excitement, but steadily held their ground.

Not that they cared a thing for Andrew Johnson. He was by no means a particularly lovable man, but he was a firm man; he was a courageous man; what he did was done no doubt in deference to his convictions on political questions, but it was not a high crime or misdemeanor, these Senators thought, and they stood their ground, and prevented that calamity coming to the country of the conviction of a President of the United States.

I believe all the men belonging to the prevailing party who refused to join in those articles of impeachment have been called away except one, and one of them is still living and living in this city, and I think that those who feel an interest in his reputation can point with pride to the fact that he

had the courage, almost in a time of war, when it was difficult for man to resist the tide of party feeling, that he had the courage to stand to his convictions and vote against those articles of impeachment. I allude to the Honorable John B. Henderson.⁷⁵

⁷⁵ John Brooks Henderson (November 16, 1826–April 12, 1913) was a United States Senator from Missouri and a co-author of the Thirteenth Amendment. *Henderson, John Brooks*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=h000483> (last visited May 25, 2013); *Landmark Legislation: The Civil War and Reconstruction Amendments to the Constitution*, U.S. SENATE, <http://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm> (last visited May 25, 2013). Henderson was appointed to the Senate on January 17, 1862, to fill the vacancy caused by the expulsion of Senator Truett Polk. *Henderson, John Brooks, supra*. When President Johnson was impeached in 1868, Henderson and six other Republican senators voted against impeachment and prevented his conviction. Ralph J. Roske, *The Seven Martyrs?*, 64 AM. HIST. REV. 323, 323 (1959).

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We had reached Section 4 of Article I. There is no more important provision in the Constitution than that, nor one about which there is a larger amount of ignorance, or none about which more unmeaning or senseless things are said.

Now, look at the words of that section. “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.”⁷⁶

With the single exception as to the places of choosing Senators, here the broad power is given to Congress at any time, in its own discretion, by law, that is, by statute, to make or alter such regulations. That is, they may make and alter regulations as to times and places and manner of holding elections for Senators and Representatives, except as to the places of choosing Senators.

Well, this is very broad. “The Manner of holding elections for Representatives.” What may the Congress of the United States do in reference to that?

The average man that never has read the Constitution of the United States, and knows more about ward meetings than about the law of his country, and you meet him on the street and he will turn up his nose at the idea of the United States having anything to say whatever about an election of Representatives in Congress. Why, he will tell you that that belongs to the states, and the United States has nothing to do with it.

Well now, so it does belong to the states in the first instance; that is to say, they may make regulations. Here is the express power given to Congress to make regulations on that subject, or to alter regulations made by the states, and why is it that the United States as represented in Congress should not have something to say about the election of Representatives in Congress?

We must not forget that a member of the House of Representatives is not there simply as the representative of the people of his district. He represents in a sense the whole country. He can make laws to bind the whole country. Therefore the people of the state of Illinois, for instance, do have an interest in the election of Representatives from the state of New York, because the men who are sent here by the state of New York can

⁷⁶ U.S. CONST. art. I, § 4, cl. 1.

assist in making laws to bind the whole United States.⁷⁷

It is not to be entertained for a moment that any state of this union can act as it pleases in the matter of sending Representatives to Congress beyond the power of the United States. Why, it might be that laws of the most important character would go through the House of Representatives by the votes of a delegation from one state, with everybody in the country knowing that that delegation was sent to Congress by the most transparent frauds practiced under the sanction of laws of the state. And hence it is, that a man who is returned by a state, as a member of the lower house of Congress as its representative from that particular district, while entitled to his seat *prima facie* upon the certificate that comes there, is not beyond the control of the House. Congress may by its committee look into that election, and if it finds for instance that the man was returned by intimidation or corruption, they can declare his seat vacant.

Now, up to the present time, Congress has not done much in that direction. Representatives in Congress are elected in the mode prescribed by the several states. The state fixes the qualification of the voter. The state provides the officers of election, and the state provides the mode of making returns of those elected.

Yet, it may be done by Congress, and Congress can provide penalties for frauds upon the election, for intimidation of voters for election of Representatives in Congress. In other respects the laws of the state are adopted; but because the laws of the states are adopted; because the election is held under the immediate sanction of the laws of the state, it does not therefore follow that the United States has nothing to do about the validity of that election.

There is a case in the Supreme Court of the United States, reported in 127 United States, the McCoy case.⁷⁸ That illustrates in a very striking way what I am trying to put before you. An election was held in the state of Indiana at a particular time for the election of Governor, Lieutenant-Governor, members of the legislature, judges of the state, and members of the lower house of Congress. And men would vote by ballot, and they would vote in the mode prescribed by the state, and they would go to the polls prescribed by the state, presided over by the officers of the state.

⁷⁷ Cf. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 841 (1995) (Kennedy, J., concurring) (“The political identity of the entire people of the Union is reinforced by the proposition, which I take to be beyond dispute, that, though limited as to its objects, the National Government is, and must be, controlled by the people without collateral interference by the States.”).

⁷⁸ *In re Coy*, 127 U.S. 731 (1888).

They were all on the same ticket.

The law of the state provided that at the close of the poll the officers of the that election in each precinct should count the ballots and they would put down on a piece of paper that AB, candidate for Governor, received so many votes, D for Lieutenant-Governor, so many votes, and candidates for judges received so many votes, etc. And the officers of the election at each precinct would sign that, and their duty, under the state law, was to fold up that paper and seal it so that nobody could see it, or tamper with it, and send it to the proper officer at the county seat, where the ballots would all be counted, and then on a particular day be returned to the Capital of the State to be examined.

Now, it so happened that in a particular election held there that those ballots which had been sealed up were tampered with. The seal was broken, and this paper that contained the return of these elections, federal and state, had been tampered with. The seal was broken and somebody had altered the returns in regard to the election of the criminal judge in the city of Indianapolis, and then sealed up the paper again. There was nothing in the case justifying the suspicion that any other part of that paper had been altered or tampered with, but Mr. McCoy was indicted in the federal courts, and was charged with the crime of having tampered with those returns, having broken those seals and altered the figures.

Well, he made the point in the federal court, and the question was afterwards renewed upon writ of habeas corpus before me as Circuit Justice for that Circuit.⁷⁹ Says his attorneys, what has the federal court to do with this case? What has the federal court to do with the alteration of returns in reference to a state judge? That is not a federal matter; it belongs to the courts of the state of Indiana; therefore, said his attorneys, these proceedings in the federal court are void; the court is without jurisdiction to deal with that matter.

Well, my view was, that that paper contained the returns of state and federal officers and was the joint property of the United States and of the state of Indiana; that both governments owned it. It was the evidence of the return of election for federal as well as state officers, and the object of these laws was to prevent by sealing up these papers the possibility of anybody tampering with them, and I would not stop to inquire what was the motive of the man who broke the seal and altered these returns; suffice it to say that that paper contained a return of the election of members of Congress, and the breaking of that seal was an offense against both the United States

⁷⁹ *In re Coy*, 31 F. 794, 794 (C.C.D. Ind. 1887) (Harlan, J.).

and the state, and the breaking of the seal gave an opportunity, although the purpose may have been only to alter the returns as to the state officers, it gave them an opportunity of altering the returns for the federal officers. My view was reaffirmed by the Supreme Court of the United States in this case.

Now, can anybody's enthusiasm for what he calls states' rights be outraged by the idea that the United States has the power, and ought to have the power, to see to it that the election for members of Congress of the United States, sending men here to make laws for the whole United States, be fair and honest, shall represent the will of the people? Can anybody's sense of right be shocked by the idea that the United States ought to have some control over the election for members of Congress of the United States?

And they delegate to the Congress of the United States the power to make and alter regulations in reference to the times, places and manner of holding elections for Senators and Representatives, except in the one case to which I have referred. I grant you that unless it should become necessary, the Congress of the United States ought not, and need not, exercise all the power it has on that subject, and all things considered it is best and wisest to leave those matters to the regulation of the different states in the belief that they mean to do what is right, and will do what is right, but it is well for the whole country that every state in this union is informed by this Constitution, that if the time comes and it is necessary for its power to be exercised, that in order that the seventy million of people in this country interested in the integrity of the national legislature may have honest, fair elections, subserving the will of the people, the power is here given to Congress to bring about that result.

Now, the next clause: "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."⁸⁰

You may think when you first read that, why was it necessary to put in this Constitution the requirement that the Congress shall assemble at least once every year? Well, that was a provision suggested by the experience of England during many centuries, and the men who framed this Constitution proceeded upon the idea which was a sound one, that the price of liberty is eternal vigilance, and that the surest safeguard of the people was by a constitutional provision to put it out of the power of anybody to infringe upon that liberty.

⁸⁰ U.S. CONST. art. I, § 4, cl. 2, *amended* by U.S. CONST. amend. XX, § 2.

What happened in England? When a King had all the money he wanted to carry on a war, he didn't need Parliament. He would call Parliament together and get what money he wanted, and then Parliament would be paroled and he would not call it together. Sometimes as many as ten years would be passed without Parliament being called together to legislate for England. The King was running it his way and he didn't want to be checked by the act of Parliament. He had money enough for his purpose, and that was all he wanted.

A great fight was made against that sort of thing, and in the end the law was passed which requires Parliament to be assembled once in every seven years.⁸¹ This Parliament now in existence may last seven years without a new election. At the end of that time there must be a new election.

Well, our Fathers thought that was too long a time, and said we will put it out of the power of any harm coming to this country by the want of any legislation by requiring that Congress shall assemble at least once every year. The President has got nothing to say as to when they should assemble.

Now, there are some who often say in jest, that the country is now safe because Congress has adjourned.⁸² They get an idea that everything is in danger when Congress is in session, because of the everlasting talk that is done there, and because nothing is done, they say. Well, the opinion of some is that there is too much done.

Now, I have an old-fashioned idea that it is well to assemble at least once in each year and talk, let them talk. It does not cost much, except the cost of printing the Congressional Record, but it gives an opportunity to people to have their say, as we call it, and to advance new ideas, as they deem them to be, and throw them out before the country. That does not do any harm.

Many a man would be mischievous if you would try to shut him up all the year round and not allow him to talk. He is quite certain, if his

⁸¹ The Triennial Act of 1641, also known as the Dissolution Act, provided that Parliament must meet for at least one fifty-day session every three years. Triennial Act, 1641, 16 Car., c. 1 (Eng.), *repealed by* Triennial Act, 1664, 16 Cha. II c. 1 (Eng.). It was intended to prevent the monarch from ruling without Parliament, as Charles I did during the Long Parliament from 1629 to 1640. The Septennial Act of 1715 increased the maximum length of a parliament from three years to seven. Septennial Act, 1715, 1 Geo. 1, c. 38 (Eng.) (current version at Fixed-term Parliaments Act, 2011, c. 14 (U.K.)).

⁸² See, e.g., *Final Accounting in re Estate of A.B.*, 1 Tucker 247, 249 (N.Y. Sur. 1866) (Tucker, J.) (quoting the saying, "no man's life, liberty or property are safe while the Legislature is in session").

opportunity of speech is interfered with, that something is wrong. Let him talk and he is satisfied. They can have their say and air their views, and that is not without its value.

This Congressional Record that we belittle so much, because we do not read it, contains a vast amount of information. It is these speeches of public men, these meetings of public bodies, that educates the popular minds; that qualifies the average man to understand his government, and know what is going on. He knows that he is a part of the country; that there is a responsibility upon him as a voter, and this assembling of the Congress of the United States every year prevents the possibility of combinations behind the scenes among bad men to overthrow the government.

There is no danger if we have publicity of our affairs. If a statement is made as required by the Constitution of the expenditures out of the public treasury, and if people are allowed to talk and express their views, why the result is that at the end of every year substantially everybody in this country is reasonably well informed as to what is going on; what is designed, and what is intended—everything above-board, nothing concealed. Congress assembling each year, they can prevent any mischievous designs being entertained on the part of the President of the United States and his army of office holders at his side. But so far we have met with no danger in that regard.

Now, the next section is that “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”⁸³ I have already referred to the first branch of that section. The latter branch is “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.”⁸⁴

What was the necessity of saying a smaller number might adjourn from day to day? Why, it was to prevent the possibility of there not being in existence a lawful legislative body. Here is a statute which says, Congress shall assemble on the first Monday in December.⁸⁵ When the first Monday in December comes, the Speaker takes his place in the chair, and the roll is called. There are only forty members present out of over three hundred, but there is the lawful House of Representatives. They

⁸³ U.S. CONST. art. I, § 5, cl. 1.

⁸⁴ *Id.*

⁸⁵ U.S. CONST. art. I, § 4, cl. 2, *amended by* U.S. CONST. amend. XX, § 2.

cannot do business for they have not a quorum, but they can adjourn from day to day, and may compel the attendance of absent members.

How compel them? Suppose a man is way in California; way up in the Yosemite Valley, a lawful member of the House of Representatives, and has not attended and refuses to attend. What may the House do, even this small minority? It can order its Sergeant-at-Arms to go to the Yosemite Valley and lay his hand on that man and bring him here. That is what it can do. May compel him.⁸⁶

Well, suppose, you say, he won't come. Well, that Sergeant-at-Arms can summon an officer to bring him forth. Got all the power a constable has. That is done to prevent the breaking up on the legislative branch of the government, and they many do that and impose a penalty on the party for not attending as is his duty to the House of Representatives.

"Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour . . ."⁸⁷ Punish them, how? Why in a way that may be consistent with our civilization. Put him in jail if he is guilty of misbehavior. If a member of the House should stagger into that body some day drunk, that is disorderly behavior. He can be fined by that body, and punished for that disorderly behavior.

Is there a member of that body that is not a fit associate for honest people? Is there a member of that body who has been guilty of some conduct that ought to disgrace any man? Very well, that House has the power by a vote of two-thirds to expel him. And no matter for what reason they expel him; it may be wholly unnecessary; it may be a wrong one; it may be one so unjust to the man, but if the House exercises its power and expels him, that is the end of it. No court has authority over that House of Representatives to compel them to receive AB as a member of its body.⁸⁸

"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 . . ."⁸⁹ How much of a journal? Not one that is to record every word that is said, and everything that is done. It may keep its journal in its own way, but it would not comply with the Constitution if it was not a fair record of the proceedings.

⁸⁶ See FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE, S. DOC. NO. 101-28, at 214-24 (1992).

⁸⁷ U.S. CONST. art. I, § 5, cl. 2.

⁸⁸ The Court eventually held that expulsion by a vote of two-thirds is the only way the House of Representatives can exercise its power to determine the qualifications of its members. See *Powell v. McCormack*, 395 U.S. 486 (1969).

⁸⁹ U.S. CONST. art. I, § 5, cl. 3.

And why publish the same? Why in order that there may be nothing secret from the people of the United States. This government, unlike any other government on the face of the Earth, or that ever existed on the face of the Earth, rests upon the consent of the governed, and in a government of that sort, the safety lies in publicity attending all matters that concern the states. Therefore, this journal is to be published, that the people may see what their Representatives have done, and the people of a particular district may see precisely what votes their Representative has cast, and see whether or not he has represented their views, and whether or not he ought to be returned.

“[A]nd 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.”⁹⁰ That was suggested by a knowledge of human nature. I have been myself often on the floor of the House as a motion was made and the Speaker would put the motion, and you would suppose from the thundering Yeas that the motion was sustained, but somebody would call for a division. He would call for the Ayes and Noes, and the vote would be taken and many a Representative who has said Yea before the roll was called, voted Nay when the roll was called. He did not intend to allow some man in a back district that wanted his seat to be able to say in the next election, and prove it by the Journal, that he had voted in a particular way, and therefore he would vote Nay. And the object of this provision was to compel members of the House to deal openly and fairly with their constituents; have no secrets in public affairs. If you do a thing let the record show it. Do not be ashamed of it.

“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.”⁹¹ That is a provision of very great consequence. No member today of the English Parliament receives any compensation from the government of England for his services. The members of the House of Lords, a great many of them, or most of them, are able to pay their own way, and those who are hard up get their compensation in the honor which they suppose comes from the titles which they enjoy, and which came from somebody else, that they didn’t earn, but even members of the House of Commons get no compensation. There are members of the House of Commons today too poor to pay their own board bills in the city of London, and they are assisted in the matter by private contributions among

⁹⁰ *Id.*

⁹¹ U.S. CONST. art. I, § 6, cl. 1.

their constituents.

Now, we proceeded in this Constitution upon a different idea. Suppose that was not the rule of the Constitution. It would be a good deal more so than it is, that these public positions would be filled by those that have been blessed with this world's goods, and men who are capable of serving their country would be kept out of public life altogether. The country would be deprived of their services.

The fact is, stating it broadly, that three-fourths, I do not think I overstate it when I say that the large majority of the statesmen that have served in the Senate and House have lived well and died poor. While I say lived well, I do not mean extravagant, but it took all that they received from the Treasury to pay their expenses while in public life, and large numbers of them died insolvent. They made no money while they were in public life. They didn't know how, a great many of them, to make money. (Laughter). Now, I don't mean to say that anybody has.

Well, why should not a man be paid because he is a servant of the public? We compensate our Senators and Representatives in a moderate degree, in order that they may give themselves to the service of the country, and if that were not the rule, it would have occurred in the history of our country that we would have lost the services of some of the greatest men that have figured in all our history. And we pay them little enough. No Senator, except upon the utmost economy, can get along in the city of Washington, make ends meet at the close of each year, upon the salary he gets. No Representative can do it, or very few can.

Well, you ask, if that is so, why do they remain in public life? I cannot tell, except from the feeling of the ambition that is planted in the breast of every man to live after he is dead and gone in the memory of his fellow citizens. I can understand why a man may be willing to give his whole life, and lead a life of poverty and self-denial, if by so doing he can make a great name in his country.

That is true of our profession. There are very few lawyers that have the gift of money making. There are very few lawyers that lay up large estates, and when you find the lawyer who loves money better than he does the practice of his profession, it is absolutely certain that he never makes a great lawyer or a good lawyer.

Compensation here provided for by the Constitution, or the direction to make compensation, is upon the idea that the public must not be deprived of the services of worthy men not blessed with this world's goods, who are willing to serve their country, and if that were stricken out, and no mode provided for the payment of Senators and Representatives for the time and labor that they give for the benefit of the public, our nation would be in

sorry condition, and the result inevitably would be that both of those branches of Congress would fall into the hands of men who had more money than they had character or brains.

“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”⁹² The object of that is to protect them from arrest, so that they may be at their posts during the sessions of Congress to discharge their duties to the public. Except, however, in cases of treason, felony, and breach of the peace, for which they may be arrested, “and for any Speech or Debate in either House, they shall not be questioned in any other Place.”⁹³

That does not mean that you may not criticize a speech made by a Senator or Representative in debate. That does not mean that you may not, in friendly conversation with him, tell him you disapprove of what he has said in his speech in the House to which he belongs, but it means that he shall not be held responsible to anybody for it.

And why is that? Suppose a member of the Senate or House, when he arose in his place, was apprehensive that he might be sued by Tom, Dick, or Harry for what he might say. Here is a claim that is preferred against the United States, that is up for consideration in either House. There is the evidence. The Senator or the Representative who speaks on it, having examined it, says that claim is a fraud, and that man who has made that affidavit is shown by other evidence in the case to have been guilty of perjury in making that statement.

No matter what observation he may make upon the matter pending before the House, has the right to make, you shan’t arrest him for it in the court, or question him about it in any proceedings. That was intended to give assurance to the Senator or Representative that the people did not wish him to withhold his expression of views, to refrain from saying what he ought honestly to say. They assured him by that provision, you shall be untrammelled now. Speak out your mind; tell your honest conviction; say what you choose about this public measure, for and against. You may do so with impunity, that you shan’t be questioned in any other place about it.

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

⁹² *Id.*

⁹³ *Id.*

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.⁹⁴

Now, the first clause of that means this. Here is a proposition pending in Congress to increase the salary of the Ambassador to England to twenty thousand dollars a year, and it prevails and becomes a law. Now, that Constitution says that no Senator or Representative shall be appointed to that office during the term for which he was elected as Senator, because the emoluments were increased during that time. If a Senator is thinking that when he increases the emoluments of a particular office he may secure that office from the President of the United States, he is mistaken, and sometimes men of the very highest caliber are misled in that manner, not thinking of this provision of the Constitution.

One of the most estimable Senators we have had for many years, Mr. Ransom from North Carolina, was made Minister to the government of Mexico, and he entered upon the discharge of his duties.⁹⁵ When the first pay day came around, the Comptroller of the Treasury says, I cannot pay, I cannot pass this claim for the salary of Minister Ransom, because the emoluments of that mission were increased during his term as Senator, and the Constitution said he was ineligible to that place.⁹⁶ So, he didn't get the emoluments. He had to be reappointed after his term as Senator expired before he could lawfully hold the office.

The idea was that the Senators and Representatives must be in a condition of impartiality when they passed upon measures of that sort, and that removed the idea that they might reap profit by their own vote. Of course, Senator Ransom never thought of such a thing at all when he voted. He voted, as did all the other Senators, as they ought to have years ago, to increase that compensation.

⁹⁴ U.S. CONST. art. I, § 6, cl. 2.

⁹⁵ Matt Whitaker Ransom, born October 8, 1826 and died October 8, 1904, was a Confederate general during the American Civil War and was later elected as North Carolina's Democratic United States Senator from 1872 to 1895. *Matt W. Ransom (1826–1904)*, N.C. HIST. PROJECT, <http://www.northcarolinahistory.org/encyclopedia/751/entry> (last visited May 27, 2013). He then received an appointment as United States Minister to Mexico and served from 1895 to 1897. *See id.*

⁹⁶ Member of Congress—Appointment to Office, 21 Op. Att'y Gen. 211 (1895); *see also Not Minister to Mexico*, N.Y. TIMES, Aug. 17, 1895, at 1.

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In consideration of Article I, I had passed over one matter without giving you the reference to the authority upon a question of considerable interest in these later days, and I want to go back to that for a moment.

Section 5 of Article I says that a majority of each House shall constitute a quorum to do business, and the question arose a few years ago in Congress here as to what was a quorum to do business; what was a quorum sufficient to pass a law? Now, let me suppose in round numbers that there are three hundred members of the House of Representatives. One hundred and fifty one of those members would constitute a majority. Well, the House is in session, the Speaker in his place, there are a lot of members in their places, and the question arises whether or not there is a quorum there to do business, and they rise in their places. The Speaker will say, "Those in favor of the passage of this resolution will rise to their feet."

Well, he counts one hundred and fifty one men there standing. He sees them all with his eye, and says there is a quorum present and we will proceed to business. Well, a bill comes up. The half of one hundred and fifty one is seventy-six. A little more than half. Seventy-six vote for the law and seventy-five against it. Has that law passed the House? Yes. There was, in any view of it, one hundred and fifty one men there, a majority of the House to do business, and a majority of that number will be sufficient to pass a law, or pass a resolution, or to enact a statute, as far as that House can act.

Well now, let us suppose that the Speaker is required to count whether there is a quorum there or not with which to proceed to business, and seventy-six have been on their feet at his request, and he counts them. Well, he knows that seventy-six is not in itself a quorum to do business. But here are seventy-five men in their seats in the House. They do not rise. If the Yeas and the Nays are called they do not answer. You cannot make a man answer. Are they present under the Constitution to be counted as a part of the quorum? If a resolution is voted on and seventy-six vote for it, has it passed?

Well, the Speaker says, "Yes, there is a quorum here." "How do you know?" some man asks. "Why, I see them." Some man will rise in his place and say, "Mr. Speaker," and he recognizes Mr. Jones of Missouri, I suppose. "Do I understand that you have counted me as a part of this House, as a part of the quorum to do business?" "Yes, I have counted you." "I wish to inform the Speaker that I am not here." "But," the Speaker says, "you are here. I see you. You are Mr. Jones of Missouri, are you not?" "Yes." "You were elected from the First District at the last

election?" "Yes." "You were sworn in as a member of Congress from that state?" "Yes." "You are sitting in this seat here by virtue of your privilege as a member of the House of Representatives?" "Yes." "That is all I want." "But I am not here. I must not be counted." "But you will be counted," says the Speaker, "You are here in this House. If you don't want to be counted you ought to have gotten out so that I could not see you, but you are sitting in this seat by authority of law and because you are a Representative from Missouri, and you are present in the place appointed by law for the transaction of public business. Therefore I count you." And he counts seventy-five men and adds up. There are one hundred and fifty one men, a majority of the House.

Now, I can see how a very serious question might arise. I can put an extreme case. It is not so easy to answer. Let us suppose that in point of fact there are one hundred and fifty one men in the House, and when they call the Ayes and Noes, the Speaker has counted one hundred and fifty one men there, a quorum, a majority of those elected, a quorum sufficient to pass that resolution, and the roll is called and two men vote for the resolution and one against it. All the balance keep their mouths shut.

Now, has that resolution passed? Well, perhaps it has. It is passed by a majority of those voting, and there is a quorum there to do business. Well now, I express upon this supposed case no decided opinion, but you will find that question very interesting to study, and take, therefore, a minute of the case of the United States against Ballin, where you will find that subject considered by the Supreme Court of the United States, and the opinion delivered by Mr. Justice Brewer. It is in 144 United States, page 1.⁹⁷

Well now, there is another matter that I had pretty nearly passed over. I had only suggested it at our last meeting. "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."⁹⁸

Now, no decision of the Supreme Court of the United States has ever laid down a rule by which you are to determine in every case what are bills for raising revenue and what are not. At the last term of the Supreme Court a question arose in a case whether a tax imposed upon the circulation of notes of national banks was a bill for raising revenue.⁹⁹ The point was

⁹⁷ *United States v. Ballin*, 144 U.S. 1, 9 (1892) (holding that under Article I, Section 5, the presence of a majority of the members of the House of Representatives, according to a valid rule, constitutes a quorum, and that the action of a majority of a quorum is legally binding).

⁹⁸ U.S. CONST. art. I, § 7, cl. 1.

⁹⁹ *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897) (Harlan, J.).

attempted to be raised in the case in a suit, that a bill was never constitutionally passed because it originated in the Senate, or because the important part of it was adopted in the Senate. "Therefore," the litigant says, "it is not a part of the law of the land. It should have originated in the House of Representatives."

We held that that was not a bill for raising revenue under the meaning of the Constitution. It was under an act passed for the purpose of establishing a currency of the United States. And this thing of a tax upon the banks was an incident to that object.

Now, ever since the foundation of the government there has been discussion and contests among statesmen as to whether a tariff was a bill for raising revenue. Well, undoubtedly, it is in a very large sense a bill for raising revenue, although its purpose may be something else, or its purpose in part may be something else. You have got to have these laws for raising money with which to run the government. These may be called bills for raising revenue.

When the Wilson bill was passed in the last administration of Mr. Cleveland it got to the Senate, and it was there so mutilated that its father didn't know it.¹⁰⁰ Several hundred amendments made to it. Whole sections stricken out, and a new tariff substituted for it, which finally got through.

Well now, it has always been contended by some in the Senate, that the business of the Senate was to take the bill as it came from the House, substantially. They will admit the right of the Senate to amend, but they say it must be an amendment, not a substitute, and when, therefore, that is their argument, a tariff bill comes from the House complete in itself, and the Senate has a scheme of its own and it substitutes a new bill for the House bill, they say that is a new measure, that that is a bill raising revenue and it cannot originate in the Senate.

Well now, you see from the very nature of things how very difficult it is to determine a question of that sort. When do you make a new bill; what is fairly said to be a new bill, and what is fairly said to be an amendment to the bill which originated in the House? The question has never reached the courts, and if it did, the probabilities are that the courts would have to have a very gross case in order to determine.

Now, you may ask yourself, what is what is the use of that provision? What does it matter where a bill originates for raising revenue? The Constitution says it has got to go through both houses. It has got to receive

¹⁰⁰ Wilson-Gorman Tariff Act of 1894, ch. 349, 28 Stat. 509; *see also* FESTUS P. SUMMERS, WILLIAM L. WILSON AND TARIFF REFORM: A BIOGRAPHY 202 (1953).

a majority of the votes of both houses, and it has got to receive the approval of the President. What does it matter whether it originates in the Senate or House?

Well, the reason in the Constitution is not difficult to understand. It came from England. It came from the struggles in England between the King on one side and the immediate representatives of the people. There is one branch of the legislature that it supposed to represent the people, and that is the House of Commons, and the right of the House of Commons to originate bills for revenue which impose taxes was the club which the people through their representatives held in their hands so as to bring the King and the Lords and titled people to accept and to adopt measures that were essential to the liberties of the people, and the principle was settled way back yonder in the history of England that no tax could be laid upon the people of England except with the consent of Parliament, and that all bills to impose taxes must originate in the House of Commons, because the members of that body immediately came from the people. They represent the persons who are to be taxed, and therefore no tax shall be laid except with the consent of the House of Commons.

Often it occurred in the history of England, when a King wanted to have this or the other thing, wanted to carry on a little war across the Channel, or other ambitious schemes, he could not get along without troops, and he could not have troops without he had money to clothe, feed, and pay them, and he asked for the appropriation of money. Time and again, the House of Commons said, we will give you this, provided such things are done, such and such additional guarantees for the life, liberty, and property of the people are assented to by you, and many of the best privileges enjoyed by England today have been wrung from the Kings of England by their rights to resist the imposition of any tax without their consent.

Now, that was transferred to our Constitution here when it said, "All bills for raising Revenue shall originate in the House of Representatives."¹⁰¹ Why in the House instead of in the Senate? Because the Senate represents more immediately the states, and the representatives were fresh from the people, were closer to the people, and unless the House originated the bill it could not be passed.

Now, there is a vast deal of learning upon that subject, and the intelligent lawyer does not wish anything worth reading bearing upon great questions of the sort to escape his attention, and therefore I suggest to you

¹⁰¹ U.S. CONST. art. I, § 7, cl. 1.

to take a note of 126 Massachusetts, page 557.¹⁰² Now, as I have had occasion heretofore to say to you, they have a system in Massachusetts that does not prevail in any other state, or in not more than one or two, to the effect that when either branch of the legislature of Massachusetts has a bill before it, and the question is raised, is this bill constitutional, or is this section constitutional under the Constitution of Massachusetts, why that branch of the legislature may submit the question to the Justices of the Supreme Judicial Court of Massachusetts and they may examine it and answer it.

Now, this is an opinion of the Justices of the Supreme Court of Massachusetts addressed to the Senate and House of Representatives, wherein the question was propounded under the Constitution of Massachusetts whether a bill appropriating money from the treasury of the commonwealth is a money bill, which must by the Constitution originate in the House of Representatives. Now there, the judges discuss in the light of all the authorities as to what, under the Constitution of Massachusetts, is a money bill.

Now, the learning there displayed what is a bill for raising revenue under the Constitution of the United States. That is a very long and elaborate opinion, signed by all the Justices of the Supreme Court of Massachusetts, and my understanding is that the bill was prepared by a present member of the Supreme Court of the United States, formerly a member of the Massachusetts court, Mr. Justice Gray. Now, you will find in that the whole history of this question of revenue bills in this country and England. If there is any other authority on this subject I do not know, outside of those referred to in that case.

Now, passing to the next clause of Section 7, "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 . . ." ¹⁰³ Every member of the Senate and every member of the House of Representatives may concur in passing a particular measure. That may appear at large upon the journal of both bodies. Is it a law when you show that alone? No. It shall be presented to the President of the United States. That is an essential prerequisite.

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

¹⁰² *In re* Opinion of the Justices to the Senate and House of Representatives, 126 Mass. 557 (1878).

¹⁰³ U.S. CONST. art. I, § 7, cl. 2.

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.¹⁰⁴

Therefore, when the President, if he vetoes a bill and it appears from the Journal of the Senate and House, to state it generally, that each house passed the bill by a two-thirds vote over his head, it does not by that become a law, because it says that the bill “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.”¹⁰⁵

“If any Bill shall not be returned by the President.” Those wise men did not intend to leave it in the power of the President simply by keeping his mouth shut to defeat the bill. On the contrary, they said:

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.¹⁰⁶

Many and many statutes you will find in the records of the State Department and published volumes have a minute at the bottom put there by the Secretary of State, “This bill not having been returned by the President to Congress within ten days is a law.” So that it is not in the power of the President of the United States absolutely to defeat the will of the bill, by silence.

Now, the first idea that will occur to you, the first question you will put to yourself is, why give the President the power to veto a bill at all? If the representatives of the people in the House of Representatives and the representatives of the states in the Senate agree—have a majority of each house—that such and such a thing ought to be a law of the United States, why let the President say anything about it?

That question was propounded a great many years ago, and it was the

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

basis of many an argument made by wise and patriotic men against the exercise of the veto power by the President. We now hear, we hear it at this day, with a smile upon our faces, some speeches made say sixty years ago in the Senate of the United States, or seventy years ago, by such men as Henry Clay, arraigning Andrew Jackson as guilty of moral treason for vetoing an act of Congress. Mr. Clay contending, with great show of authority, and perhaps of reason at that time, that it was never contemplated by the Constitution that the President of the United States should stand in the way of the execution of the will of the people of the United States, unless the law presented to him was in violation of the Constitution of the United States.¹⁰⁷

Well now, one answer to that is, that that is scarcely a sufficient reason. That was not the whole reason, because there were the courts. They could put their foot upon an unconstitutional law, and the framers of the Constitution did not intend to narrow the veto power to the case in which the law was invalid, and as there were no restrictions upon the President, nobody could sit in judgment upon him. He could sign a bill or not as he pleased, and for any reasons that suggested themselves to him as proper. He was not bound to account to anybody.

It is a good legal veto of a law for the President to send a message to the House in which the bill originated and say that "I have not signed this bill because it does not meet my approval," and give no other reason. That is a legal veto. It is enough to stop that law, unless two-thirds go over it.

A great many thoughts now may occur to us for and against the investiture in the President of the United States with power to veto an act of Congress. Some have gone too far, doubtless some have vetoed very often when it was not expected, and when the play was not worth the candle. During Mr. Cleveland's two terms he exercised the veto power in eight years oftener than it had been exercised in all the past history of the government.¹⁰⁸ In some instances he felt called upon to veto a pension bill that would give \$8.00 or \$10.00 a month to some widow whose husband had died in the war.

Now, I refer to that not for the purpose of criticizing him, because it

¹⁰⁷ 8 REG. DEB. 1265 (1832) (statement of Sen. Henry Clay).

¹⁰⁸ President Grover Cleveland issued 346 regular vetoes and 238 pocket vetoes, for a total of 584 vetoes. His veto count is surpassed only by President Franklin Delano Roosevelt, who issued 635 vetoes over a period of approximately twelve years. *Summary of Bills Vetoed, 1789–Present*, U.S. SENATE, <http://www.senate.gov/reference/Legislation/Vetoes/vetoCounts.htm> (last visited May 27, 2013).

may have been that pension was granted under such circumstances as would make a bad precedent. That is the ground upon which he put it, but all things considered, it is one of the safest things of our future, in my judgment, that that power of veto rests with the President of the United States.

You say it sometimes defeats the will of the people. So it does, but this Constitution says if two-thirds of you gentlemen in the House of Representatives say this ought to be law, and two-thirds of you gentlemen in the Senate of the United States say it ought to be law, it will be law notwithstanding the veto of the President, but if you have not got that majority in each house for the measure, why there is ground to say that there may be doubt about it, and let the President's veto delay it awhile.

We are never hurt in this country for want of legislation. A bill may fail at one session, but the country will survive, and if a veto is wrong, if it rests upon grounds that are insubstantial, the matter is to be examined at the next election before the people. The newspapers discuss it, and at last the popular mind will reach a judgment that is safe. I know it sounds harshly in the minds of a class of people that get up at twelve or one o'clock in the day for breakfast; those fellows that go yawning to breakfast at one o'clock say, "Who are the people? What do they amount to? What do they know about it?"

Well, it is quite sufficient to say, judging by the experience of the past, that the popular mind of this country is pretty apt to reach a sound conclusion in the end. Luckily for us, we have got a government that cannot be swept off its feet as other governments are by the decision of one branch of the legislature. We have a government that is a check upon ourselves. The House of Representatives may go wild, but the Senate may not go wild. They may both go wild, but the President of the United States have a level head for the time being. Then the papers take up the question, and the result is—that has been the experience in this country—that the popular judgment at last has got it on a sound basis, and therefore no wise man of this day proposes to take that veto power from the President of the United States.

The question has often arisen as to whether a particular statute in the statute book is a law of the United States. You go into a lawyer's office and find the statutes of the United States. You turn and look at the title page, and it will say, Acts of Congress passed at a certain session of Congress. It is published by the Public Printer under the superintendence of the Secretary of State, and in that book are the acts that are said to have been passed by Congress. You go to the State Department. You will find there the original manuscript that came from Congress and which is signed

by the President of the Senate and Speaker of the House, and “Approved, William McKinley,” and then taken to the State Department and placed in the custody of the Secretary of State, and from that he publishes this volume of the statutes of the United States, so that when you look into that volume of the United States you have that which is *prima facie* a valid statute of the United States.

Of course, if there is a statute which is unconstitutional, it is not a statute of the United States, but it has been passed by Congress. Well now, a man will say, “That statute is not to be deemed a statute of the United States, because not passed in the mode prescribed by the Constitution.”

When the McKinley Tariff, as it is called, passed, it imposed certain duties upon certain goods.¹⁰⁹ And goods of that character were brought into the Port of New York and other ports, and the proper officer imposed a certain duty upon those goods prescribed by the McKinley Tariff. And the importers said, “You have no right to tax this at all under this so-called McKinley Tariff.” “Why?” says the man at the port, “That is not a valid law of the United States. I am only bound by the tax existing under previous tariff laws.” “Why is not that a law of the United States; got the signature of the President of the Senate, Speaker of the House of Representatives, and President, on file in the State Department, and published by the State Department.” “Why,” said these importers, “turning to that act I find here a certain provision or two. That provision, that section, was never passed by either the Senate or the House of Representatives.” “How do you know that?” “Why, I have looked into the journals of the two houses. That section was not in the bill as passed. That section never was offered or voted on by either house of Congress. Congress of the United States never assented to that as part of the statute of the United States, and therefore an act which contains that is not an act passed by the Congress of the United States, and I prove it by referring to reports of committees and the proceedings of the two houses. Therefore,” he says, “the whole law is void.”

Now, in the case of *Field against Clark*, 143 United States, 649.¹¹⁰ I have some little embarrassment in asking you to read the case because I wrote the opinion, but as it is the only case covering that precise ground that we have had in our court, and as it has received the unanimous opinion of the court, I therefore refer you to it. Now, in that case this was said:

The signing by the Speaker of the House of Representatives,

¹⁰⁹ Tariff Act (“McKinley Tariff”) of 1890, ch. 1244, 26 Stat. 579.

¹¹⁰ *Field v. Clark*, 143 U.S. 649 (1892).

and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution.

It is admitted that an enrolled act, thus authenticated, is sufficient evidence itself—nothing to the contrary appearing upon its face—that it passed Congress. But the contention is, that it cannot be regarded as a law of the United States if the journal of either house fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and approved by the President. It is said that, under any other view, it becomes possible for the Speaker of the House of Representatives and the President of the Senate to impose upon the people as a law a bill that was never passed by Congress. But this possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committee on enrolled bills, and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution. Judicial action based upon

such a suggestion is forbidden by the respect due to a coordinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two houses of Congress, and the approval of the President, as conclusive evidence that it was passed by Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of Congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them.¹¹¹

Now, you will find in that opinion reference to a number of state decisions.

Now, that brings me to Section 8, which I will only open tonight and not go much at large in it. That section is one of the weightiest in the Constitution, and we will proceed with it as deliberately as we may, because most of the contests that have heretofore arisen in this country have been about the powers of the Congress of the United States.

We have finished certain clauses only about the legislative; its organization, its composition, its mode of proceeding, and now we come to consider what are the powers of Congress. They are here defined, and yet that is not the right word to use. They are enumerated. If a man puts to you the question, can Congress legislate on this subject, naming it, well, you ask yourself, what does the Constitution say on that subject? Let me go to the instrument itself. You cannot say that Congress can legislate upon that subject simply because it ought to do so; simply because you think it would be best for the country if it did.

Let me repeat what I have heretofore said, that this Constitution is the power of attorney from the people of the United States to the government of the United States, to the Congress of the United States. Unless you can find some clause in the Constitution of the United States, properly construed, that authorizes the Congress of the United States to legislate upon any named subject, then the conclusion must be that Congress cannot legislate upon that subject, and if it does its act is a nullity. It is void. What you call a statute of Congress in such a case is not law. It is not simply voidable when declared by the courts, but it is void from the start, and that every man is presumed to know when he reads it.

¹¹¹ *Id.* at 672–73.

“Congress shall have Power To lay and collect Taxes”¹¹² The Congress under the old Articles of Confederation had the power to lay taxes.¹¹³ It had the power to call upon the states to furnish money. If they did not furnish it, the Congress was at the end of its rope. The power to lay taxes would amount to nothing unless there was the power to collect.

“Duties, Imposts and Excises”¹¹⁴ If you will turn to the Constitution, you will see after the word “Excises” a comma, and there would be ground from the mere existence of that comma, perhaps from grammar, to say that the “Power To lay and collect Taxes, Duties, Imposts and Excises” was without restriction to the objects for which these taxes may be laid; that if the government of the United States chooses to impose a tax it may do so, and nobody has a right to inquire into the purpose for which it is imposed. But you will not find any act passed since the Constitution that does not indicate the object for which it was passed.

Now, all agree that two words should be inserted there, just after “excises,” to get at the meaning of the framers of the Constitution, so that it will read, “The Congress shall have power to lay and collect taxes, duties, impost and excises, *in order* to pay the debts and provide for the common defense and general welfare of the United States.” Has Congress the power to lay a tax to pay the debts of some charitable institution, or the debts of some state? No. It is to pay the debts and provide for the common defense and general welfare of the United States. Does the United States owe a debt? Well, if so, here is power in the Congress of the United States to lay taxes to whatever amount may be necessary to pay that debt.¹¹⁵

To “provide for the common Defence.”¹¹⁶ What do we mean by the common defense? Why, it is the defense that will be given to the whole country. Whoever assails the United States knows from this instrument

¹¹² U.S. CONST. art. I, § 8, cl. 1.

¹¹³ ARTICLES OF CONFEDERATION of 1781, art. VIII (“All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.”).

¹¹⁴ U.S. CONST. art. I, § 8, cl. 1.

¹¹⁵ See *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 640 (1895) (Harlan, J., dissenting).

¹¹⁶ U.S. CONST. art. I, § 8, cl. 1.

that there is behind the United States the power that is conferred upon seventy million of people to bring to its support the whole property and wealth of the country, in some form, in order to meet that common enemy.

The states, before this Constitution, had to depend each one upon its own resources for its defense. Massachusetts was not bound by law to come to the defense of Virginia, or Virginia to the defense of Massachusetts. Not bound by law, but under this instrument every foot of the soil of the United States is a part of the United States when the question of the defense of that territory is involved. Therefore, if any foreign power should invade this country, should invade Texas for instance, Texas could meet the crisis with her own resources, if it was necessary for her defense, but the President of the United States, if he saw that Texas was invaded, would act upon the theory, not that the state of Texas was invaded, but that the United States was invaded, and the whole power of the United States would be behind him, although there might be nothing else except the invasion of that one state, and the assault upon the territory of that single state is an assault upon the whole United States, and there is no limit placed upon it.

Shall it be one percent or two percent? The Constitution does not say. That is left to the Congress of the United States to determine. Now, there are some words here which have given occasion to some extravagant notions by some of the statesmen of this country. In order “to pay the Debts and provide for the common Defence and general Welfare of the United States.”¹¹⁷ Therefore, it is the view of some that the government of the United States may lay a tax for any purpose which in any fair sense involves the general welfare of the United States. Therefore, some argue that the Congress of the United States can lay a tax for the purpose of maintaining orphan asylums in every nook and cranny of this country.

¹¹⁷ *Id.*

LECTURE 9: DECEMBER 11, 1897

We had commenced at our last meeting to consider the clause of the Constitution which defines the powers of the Congress of the United States. In many respects, that is the largest and most important part of our Constitution, because it enumerates the powers possessed by that branch of government from which emanates the laws of the United States.

Naturally, the first subject embraced by the clause enumerating the powers of the Congress of the United States is the subject of taxation. It is not too much to say that without that clause of the Constitution of the United States, our government would be a rope of sand; it would not be worth preserving; it could not be preserved. That is at the very basis of every live government. If it has not the power to tax; if it has not the power to raise money, why the remainder of its powers amount to nothing; they are mere recommendation.

Without money, the government could not last a day. You have got to pay the expenses of that government, and those expenses include a vast number of items. You have got to pay the officers of that government; you have got to pay the men who pass these laws; you have got to pay your debts, the debts of the government, and the power to lay and collect taxes to pay the debts of the United States is one of immense consequence every way. You go to a bank tomorrow here in this city, and you propose to borrow a thousand dollars. You may give as your sureties men worth half a million, or you may deposit as collateral securities worth ten times over the amount you propose to borrow. The bank will charge you certainly five, and probably six percent interest. "Why, certainly," they say, "We will loan you the money," and you give a note payable sixty or ninety days after date at five percent or six percent interest.

Well, the government of the United States may wish to borrow five hundred millions of dollars tomorrow under the authority of an act of Congress. I put the amount large so as to make the illustration effective. I will suppose that the government wants for use now five hundred millions of dollars, and it is authorized by an act of Congress to issue the bonds of the United States to that amount. Can it raise five hundred millions of dollars? Yes. Could raise it in ten days after the bids were opened. And could raise it in this country without going outside of it. Could raise it in the markets of Europe. At what rate of interest? I have no doubt they could borrow within thirty days from this day, and have in the Treasury, five hundred millions of dollars on bonds of the United States, calling for two and one-half percent interest.

Why would a moneyed man in London, if he had fifty millions to put

out at interest, jump at the opportunity to take the bonds of the United States at two and one-half or three percent? Well, he would do so, firstly, because he knew that the honor and good faith of these United States had never been doubted, and he had no right to doubt it; that this country, if it made that obligation, would meet it according to its terms.

But what would be at the bottom of his contract? Why, he would be told by a lawyer or a statesman of whom he inquired about the matter that here was a government that had the power to lay and collect taxes to pay its debts.

Under the old Articles of Confederation, Congress had not the power to lay and *collect* taxes to pay the debts. Therefore, the man abroad would say, “I don’t want the bonds of a government that cannot enforce the collection of money enough to pay them,” and therefore it often occurred in the history of the revolutionary period that our ministers abroad had not money enough to pay their boarding bill while they were in Europe, except out of their private estate. Our own government had not credit abroad upon which to raise the money at that time, because it had no power to raise money to pay its debts.

Here is the power to lay and collect taxes to pay our debts. Lay and collect taxes, for what, or for whom? Why, it is to lay and collect taxes out of imports and excises. Now, if there is any form to collect taxes that is not embraced in one of those terms, I don’t know what it is. What may it lay its taxes on? Why, anything and everything, would be one construction of the instrument. There may be a quarrel as to the mode in which you will do it, the form in which you will do it. It may be said that if you lay direct taxes you must do it in a certain way, but the power to lay taxes without limit as to amount is given by this Constitution.¹¹⁸ Therefore, there is not one dollar’s worth of property in this country from one end of it to the other that may not be in some form reached by the taxing power of the United States, and made to contribute to the expenses of the government.

Under the old Articles of Confederation, when Congress wanted to raise money they said, we will assess so much to Virginia, so much to Maryland, so much to Massachusetts, so much to New York, and make a requisition. Well, a state didn’t pay, and if it didn’t pay, that was the end of it. There was no power to compel them to pay.

Is there power now to do it? Well now, if you will turn to the close of that Section 8, you will see there a clause—it does not make four lines in

¹¹⁸ See *Pollock*, 158 U.S. at 618 (holding the federal income tax unconstitutional as an unapportioned direct tax).

this little pamphlet that I have here—that are tremendous in their consequence. Congress shall have power “[t]o 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 any Department or Officer thereof.”¹¹⁹ Here is the power given to lay and collect taxes. This clause that I have just read carries with it the power to make whatever law is necessary for the laying and collecting of taxes.

Therefore, the government of the United States does not have to ask the consent of any state as to a tax law that may pass. When the law is constitutional, the government of the United States does not have to ask the consent of the state to pass it. It may lay a tax upon real estate across the river here in Virginia, a direct tax for some of the purposes for which the government of the United States was established. The United States do not have to ask the consent of the sovereign of the state of Virginia. It may pass a law imposing direct taxes upon all of the lands of the United States. It may pass an internal law by which it taxes its business to raise money for the United States, and when an internal collector is appointed he does not have to ask his state whether they will consent to that or not. He does not have to ask his state whether he shall levy a distress warrant for the purpose of collecting the tax.

There are no state lines so far as the taxation of the United States are concerned, and this government today is strong as it is because it is a government which can reach its hand out, without the consent of the state, upon every human being in the United States, and every square foot of land in the United States, and every dollar of property in the United States, and say, you shall contribute to the support of the government of the United States. That is the reason we have got a government that is strong enough to conquer rebellion, and strong enough to stand anything that may be in opposition to it.

There is the power in this instrument to lay and collect taxes, pass all laws necessary for the laying and collecting of taxes, for the purpose of paying the debts, providing for the common defense, and the general welfare of the United States. What do we mean by paying the debts of the United States? What is a debt of the United States? Well, there is room for argument there. That may mean a bonded debt of the United States, but it is a little broader than that. The Supreme Court of the United States has said: We may owe a debt that is sacred because of the moral obligation that

¹¹⁹ U.S. CONST. art. I, § 8, cl. 18.

underlies it.

A few years ago the Congress of the United States passed a law giving a bounty to sugar makers.¹²⁰ That is to say, they agreed to pay so much money for every pound of sugar that might be grown in this country.¹²¹ And men set to work under the authority of that law and expended large amounts of money providing machinery for the refinement of sugar. I do not know how much was expended, but a very large sum. But in the course of two or three years the wheel of political fortune turned around, and gentlemen got in control of Congress, of both branches, that did not think that law was right, and they repealed that bounty provision, I believe in the McKinley Tariff.¹²²

Well, what was the result? Enormous losses to the people who had, upon the faith of the legislation, prepared themselves to refine sugar. Well, this Congress, when they repealed that law, said it is but fair that we should do something towards relieving these people that have acted upon this legislation, and a certain amount of money was appropriated for them.¹²³

Well, it got to the Comptroller of the Treasury here, and he in his wisdom said that Congress had no power to pass a bounty law at all, that Congress had no power to use the money of the United States in that way, and therefore he said, “the Congress had no power to appropriate money to make good those losses, and I won’t honor those claims. I repudiate them. It was beyond the power of Congress.” Well then, the men who had the claims brought a suit against the government of the United States, and it finally came to the Supreme Court.

Now, here was the power to lay and collect taxes in order to pay the debts of the United States. Was that a debt against the United States in the sense of the Constitution? Well now, the Court said, we will not stop to consider whether the Congress had the power to make that bounty law or not. It did it, and it was approved by the President; people acted upon it; there was a high moral obligation imposed upon the government of the United States to make that good, and that was in the sense of the Constitution. Congress had the right to induce these people to undergo these expenditures, and there is a moral obligation upon us to meet this debt, although not strictly a legal debt. In other words, that the Constitution did not prohibit the United States from doing what was just

¹²⁰ McKinley Tariff Act of 1890, §§ 231–35, 26 Stat. 567, 583–84.

¹²¹ *Id.*

¹²² The McKinley Tariff of 1890 created a sugar bounty, which was repealed by the Wilson-Gorman Tariff Act of 1894, § 182, 28 Stat. 509, 521.

¹²³ Act of Mar. 2, 1895, ch. 189, 28 Stat. 910, 933.

and right in the distribution of the money collected by taxation.¹²⁴

Now, in that connection, I wish to tell you that the decision did not at all rest upon any interpretation of those words, “general welfare of the United States.” A plausible argument is often made that Congress may lay taxes in order to provide for the general welfare of the United States, and it is argued that the general welfare is broad enough to include anything and everything, and therefore the government of the United States has the power to collect taxes for anything on the top of the Earth that Congress may think appropriate.

Well, that statement is made without any judicial authority to support it, and yet there is room for a very extraordinary view about that clause. The Congress of the United States gave the credit of the United States to bonds that were issued by the Chicago World Exposition. The credit of the United States was behind that enterprise. Well now, point to the clause of the Constitution that authorizes the money of the United States to be pledged in the first instance for *that* purpose.

A great flood arises in the Mississippi River; the river gets out of its banks and overflows a vast number of acres on the lower Mississippi; thousands and thousands of square miles are overflowed by the water of the Mississippi and plantations are destroyed; people floating about in houses, sometimes in the top of trees waiting for someone to come and save them. Thousands upon thousands of people made penniless and homeless; immense distress all about through the country, and Congress appropriates two, three, four hundred thousand dollars in order to relieve the men who suffer from that calamity.¹²⁵ Well now, where is the provision in the Constitution of the United States which, in terms, authorizes that?

Parts of the country are afflicted with Yellow Fever to such an extent that all the ordinary means of relieving people are out of the way and cannot be furnished. No state can do it. States are powerless. The government of the United States steps forward and spends money in that direction.

In 1848, there was a famine in Ireland—a potato famine—so that the Irish were reported to us to be starving for the want of food, and doubtless they were. The government of the United States appropriated a sum of money, I forget what, it was not very large, ten or twenty or fifty thousand

¹²⁴ United States v. Realty Co., 163 U.S. 427, 439 (1896).

¹²⁵ Harlan is probably alluding to the flood of 1874, which prompted the creation of the Mississippi River Commission in 1879. See Act of June 28, 1879, ch. 43, 21 Stat. 37 (codified as amended at 33 U.S.C. § 641 (2006)).

dollars, and got a vessel and filled that vessel with all sorts of things necessary to relieve the wants and the sufferings of the people of Ireland from starving in that famine, and sent it over there and it did great good.¹²⁶ Where does anybody find in the Constitution of the United States a provision that authorizes that?

Now, study it out at your leisure, where do you find the authority for that? Everybody agrees that the Congress of the United States has got no powers that cannot be found in this Constitution, either expressly or by necessary implication. Let me repeat, where do you find the authority in that Constitution for this sort of expenditure of the public money of the United States?

Well, some say that here is the broad power given to lay and collect taxes in order to provide for the general welfare of the United States. What does that mean?

Well, I am inclined to think that we can answer that about as well as the men who framed the Constitution intended that we should answer it. They intended to leave it at large; they intended to leave a large discretion in the Congress of the United States as to what they would do with the money of the United States after it was collected, and the judiciary are very slow to step between the Congress of the United States and the accomplishment of those purposes, and will not ordinarily say that when Congress says a tax should be laid for this and that purpose, the judiciary do not interfere in that matter unless it is a palpable case of an infraction of the Constitution of the United States. For the rule is fundamental both in reference to state and federal constitutions that the judiciary shall not declare an act of Congress unconstitutional unless it is plainly and palpably so, and therefore if there is any way that is consistent with reason or the fair use of language for a court to doubt whether a particular taxing law is within the limits of the Constitution of the United States, why they will resolve the question in favor of the power of the representatives of the people to do this, and that is safe, that is right; the judiciary do not lay and collect taxes.¹²⁷ The responsibility of that is upon the representatives of the people in the Senate and House of Representatives, and if the people stand

¹²⁶ Act of Mar. 3, 1847, ch. 10, 9 Stat. 207. Congress ultimately authorized the expenditure of up to \$16,000 for the expenses of the *Macedonian*. Act of Aug. 12, 1848, ch. 166, 9 Stat. 284, 290.

¹²⁷ See, e.g., *Lochner v. New York*, 198 U.S. 45, 68 (1905) (Harlan, J., dissenting) (“[T]he rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power.”).

by their representatives in a particular use of the public money, the judiciary ought not to interfere unless they are compelled to do so by the plainness of the case.

There is a still further reason why they should hesitate to do so. The judiciary does not make laws, it declares them, and the safety of this country today, the safety of our institutions today, lies mainly in the fact that the judiciary of this land restricts the exercise of its powers to the declaration of what the law is, and not assume unnecessarily to pass in judgment upon the wisdom of legislation.¹²⁸ Whenever we get to that period in our institutions, when the judiciary, because they have got the naked power to do so, shall sit in judgment upon mere questions of expediency and policy, then the vengeance of parties in this country may be turned against the judiciary, and say we will rid this country of the system under which a particular body of men will assume to sit in judgment on the wisdom and policy of the legislature.

Now, it is a little aside from this question to refer to another matter just here, but I do so because it enables me to illustrate what was in the minds of one of the class, I judge by a question he has propounded to me, and that is suggested in an article in a recent magazine. I just read to you the clause that says Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Well now, when you turn to the article relating to the executive branch of the government of the United States, you will find there the power given to the President, by and with the advice and consent of the Senate, to make treaties, and there is of course the power for Congress to give effect to a treaty of that sort. One of the gentlemen of your class asked me if I had seen an article in the last *Forum* by a distinguished ex-jurist, in which he argued that there was no power in the United States to annex territory by treaty, and therefore he argued that this proposed treaty with Hawaii was unconstitutional.¹²⁹

Why, I said, good-naturedly, to the man who propounded that question, that the man must have been asleep for a hundred years. What

¹²⁸ See *id.* at 69 (Harlan, J. dissenting) (“Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation.”).

¹²⁹ Daniel Agnew, *Unconstitutionality of the Hawaiian Treaty*, 24 FORUM 461, 461 (1897), available at http://books.google.com/ebooks/reader?id=-_QLAAAAMAAJ&printsec=frontcover&output=reader&pg=GBS.PA461.

ground was there to say today that there was no power to acquire territory by treaty. Suppose that was the law, where would we be today?

We acquired by the treaty of Louisiana, made by Mr. Jefferson, a very large part of the northwestern territory, including Arkansas, Missouri, I believe Iowa, Minnesota, running almost to the State of Washington, if it did not include Oregon, I have forgotten the boundary now. Well, Jefferson said, "I hadn't the power to do that. I did it from necessity," and he wanted an amendment of the Constitution of the United States passed to ratify what he had done, but his friends laughed at him.¹³⁰

How did we get the present territory of New Mexico, except by treaty with Mexico? How did we get the territory of Alaska except by treaty with Russia? The old provision of the Constitution says, the President shall have power, by and with the advice and consent of the Senate, to make treaties.¹³¹ Treaties for what? The Constitution does not say. They were too wise to limit it. Therefore, it seems to me under this clause which I have quoted, that it is beyond question that the government of the United States may add to the territory by treaty, and that whatever law is necessary in order to give that treaty effect is authorized by the concluding clause of the section we are now considering.

We have got in this country for this national government all the power given by this Constitution, subject, of course, to the limitations that may be imposed by the Constitution itself. For instance, we have got a provision in the Constitution of the United States to the effect, that no man shall be compelled to criminate himself.¹³² Now, the government of the United States could not make a treaty with Great Britain under which any man, a British subject, or an American subject, in a court of the United States relating to a matter of difference between this country and England, could be compelled to criminate himself, and so many other provisions of law, but within those limitations and subject to those restrictions, this government can do all this Constitution allows, provided it does not transcend any express power.

And that brings me to the questions again, what may you do under this general welfare clause of Section 8? Can you lay a tax for everything? No. You may lay a tax only for the objects for which this government was

¹³⁰ See Thomas Jefferson, Proposal on Louisiana Constitutional Amendment (1803), available at <http://hdl.loc.gov/loc.mss/mtj.mtjbib013048>.

¹³¹ U.S. CONST. art. II, § 2, cl. 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 . . .").

¹³² U.S. CONST. amend. V.

established and those objects are defined in this instrument. This Section 8, in connection with other Articles, indicates what were the purposes for which this government was established.

Now, to accomplish those ends you may pass all laws that are necessary. Following that, and very naturally, is the power to borrow money on the credit of the United States. We cannot borrow money on the credit of any state, but we may borrow money on the credit of the United States. How much? As much as we want. There is no limit. It would not have been wise to have imposed a limit.

If the limit had been imposed at that day this union would not exist today. We would not have had the country that we have now got, because no man, when that Constitution was framed, ever supposed that an occasion would ever arise for the government of the United States to be enforcing its military authority over any part of the United States, or wanted to divide the country, and they never would have dreamed of the possibility of such a war as we had in 1861, when we had at one time more men than we could count almost. When that war closed the debt of the United States amounted to nearly three thousand millions of dollars.¹³³ We had at one time—I am a little slow to state figures, I make so many mistakes in stating them—but we had an enormous number of men in the field in 1861.¹³⁴

How did we support them? Why we supported them under that clause of the Constitution of the United States—the power to borrow money on the credit of the United States. That is what slew the Rebellion. It was not that the soldiers of the Union Army were braver than the soldiers of the Confederate Army. It was not that they could stand more than the Confederate soldiers could stand, but we had more money. That gave us more men.

We would not have had the men we had, but for the financial power of the United States based upon that. When the bonds of the United States were put upon the market, on the credit of the United States, people were perfectly willing to put their money in those bonds, here and across the water. And those few words, “to borrow Money on the credit of the United

¹³³ At the end of 1865, the national debt was about \$2.2 billion. *The 19th Century*, BUREAU OF THE PUBLIC DEBT, <http://www.publicdebt.treas.gov/history/1800.htm> (last updated Oct. 8, 2008).

¹³⁴ More than two million soldiers fought in the Civil War. The United States Army enlisted about 1.5 million soldiers and the Confederate States Army enlisted about 800 thousand soldiers. *American Civil War*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/19407/American-Civil-War/229879/The-cost-and-significance-of-the-Civil-War> (last visited June 20, 2013).

States,”¹³⁵ are today in the eye of every government in the world, and they know what it means. They know that the seventy million of people that are here are materially increasing, backed by the power of the government that is able to put the whole wealth of that seventy million of people behind the government. They know that that is enough to make it no holiday matter if those governments ever attempt to encroach upon the just rights of the government of the United States.

If this country ever got into any trouble with any particular foreign country, why we could sell our bonds in the financial markets of every other foreign country, and the power to borrow money on the credit of the United States, containing as much money as we have got, and as much wealth as we have got, protects us from unnecessary attack at home and abroad, and the people of this country know by hard experience, by the long pension roll that we have got, by the number of widows and orphans that we have got in the country as the result of a former struggle—every part of the United States knows about it, that if there is any attempt to destroy this country, all this power is behind the government of the United States, and that they had better think twice before they attempt it.

That power did not belong to the Congress of the United States before the adoption of the present Constitution, and the government that has not that is a government without power; it is a government we cannot respect; it cannot enjoy the respect of the balance of the world. The decision of the Supreme Court in the case—which if you have not read I would advise you to read—of *McCulloch* against the State of Maryland, 4 Wheaton, 316,¹³⁶ and along with it I would advise you to read *Weston* against the City of Charleston, 2d Peters, 449.¹³⁷

We are apt to think, and very rightly, that if it had not been for George Washington, we would not have had the country we now have. We style him “The Father of the Country,” and he was. I believe we owe more to him for the adoption of the present form of government than any man of his day. He was not trained in statesmanship, but he had what we may call saving common sense. He was raised up, if there is such a thing as a special providence, to save this country.¹³⁸ So far as we now see and can

¹³⁵ U.S. CONST. art. I, § 8, cl. 2.

¹³⁶ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

¹³⁷ *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829).

¹³⁸ “Providence” was the central feature of Washington’s religious faith. See FRANK E. GRIZZARD, JR., *THE WAYS OF PROVIDENCE: RELIGION AND GEORGE WASHINGTON* 5 (2005); see also George Washington, First Inaugural Address (Apr. 30, 1789) (“No People can be bound to acknowledge and adore the invisible hand, which conducts the Affairs of men

judge, there was no other man of that day that could have led our armies and kept up their courage to the spirit of independence that he did.

Now, that is true of him as to the establishment of the government, and this Constitution put into effect, and as it was, a new system had to be adjusted to our institutions and expounded. Was it to fall into the hands of a judge that looked upon it like a private instrument? Was it to fall into the hands of judges that were jealous of the just power of the national government, and who would construe it so strictly as that it would not accomplish the purposes for which it was framed, or was it to fall into the hands of judges that were as wise in judicial statesmanship as Washington was in the field, who were able to look over the field and see the weakness of the old form of government, and who were able to give this instrument such a construction as would enable the government of the United States to accomplish what was intended by the framers of the Constitution? Was it to fall into the hands of judges who were ready always to look with jealousy and hatred upon the national government, and say I owe no allegiance but to my state; my state is sovereign; whatever my state tells me I will do, I am bound to do no matter what the United States says, or the government of the nation says? Or was it to fall into the hands of the judges who respected the rights of the states but were willing to so construe that instrument as to have it accomplish what the framers of the Constitution intended?

Well, it so happened that a vacancy occurred in the Chief Justiceship of the Supreme Court of the United States during the term of John Adams, and just before he closed his term, John Marshall was made Chief Justice of the United States. If that vacancy had not occurred just when it did, or about when it did, John Marshall would not have been Chief Justice, but another man would have been Chief Justice, who, honest as he was, was not worthy to be thought of in the same connection with Marshall.

Marshall came to the Chief Justiceship when quite a young man—not more than forty-six at the time. Now, I commend his opinion to you in 4 Wheaton,¹³⁹ and I doubt—although he was abused in that day and sometimes familiarly called by politicians “Jack” Marshall—whether there is a single human being in the United States of the legal profession who is of any standing as a lawyer today that would question a line of that opinion,

more than the People of the United States. Every step, by which they have advanced to the character of an independent nation, seems to have been distinguished by some token of *providential agency.*”) (emphasis added), *available at* <http://www.archives.gov/legislative/features/gw-inauguration/>.

¹³⁹ McCulloch, 17 U.S. (4 Wheat.) at 316.

certainly they will not dispute the principle that underlies it, and what is that principle?

The State of Maryland sought to lay a tax upon one of the financial securities of the United States, provided by the United States. The question was whether it could do it. Well, if they could do it, what would be the result? What would the securities of the United States be worth in the market, and what would the credit be worth, if the securities which it employed, or the instrumentalities which it employed to carry on the government of the United States, were to be subject to taxation by the states?

Why, easily the states might tax it out of existence, might paralyze the government of the United States, and the principle in that decision, whatever may be the objection to some of the words employed, the principle of that decision is that this thing which the State of Maryland proposed to tax is one of the instrumentalities employed by the government in order to accomplish the ends of the government, and the Supreme Court said, speaking through Chief Justice Marshall, "What is the use in saying that the Constitution and the laws of the United States shall be the supreme law of the land, if the instrumentalities which it employs to carry on the government can be taxed by the states."¹⁴⁰ And let me say of that decision, I venture to say that if you will read the argument in that case, if you will study that case and master it, take into your mind all the principles laid down, you will understand the spirit and meaning of the Constitution almost as much as if you were to read a whole textbook.

Now, before I leave the subject, let me express another view that may come into somebody's mind. What would be the result if some of the states in the government of the United States could be taxed by the government? Well, the question arose later on, and it was decided in exact accordance with those principles, that this government of the United States could no more tax the instrumentality of the states than the states could of the United States.¹⁴¹

¹⁴⁰ *See id.* at 391 ("There is a manifest repugnancy between the power of Maryland to tax, and the power of Congress to preserve, this institution. A power to build up what another may pull down at pleasure, is a power which may provoke a smile, but can do nothing else.").

¹⁴¹ *See Collector v. Day*, 78 U.S. (11 Wall.) 113, 127 (1870) ("It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, is subject to the control of

A state owns its government mansion, the house upon which its legislative buildings stand. Can the government of the United States tax that? No, it has been held it could not. This state pays the Governor a given salary. Well, the United States can pass an internal revenue law and it may make a man under that law pay a tax upon his income. Can it make the Governor pay a tax upon the salary that he receives? No. Because if you could tax the salary of the Governor of the state one cent to support the government of the United States, you could tax it a hundred cents and tax it out of existence, so that following out from that grand old decision, the principle is now settled thoroughly, nobody disputes it. These two governments are running side by side in this country. Each can attend to its own operations, and neither has the right to interfere with the other.

That brings us to the fundamental thought which every young man in this country ought to understand, that there are under our institutions state rights and national rights; that the man who is so narrow in this day as to think that he has got no duty to perform except the one which he owes his state, and that his state can command him to do anything, no matter what it is, that man is just as far wrong and just as wild as the man who says that there are no state rights, and that we have got a vast centralized government here that can do just as it pleases. The fact is, that our constitutional liberty depends as much upon the preservation of the states as upon the preservation of the national government, and that man is the best friend of the states who recognizes the just rights of the federal government, and that man is the truest friend of the national government who recognizes the just rights of the state government.

another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"), *overruled by* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939).

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Now, I come to an important provision of the Constitution. We are in the habit of saying that some provisions of the Constitution are more important than others. They are more far reaching. They undoubtedly are, some of them.

First in order in this enumeration of the powers of the government of the United States was the power to lay and collect taxes, duties, imposts, and excises, without which power this government would not be in existence today, perhaps. Certainly would not be in existence today with all its acknowledged authority, and with the power that it has. A government that has not power to lay and collect taxes for its support is not a government that can last. Naturally, therefore, that subject was first dealt with when enumerating the powers granted the Congress of the United States. That is at the very basis of our institutions.

Next to that, perhaps equally important, was the power to borrow money on the credit of the United States, so that the government is not driven always to lay the taxing hand upon the people for the whole amount which may be needed. We may want today ten millions of dollars, or fifty millions of dollars. Well now, if that had to be collected at once by taxation upon the people of the United States, it would be a pretty serious matter, but instead of that the government of the United States will borrow the amount of money necessary, and then it soon lay taxes necessary to meet the interest. By the time the principal fell due this country, instead of having seventy millions of people, might have one hundred or two hundred millions; instead of having a given amount of business, it might have tenfold more, so that the principal could be easily paid off.

Next to those provisions come the clause I am to talk about tonight, the power "to regulate commerce." Congress shall have the power to regulate commerce. All commerce? No, but "Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁴²

What is the power to regulate commerce? That is not a power to bring commerce into existence. Commerce existed before the government existed. Commerce involves the idea of trade between people, intercourse between people. Well now, that existed when the government was formed, more or less modified, and the power here is to regulate commerce.

What do we mean by "to regulate commerce"? It is to prescribe the rule by which commerce is to be governed, and this commerce, not all

¹⁴² U.S. Const. art. I, § 8, cl. 3.

commerce, but commerce with foreign nations, and among the several states, and with the Indian tribes. While it is well established by the history of the period that at the time when our Constitution was adopted, that one of the moving causes for displacing the old Articles of Confederation and establishing the present government of the United States was the necessity that existed for a government that would regulate this kind of commerce.¹⁴³

What existed before this government was formed? Why, each state was taking care of itself; each state was passing laws and making regulations that would give its own people the benefit of all the commerce of every sort that would come within its limits, without regard to the convenience of others. The City of Newport, at the time of the adoption of the Constitution, was a very promising commercial city. It has had a fine harbor; it has got a fine harbor today. A great deal of the commerce that came from Europe entered this country at the Port of Newport before the Constitution was adopted. The State of Rhode Island put taxes and imposts on the commerce that came through the Port of Newport destined for states behind Rhode Island among the thirteen. It was, therefore, not extraordinary that when it was proposed to adopt this Constitution, the State of Rhode Island held back. It didn't send delegates, and why?

Why, they could see under this Constitution that if it was adopted all of the fruits of commerce with foreign nations that came into Rhode Island through the Port of Newport would be lost, and therefore if you will turn to the names of the men who signed the Constitution of the United States, you will see there no delegate from Rhode Island.¹⁴⁴ Rhode Island wanted to keep all of that profit to itself, but the states behind it felt that it was unjust that they should be paying tribute to the State of Rhode Island simply because for the time being it was an independent principality or colony, nor did they want taxes laid by New York upon goods that came into the Port of New York, or taxes laid by Georgia upon goods that came into

¹⁴³ Letter from George Washington, President of the Fed. Convention, to the President of Congress (Sept. 17, 1787), *reprinted in* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1 (Washington, U.S. Dep't of State 1894) ("The friends of our country have long seen and desired, that the power of making war, peace, and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union . . .").

¹⁴⁴ Rhode Island was the only state that did not send any delegates to the Constitutional Convention of 1787 and was the last of the original thirteen states to ratify the Constitution. *See, e.g., Rhode Island's Ratification of the Constitution*, HISTORY, ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/HistoricalHighlight/Detail/35264> (last visited May 27, 2013).

Savannah. That was a matter to be regulated by the government that was to be established, and it is not too much to say that but for the necessity arising out of a rule applicable to all the seaports of the states alike this government might not have been established. But for that provision in the Constitution, the requisite number of states would not have accepted this Constitution.

Now, I have said that it is not commerce of every kind that the government may regulate. There is a commerce with which the United States has nothing to do, the power to control which has never been granted to the United States.¹⁴⁵ Take commerce between the City of New York and the City of Rochester, New York, for instance, or commerce between Alexandria and the City of Richmond, Virginia, or commerce between the City of Cincinnati and Columbus, Ohio. That is purely domestic. That commerce commences in a state and ends in the same state.

Now, commerce of that character is completely within the control of the respective states where those points lie, and the government of the United States has no more to do with it than it has with the commerce in the interior of China. The states have never granted to the government of the United States the power to control those things, and it is well that they have not. If the power to control the internal domestic trade of the states belonged to the government of the United States, there would be foundation for the apprehensions of some that all powers of localities and municipalities in this country would be lost sight of in a vast centralized government, and the men who framed this Constitution were wise in the thought that there were many things that could not be controlled by the United States.

Why, the larger amount of the legislation in this country is by the states in their local affairs. It is hard enough to get the attention of Congress to matters that concern the nation. It is very difficult, our institutions have become so numerous and varied and our two branches of the legislature have become so large, that it is very difficult to get through any session of Congress but a very few measures that relate to the nation at large. Any man to do it in either house has got to have a good deal of tact. He has got to be on a committee. He has got to have the eye and the ear of the Speaker. When he gets up in his place in the House of Representatives,

¹⁴⁵ See, e.g., *Ex parte Clark*, 128 U.S. 395 (Harlan, Circuit Justice 1888) (“If congress, under the grant of power to regulate commerce between the states, can, by direct legislation upon the subject, override the statute of Pennsylvania, so far as it applies to persons controlling vessels or boats employed in such commerce within its limits—a proposition which cannot, I think, be sustained—it has not exercised that power.”).

although he may weigh more than two or three hundred pounds, and ought to be seen a mile by a man of good sight, sometimes a Speaker does not see him, does not recognize him.

I am not now commenting on that, or saying it is unwise. I am speaking of the fact. I am speaking of the difficulty in our present system of getting proper attention to matters that concern the nation. What would we do if all these merely local affairs that belong now exclusively to the states were under the control of the Congress of the United States, simply because you call it commerce? No, the kind of commerce which Congress can regulate is commerce with foreign nations, and among the several states, that is commerce between the states.

Now, the difficult question that cannot be solved by any rule today that would be applicable a hundred years from now is, what may be done under the power to regulate commerce with foreign nations and among the several states? What may the United States do in that matter? It is more pertinent to inquire what may it not do under that broad power. May the United States prohibit the introduction into this country of certain articles that may be manufactured in England, or France, or Germany, or Spain, absolutely prohibit them?

Well, who will say it cannot? Here is the power to regulate. How may it regulate it? May it regulate it by a duty that is prohibitory in its character? Well, if it does, how are you to sit in judgment as to the methods that govern Congress in a matter of that sort? What does commerce include? Does it include simply the transportation of goods? It has been long settled that it includes something more than that. It includes intercourse, and still more, it includes navigation, and if it includes intercourse, as undoubtedly it does, the government of the United States may, if it sees proper, say who shall and who shall not come into this country from other countries. We have said, that is, the highest tribunal of the country has said, that if it chooses, it may exclude citizens or subjects of any particular nation from coming to this country under the power to regulate commerce with foreign nations.¹⁴⁶

When this Constitution was adopted, what did commerce mean? And

¹⁴⁶ See, e.g., *Lem Moon Sing v. United States*, 158 U.S. 538, 541–42 (1895) (Harlan, J.) (“That the government of the United States, through the action of the legislative department, can exclude aliens from its territory, is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.” (quoting *The Chinese Exclusion Case*, 130 U.S. 581, 603–04 (1889))).

that question suggests the wisdom of the remark made by the only Englishman that I ever heard of that seemed ever to have had the slightest comprehension of our system of government, and that was Mr. Bryce in his history of the American Commonwealth.¹⁴⁷ He is a distinguished Englishman who seemed to have comprehended our system of government and was able to put on paper correct ideas about it, tell exactly what it was. He was the only Englishman within the last two hundred years that has been able to understand our Constitution. He says that instrument was wonderful in its capacity of expansion in order to suit the expansive power of the country over which it was to preside.¹⁴⁸ And that was illustrated in the meaning of the word “commerce.”

When that Constitution was adopted, no man of that day had the slightest idea that he would be able to start from the City of New York in the morning at ten o'clock and find himself in Chicago the next day at nine o'clock. The commerce that was then thought of was commerce on water, commerce on navigable waters; the commerce between the City of New York, for instance, and Savannah, Georgia, by the ocean; commerce from the City of New York to Philadelphia, partly by ocean and partly by Delaware River. Nobody ever thought then of steam railways, and yet it is practically well settled at this day, and settled some while back, that that provision of the Constitution of the United States embraces commerce across the country by railroad as well as commerce upon the navigable waters of the United States.

And that suggests a line of thought that no doubt has occurred to you. It suggests a subject about which the public mind of this country is very much divided today, and so much divided that no statesman is able to speak with very great confidence as to what can be, or ought to be done. If, as undoubtedly is the fact, commerce between the City of New York and the City of San Francisco across lines of railway is commerce, that may be

¹⁴⁷ 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* (London, MacMillan & Co. 1888).

¹⁴⁸ *Id.* at 465–66 (“That federalism supplies the best means of developing a new and vast country. It permits an expansion whose extent, and whose rate and manner of progress, cannot be foreseen to proceed with more variety of methods, more adaptation of laws and administration to the circumstances of each part of the territory, and altogether in a more truly natural and spontaneous way, than can be expected under a centralized government, which is disposed to apply its settled system through all its dominions. Thus the special needs of a new region are met by the inhabitants in the way they find best: its special evils are cured by special remedies, perhaps more drastic than an old country demands, perhaps more lax than an old country would tolerate; while at the same time the spirit of self-reliance among those who build up these new communities is stimulated and respected.”).

regulated by the United States. What shall be the extent of regulation that the government of the United States will undertake? How far will it go? Will the interests of this country compel in the end the government of the United States to own lines of transportation connecting the two oceans, or will it be left, as it now is, to regulations of the states so far as the states may pass laws upon the subjects, and to regulation that comes from competitions between great trunk railways?

For instance, a man living three hundred miles this side of the City of Chicago wishes to ship certain articles from that place to the City of New York. Another man has some of the same articles to ship from the city of Chicago to the City of New York, three hundred miles farther. The railroads say that it costs less to ship the articles from Chicago to New York than it does to ship them from the place this side of Chicago to New York, so that the man three hundred miles nearer to New York pays more for a given amount of freight than a like shipment of the same amount and sort of freight from Chicago to New York. And as you follow these lines across the country the difficulty increases.

Is that theory sound? Is the country to agree to that mode of doing business? Are these vast lines of communication that connect the Pacific and Atlantic to fall ultimately into the hands of a few syndicates and bodies of men that can control rates and fare as their interests may indicate or suggest, or is the government of the United States put under the necessity of owning lines of transportation of its own connecting these oceans, and establishing rates that will be just to the people all along the line?¹⁴⁹

Still further, you go to an office in the City of New York, for instance, a railroad office, to buy a ticket to San Francisco. Well, you will pay a certain price for it, and that price you would pay if you went to another railroad office that had railroad connection all the way to San Francisco. Shall the government of the United States take that subject of rates for passengers and freight into its hands? Does the power to regulate commerce among the states carry with it the power in the government of the United States to say what shall be the rates for passengers and freight between New York and San Francisco, or between New York in one state and Philadelphia in another state? Shall this whole subject be taken possession of by the government of the United States, and regulated by some rule common to all parts of the country and upon a basis of equality

¹⁴⁹ See, e.g., *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 341 (1897) (holding that “the Anti-Trust Act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce”).

to all parts of the country?

Now, these questions thus suggested will indicate to you what vast power lurks under that clause of the Constitution of the United States, but as vast as that power is, and whatever may be the dangers that are to come from its exercise, it had better be there; it had better rest with the government of the United States than to rest with each state as to what shall be charged for the transportation of persons and freight across that state. Suppose that clause was not there. Suppose Congress had no power to regulate commerce among the states. What might be the result?

Well, the State of New York would say how much should be charged for freight and passengers from the City of New York to the western line of New York. What would control it except its own discretion? Why, it could say what it pleased on that subject. Very well; when that train reached the State of Ohio, then an Ohio law would come into operation and say what should be charged for that passenger or freight across the State of Ohio, and then when you reach Indiana there is another rate, and Illinois there is another rate, and Iowa there is another rate perhaps, and so on until you got to the Pacific Ocean.

Now, a difference of rules of that sort would utterly demoralize the commerce and business of this country, and put all to inconveniences that would be intolerable. So far, the states have not assumed to regulate those matters as between states. The State of Illinois a few years ago passed a statute regulating rates for passengers and freight in that state. That statute was so framed as that it was a regulation as to what should be charged for freight or passengers starting in Illinois, their ultimate destination being the City of New York.

Well, the Supreme Court of the United States held, that so far as rates, whether for passengers or freight, commencing at a point in Illinois and ending at a point in Illinois, that was a matter for Illinois. The government of the United States had nothing to do with it, but that Illinois was not competent to say what shall be the rates charged in Illinois to points beyond the State of Illinois, and that part of the Illinois statute was held to be unconstitutional and therefore void.¹⁵⁰

Now, there is a line of decisions in this country that you ought to become familiar with on that subject, for I can state to you with entire confidence that when you get to the bar and have a good practice in your profession, and you become connected with cases involving constitutional law, probably the most important you will have are those connected with

¹⁵⁰ See *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557, 577 (1886).

the commerce of the country. Now, some of those are monuments to the wisdom of the judge who delivered those opinions, and one of them will live as long as our country exists, as long as our Constitution lasts, and you cannot read it too often or study it too closely. I allude to the case of *Gibbons against Ogden*, 9 Wheaton, page 1.¹⁵¹

Now, if you wish to understand that case thoroughly, you will have to get hold of the original decisions of the Supreme Court of the United States, and not this condensed decision which I have here in my hands. I assume that all of you have read more or less of the speeches of Mr. Webster. If you have not, you cannot too soon read them, for in his public speeches you will find his argument in the case of *Gibbons against Ogden*, written out by himself, or revised by himself after it was published.¹⁵²

Four very great lawyers appeared in that case, Mr. Webster and William Wirt, who was then Attorney General, appeared for the plaintiff, and on the other side was Oakley and Emmet.¹⁵³ Emmet was a kinsman of Emmet of Ireland, who was executed because he was a patriot.¹⁵⁴

Now, read the opinion of Chief Justice Marshall in this case. That was the first attempt on the part of the state to draw to itself a control over commerce that would have done infinite mischief if it had not been for the decision of the Supreme Court of the United States. It is the first case where the question was very elaborately considered as to the extent of this power given to the Congress of the United States. There was a case before that, but it was disposed of very shortly,¹⁵⁵ but here it became necessary for the Supreme Court of the United States to go to the very foundation of the subject.

Now, in that certain propositions were laid down. I will read from the head-note. "The power to regulate commerce includes the power to

¹⁵¹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

¹⁵² Edward Everett, *Biographical Memoir of the Public Life of Daniel Webster*, in 1 THE WORKS OF DANIEL WEBSTER lii–liii, lxxvi (Boston, Little, Brown & Co. 1853).

¹⁵³ Harlan refers here to Thomas Jackson Oakley (1783–1857) and Thomas Addis Emmet (1764–1827). See *id.* at lii–liii; see also Oakley, *Thomas Jackson*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=O000003> (last visited June 20, 2013); *Thomas Addis Emmet*, BRITANNICA ACADEMIC EDITION, <http://www.britannica.com/EBchecked/topic/185952/Thomas-Addis-Emmet> (last visited June 20, 2013).

¹⁵⁴ Thomas Emmet was the elder brother of Robert Emmet, who was executed for leading the Irish Rebellion of 1803. L.B. Proctor, *Robert Emmet, The Lawyer, Patriot and Martyr*, 1 LAW. SCRAP BOOK 33, 34, 40–41 (1909).

¹⁵⁵ See *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 176 (1819).

regulate navigation, and does not stop at the external boundary of a state, therefore vessels engaged in commerce between the states may be required to have on board of them engineers licensed by the government of the United States.”¹⁵⁶

Now, the laws of the State of New York granted to Livingston and Fulton the exclusive right to navigate all the waters within the jurisdiction of that state with boats moved by steam or fire, for a term of years. Now, the Supreme Court held that those laws were inoperative as against the laws of the United States regulating the coasting trade, and could not restrain vessels carrying on the coasting trade under the laws of the United States from navigating those waters in the prosecution of their trade. What would have been the condition of things if the State of New York had had the power to say that only two men or their licensees should navigate the navigable waters of the United States within the State of New York?

Now, luckily for this country, a navigable water is a water of the United States, although it may be exclusively within the state. A navigable water of the United States is one over which vessels may travel, although it may be entirely within the state. A vessel starting from Philadelphia and passing around the coast of New Jersey, when it gets to the mouth of the Hudson, may want to go to Albany, New York. Now, what would have been our condition if the State of New York could have stopped the vessel at the mouth of the river, saying we have given the exclusive right to Livingston and Fulton?

No state in this union which borders on the great Mississippi can interfere with the navigation of the waters of that river, and any boat on the Mississippi River that wants to go up the Ohio River has the right to go up the Ohio, and no state on its borders can stop it, and any boat that is up the Ohio River that wants to go up the Kentucky River can go up as far as it chooses, and the State of Kentucky cannot stop it.

Now, while this is true, there are certain things that the state may do that the United States will not interfere with, or rather that cannot be interfered with, unless the United States steps in. I take for granted that many of you have been to the City of Chicago. If you have not, every citizen of the City of Chicago will be surprised that you have lived this long without seeing it. That city is on Lake Michigan, but it is also on Chicago River. On both sides of Chicago River, which fifty years ago was a very modest unpretending stream, but the enterprise of that great people has made it a highway of commerce—that river has been dredged so that

¹⁵⁶ It is unclear what “head-note” Harlan is reading from here.

thousands upon thousands of vessels come from Lake Michigan into the Chicago River, and they will go up a mile and a half or three, perhaps five miles, to the very heart of that marvelous city. Each side of that little river, that is narrow enough to enable you to stand on one bank and talk to somebody on the other side of it without difficulty, are great warehouses all along.

Well, there are bridges over that river for vehicles and for persons, without which bridges communication between North and South Chicago would be very inconvenient and very difficult. Well, a number of years ago the City Council of Chicago passed an ordinance, saying that the bridges across that river should not be opened between six and seven o'clock in the morning—I believe those were the hours—and between six and seven in the evening. I take those hours for samples. They were drawbridges.

Well, the steamboat interests said, that is an interference with commerce; that is an interference with commerce among the states and we deny the power to the City of Chicago to do that, although it is backed by the authority of the State of Illinois, and the question came into the courts. The case at its first hearing came before me, and I decided it, sitting in that circuit, and the decision was afterward affirmed by the Supreme Court of the United States.¹⁵⁷

In that decision, I held that that river being entirely in the boundary of the State of Illinois was primarily subject to the control of the State of Illinois; that commerce across that river was a commerce which Congress could regulate insofar as it affected the commerce there, but until Congress acted, it belonged to the State of Illinois to say how that commerce across that river should be regulated, but if Congress chooses to interfere it might control.

And so in another case in reference to the Illinois River, which is entirely within the State of Illinois, up which boats were accustomed to go, starting from the City of St. Louis.¹⁵⁸ The State of Illinois came to the conclusion that the river might be improved and it made provision for its being locked and dammed so as to throw the water further up into the state to include boats of certain dimensions to go further up into the state, and they charged rates of toll for passing through those locks. Some said this is

¹⁵⁷ *Escanaba & Lake Mich. Transp. Co. v. City of Chicago*, 12 F. 777 (C.C.N.D. Ill. 1882) (Harlan, J.), *aff'd sub nom. Escanaba Co. v. Chicago*, 107 U.S. 678 (1883).

¹⁵⁸ *Huse v. Glover*, 15 F. 292 (C.C.N.D. Ill. 1883) (Harlan, J.), *aff'd*, 119 U.S. 543 (1886).

an interference with the state commerce. We live in St. Louis; our boats start from there; we have a right to go up there. And therefore this is an obstruction. Now, the court said below, and the Supreme Court agreed with it, that while it was perfectly true Congress could control that matter, it had not done so, and until it did so, it belonged to the state to control that matter.

In line with that is another class of cases that affected interstate commerce, a principle that it is not everything that affects interstate commerce that is beyond the power of the state. There are many things that the state may do that affect interstate commerce that are good until upset by Congress. Two terms ago, probably last term, there came before our court the question as to the validity of the statute of the State of Georgia called the Sunday Law.¹⁵⁹ Georgia passed a statute which prohibited the running of freight trains within that state between eight o'clock on Sunday morning and eight o'clock Sunday night, and the statute was so framed that it applied to interstate trains as well as domestic trains. An exception was made in the statute in favor of the right of a train that should come into the state before eight o'clock.

Well, the men that wanted to get their freight trains through that state said that this was an interference with interstate commerce; that the power to regulate interstate commerce belonged to the national government and the state could not stop it. But the Supreme Court said that there remained with the state what are called its police powers. They had not surrendered those powers, and whatever tended toward public health, or public morals, or public safety, was a thing that the state might accomplish, and if there was in doing that something that affected more or less interstate commerce, the remedy was not with the courts but with Congress. And therefore we held that until the Congress acted, the legislature of Georgia had the right to say to the men within the state and outside of the state that we want a quiet, peaceable Sabbath here; we have a right to that; it is our own state; we are regulating the affairs of this state in that regard, and you, because you are starting from another state, or come in from another state, when you come into this state must be subject to the police powers of the state, and we held that that view was a sound one and could be maintained until the Congress of the United States by some statute took that whole subject in its hands and assumed to remedy it in some way that would apply to the whole people of the United States.

¹⁵⁹ *Hennington v. Georgia*, 163 U.S. 299 (1896) (Harlan, J.).

LECTURE 11: JANUARY 8, 1898

It has been some time since we were together on the consideration of the Constitution. If I remember rightly, our last talk, or the latter part of it, was upon the subject of commerce. I do not believe that I had gotten beyond that. Exactly how much of the subject I covered I do not remember, as I talk to you without notes, and if I should, in what I am going to say, cover somewhat the same ground, why it will not hurt you to hear it again.

There are some cases which I am sure I have not called to your attention, which I wish to call to your attention. I believe I have stated to you that the necessity of commerce among the states and foreign nations was one of the principal causes for the establishment of the government of the United States. The restrictions which the states were imposing on commerce among the states were of such a serious character as to destroy unity of feeling, that sort of feeling that ought to exist between people of the same country living under the same government. Each state was then regulating commerce for itself, and in the regulation each state would take care of itself.

Now, we are all very much puffed up often with what we call "state pride." You will find a man from a particular state, and he is quite certain that there is no such state on the Earth as his; no such people as the people among whom he was reared; no such civilization as is to be found there, and every other man is a little annoyed to hear a fellow talk that way about his own state, but if you will follow the other man a little while and bring up the subject of his state, you will find that he thinks about as much of his state as the first man did about his. We are apt to think that our states would not do some things that some other states would; we are quite sure they would not, but one thing is absolutely certain, and that is that there is not a state in this union which would not, if it had the power, support its government from top to bottom by levying tribute or taxes upon the commerce among the states; they have all tried to do it.

Miserable politicians in the state legislature won't levy the requisite amount of taxation in order to support that state government. They will proceed upon the idea that if we put too much taxes upon our people, they will beat me at the next election, and I must take care that I do not go upon record levying taxes upon this, that, and the other thing, and I must take particular care that I do not increase the taxes, that would beat me if nothing else would. So he sets about by schemes by which his state can get money from other people than his own constituents, and therefore he is ready to raise a tax upon commerce.

Now, it is not true of the new states, they have not had time to try their hand, but all the old ones, nearly every one, have passed laws which have had to be upset by the Supreme Court of the United States itself, or some court of the state, upon the ground that the state was taxing something that it ought not to tax. For instance, the good old State of New Jersey passed a statute which made the railroads in that state pay a certain amount for every passenger they carried to go into the treasury of the State of New Jersey. Well, New Jersey thought that was all right; you are going through my state here and we allow you, Mr. Railroad, to lay your track here on our land, and we are protecting you and protecting your passengers while here with our laws, why should you not pay a given tax upon every passenger that you carry?

Well, the Court said, if you levy a tax of that sort that is in effect a tax upon the passenger, because the railroads have only got to resort to an easy device of adding that to the fare of the passenger and the passenger pays it, and the result would be that if a man starts from Philadelphia to go to New York, he in effect would pay a tax for the privilege of passing through New Jersey. Now, commerce embraces not simply navigation but intercourse between one state and another state or a foreign nation, and as no state can burden interstate commerce, so no state could levy a tax of that sort under the guise of putting a tax upon the railroads, when the practical operation was to tax the passengers, and you were taxing that railroad for the privilege of engaging in interstate commerce.¹⁶⁰

Well, that is what the railroad running from Philadelphia to New York does; it engages in interstate commerce, and the State of New Jersey has no right to make the railroad pay for engaging in interstate commerce. And so the good old State of Pennsylvania. She wanted to raise some money to carry on her government out of something other than mere domestic commerce, and so she would put a tax upon the gross receipts of corporations whose whole business was exclusively in interstate commerce, and so I could go the rounds and give you illustrations of many attempts of that sort.¹⁶¹

The old Commonwealth of Virginia, in the interest of local butchers, passed a law that would require a certain system of inspection in respect to all meat brought into the state, and the statute was so framed as that men who prepared meat outside of the state to be put into interstate commerce

¹⁶⁰ See *Erie Ry. Co. v. State*, 31 N.J.L. 531, 535 (1864) (finding that levying a tax on the owner of the transported goods has the same practical effect of levying a direct tax on the goods themselves).

¹⁶¹ See *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 277–78 (1873).

and sent to the markets of other states could not do it. The whole object of the Virginia statute was to build up the Virginia butchers, and give them a monopoly of furnishing meat in the State of Virginia.¹⁶²

And so, Minnesota passed a statute having somewhat the same object so as to prevent the meat men from Illinois from sending the product of their industry into the State of Minnesota. It was done under the guise of a statute for the public health of Minnesota, but the courts were not to be fooled by mere words, and we said in that case, as we said in others, that while the state may take care of the public health and public morals and public safety, that may be the form, the mere form of a legislative declaration, but the courts would look through the substance of things.¹⁶³

Now, what is the power to regulate? It is the power to prescribe the rule by which that commerce is to be conducted. Now, you must bear in mind that it is not everything that a state may do which affects interstate commerce that is beyond the power of the state. The state may go to a certain limit, and until Congress acts that is good. There is a certain control which each state has over the domestic order within its limits. This state may take care of the public health and the public safety.

Therefore, the State of Alabama was maintained, sustained in its right to pass a statute which prohibited any man from running a locomotive in that state that had not been examined, and licensed, and commissioned as a person having the requisite skill to run a locomotive, or any man from running a locomotive or conductor, and particularly an engineer, who had not been examined for color blindness, and that was held to be applicable to interstate, as well as local trains, until Congress acted.¹⁶⁴

In other words, as to every contrivance within that state, the management of which had relation to the public safety, that could be controlled by the State of Alabama, within the limits that were reasonably necessary to protect the public safety, and if Congress had not acted upon the subject, it was held that the state law was applicable for the purposes indicated by it, not that Congress might not legislate upon the subject. Of course it could. Congress could take charge of the question of competency of the men that are controlling interstate trains, and could regulate it, and could provide for the examination of those people.

Now, as to the power of the state to legislate, as long as Congress does not act upon the case is furnished in the case of *Gilman against the City of*

¹⁶² *Brimmer v. Rebman*, 138 U.S. 78, 82 (1891) (Harlan, J.).

¹⁶³ *Minnesota v. Barber*, 136 U.S. 313, 317–19 (1890) (Harlan, J.).

¹⁶⁴ *Nashville, Chattanooga & St. Louis Ry. v. Alabama*, 128 U.S. 96, 96 (1888).

Philadelphia, 2d Wallace, 743.¹⁶⁵ It is worth your while to study this great case, and when you master it, you have gotten about as far as if you were reading a textbook.

Now, what was that case? I believe the river on which Philadelphia is situated is the Delaware, and the Schuylkill also. Well, up one or the other of those rivers commerce had gone for a long while. Boats came in from the ocean and went up and down that river and went to the upper part of the City of Philadelphia. Well, a bridge was finally constructed, by the authority of the State of Pennsylvania, over the river Schuylkill, and steamboat men and the men owning ships said, "This is obstructing the navigable waters of the United States. We have been going up this river for years. Now, if this bridge is maintained there, we cannot get our vessels up there to the points to which we have been in the habit of going, and therefore this is an obstruction to interstate commerce."

Well, the Court said that was true as far as it went. It was not the whole truth, however. That there was some other commerce, not only the commerce up and down that river, there was also commerce across that river, over lines of railroad, and the commerce over that river was not entitled to any preference over the commerce up and down the river, and it was for the state in the first instance, and until Congress had acted in the matter, to determine how that matter was to be accommodated, and the construction of these bridges across the river at Philadelphia was an accommodation to the commerce across the river, and as that river was wholly within the State of Pennsylvania, it was not, in a constitutional sense, a violation of interstate commerce for the state to regulate that, conceding all the while that it was within the competency of Congress, if it chose, to take care of the subject, to cover the whole field of legislation.

That is one of the great problems in the future of this country. Will it become necessary for the government of the United States, through Congress, to take charge of commerce altogether—the states along all the navigable waters of the United States, and along all the railroads that connect one state to another—and pass uniform regulations equitable to every part of the country?

Well now, another illustration of the power of the state is found in the case of the New York, New Haven, and Hartford Railroad against the State of New York, 165 U.S. 628.¹⁶⁶ It is quite a recent case. There you will find cited previous cases. This railroad extends from the City of New

¹⁶⁵ *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 732 (1865).

¹⁶⁶ *N.Y., New Haven & Hartford R.R. v. New York*, 165 U.S. 628 (1897) (Harlan, J.).

York, I believe to the City of Boston, certainly to the City of New Haven. The travel over it commences in one state and goes into another state. Freight is transported from one of those states to the other. It is in every sense, therefore, a line of interstate transportation.

The State of New York came to the conclusion that the old-fashioned stove that was kept in the passenger car was unsafe for passengers, that in case of a collision, or in case of the train running off the track and car turning over, with one of those large stoves in the corner of the car there was a strong probability that the car would catch fire and people would be burned up. It had happened more than once. Therefore, the State of New York passed a statute which prescribed, if I remember the case rightly, the kind of stove that was to be used, or which prohibited a particular kind of stove.

Well, the railroad company said to the State of New York, "What have you to do with this? This road is engaged in interstate commerce. You have no right to regulate that." Well, our Court held that it had. That while Congress could cover the subject by legislation, and when it did enact legislation that covered the subject and the state legislation could be done away with, but until Congress acted there was the primary duty of the state to take care of the safety of the people of the state no matter where they were. They might be walking along the streets of the Greater New York. There they are protected in their life and liberty by the State of New York, and when a man gets off from one of those streets and steps into a railroad car, he is for fifty or one hundred miles or more in the State of New York. He has a right, while there, to look for protection from the state for his life, liberty, and safety. And that railroad was bound to respect him, until Congress made a regulation to the contrary.

Now, there is another case to which I invite your attention, for it illustrates a great many. It is the case of the Railroad Company against Husen, 95 U.S. page 473.¹⁶⁷ The State of Texas, as you know, raises a great many cattle. Texas cattle are known far and wide, and it has sometimes been said that the importation of Texas cattle of a particular kind is destructive of the life and safety of the cattle of other states. That there is a disease among the cattle called Texas cattle disease, and the idea propagated that it is not safe to admit any Texas cattle into the state, else they would carry their disease to all other cattle.

Well, there is no difficulty at all in satisfying any Kansas man, or Iowa man, or Missouri man, who is engaged in the raising of cattle there. He is

¹⁶⁷ Railroad Co. v. Husen, 95 U.S. 465 (1878).

particularly satisfied, not any doubt about it at all, that it is not safe to let Texas cattle come into that state, it is endangering everything. So, the politicians at the demand of those people would pass statutes under the guise of protecting the property of that state, but the real purpose and object of which was to keep Texas cattle out of those states entirely so that the market could be monopolized by the home cattle. That is a very convenient sort of arrangement for states that want it, but it is not very comfortable for the farmers of Texas who raise cattle.

Well now, that case brings to your attention the statute of the State of Missouri, passed previously for the purpose of protecting the people of that state against the Texas cattle disease. But the Court looked underneath the act, and through it at the practical operation of its provisions, and saw that it was not framed with a view merely to the protection of the people of that state against the introduction of diseases that might be brought there by Texas cattle; that no such distinction was made between good and bad Texas cattle as might have been made, and the law was upset because it was really a statute that interrupted the introduction into those states of the products of the other states.

Now, if there is one thing settled by the decisions of the Supreme Court of the United States, it is that while the states have the undoubted right to protect their people and their locality against disease, pauperism, and crime by any regulations that are reasonable in their character adopted to that end, the state may not, under the guise of executing its police powers, put an embargo upon the trade of this country from state to state. If a man owns a horse, or a drove of horses, here, and wants to send them west to the State of Illinois to be sold, or south to the State of Georgia, now this Constitution says to him, you may take them there. You may drive them, if you choose, along the public highways from here through Maryland, Virginia, Tennessee, etc., until you get to the State of Georgia. When you reach the State of Tennessee, Tennessee with all its power cannot say, stop here at the border, unless the horse is really a diseased animal, and his going into the state puts some of its people in peril. The Constitution does not prevent any state from guarding itself as against the spread of disease.

It is a far different thing from stopping trade between that state and another state, and so the Constitution says that you may carry that horse from here to the City of San Francisco, and no state can step between you and the exercise of that right by any regulation that is really not in execution of its police powers. Now, it is not too much to say, that there are two or three hundred cases perhaps in the Supreme Court of the United States since the formation of the government, arising under that commerce

clause of the Constitution. There is not a term of the Supreme Court of the United States that there is not half a dozen or more cases, new in their facts and circumstances, calling for the expression of opinion whether a particular thing which is being done under the sanction of the state is inconsistent with the power given to Congress to regulate the commerce between states, and I suppose we will never have an end of those questions.

I must stop here on that subject, referring you to the cases which you have already upon your minutes, and I shall hold myself ready at any time if any thought occurs to you in reading those cases to try to explain them so that you may see the full scope and effect of that clause of the Constitution. There is no clause, next to the taxing power, so important to the unity and strength of the country as that commerce clause. We are to take care in enforcing it that we do not entrench upon the just local power that belongs to the states. If, at any time, any act which the state has passed under its police powers comes in contact with the state law, why of course, the state law must give way.

Our relations with the Indians in this country are of a peculiar character. Here is the power given to Congress to regulate commerce with the Indian tribes. The Indian tribes are a peculiar people, and our relations with them are peculiar. We sometimes have made treaties with the Indians, but our making treaties with them does not stand exactly upon the footing of our treaties with foreign nations. We have been in the habit, since the foundation of the government, of making treaties with the Indians, and then when we wanted another treaty, compelled them to make another. If we want a treaty modified, why the chiefs are brought here, and broadcloth clothes put on them, and they are shown all the sights around Washington, and we get out of them such a treaty as we want. They are the wards of the nation, not citizens of the United States.¹⁶⁸ They are dependent upon us. They are mere wards, but the men who framed the Constitution knew what infinite trouble there would be if the subject of our relations with the Indians were not put in Congress, but left with the states.

Therefore, the Congress of the United States may say exactly what may go to the Indians, and what may not. Congress may say that no spirituous liquors may be carried into the Indian nations.¹⁶⁹ Congress may prescribe the rule by which you are to be governed in your trading with them. Congress may say, you shall not trade with this tribe at all, or if you do trade with it, it shall be under certain circumstances, and it was

¹⁶⁸ *Elk v. Wilkins*, 112 U.S. 94, 110 (1884) (Harlan, J. dissenting).

¹⁶⁹ *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 188 (1876).

necessary to put it there because no state had exclusive interests or control over the Indians.¹⁷⁰ They were scattered throughout the country, and it would never have done at all, as bad as has been the conduct of the United States towards that dying race, to have left it to the states. The states would have dealt with them in a way that might have shocked humanity, as some of them did, and although they have been fairly well treated in their general control by the United States, it is a race that is disappearing, and probably within the lifetime of some that are now hearing me there will be very few in this country. In a hundred years, you will probably not find one anywhere, so that clause of the Constitution about regulating commerce with the Indian tribes will amount to nothing.

That is not the only race that is disappearing. I may digress this far, and I only do so for the purpose of indicating the immense reach of this commerce power after awhile. To my mind, to my apprehension, it is as certain as fate that in the course of time there will be nobody on this North American continent but Anglo-Saxons. All other races are steadily going to the wall. They are diminishing every year, and when this country comes to have, as it will before a great many years, two or three hundred million of people, when states that are now sparsely populated become thickly populated, we will then appreciate, or the country will then appreciate more than it does now, the immense importance of the common government of the whole country having power to protect trade between the states and with foreign nations, beyond the power of any state for its selfish purposes to harass it.

Now, the next clause of the Constitution: Congress has power “[t]o establish an uniform Rule of Naturalization.”¹⁷¹ It is to be uniform, not one for one state and another for another state. What do we mean by naturalization? Why, it is a system, or a mode, by which a man not a natural born citizen of the United States can become as if he were a natural born citizen, subject of course to the few restrictions that are imposed upon people who are not. And under that, laws have been passed providing for naturalization, and the greatest farce in all the century has been the manner in which these laws have been in the main enforced.

In these large cities that are the source of most of the dangers that threaten our American civilization, men are invested with the privilege of citizenship of the United States under these naturalization laws who have not the slightest idea about our institutions, who scarcely know our

¹⁷⁰ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 540–41 (1832).

¹⁷¹ U.S. CONST. art. I, § 8, cl. 4.

language, whose habits have been formed up and passed manhood in other lands, under other systems of government, and who never do understand our civilization as we understand it who were born here, and our own doors are open practically to all the world, and the jails and penitentiaries of Europe are being emptied into this country, and large portions of them lodge in these great cities that are now becoming so large and so corrupt that they are substantially controlling the public policy of many of the states, despite what the people out in the country and away from such scenes may want. If there is any one duty resting upon this country at this time that is supreme in my opinion, it is the necessity to reorganize that whole system, and to see to it that American citizenship does not become as cheap in the future as it has been in the past.

LECTURE 12: JANUARY 15, 1898

I said to you at our last meeting all that I cared to say on the subject of naturalization.

We come now to the subject of bankruptcy. Congress shall have power to establish “uniform Laws on the subject of Bankruptcies throughout the United States.”¹⁷² And that is a subject of far more consequence than you would suppose, perhaps, at the first reading of the text of the Constitution.

Before the adoption of the Constitution, several of the states had laws upon the subject of bankruptcy that were very injurious to citizens of other states. They discriminated against creditors in other states, and as there was to be freedom of intercourse in this country among the states, it was important that on that subject there should be a uniform rule.

One of the objects of the establishment of the government of the United States by this Constitution was to establish justice. Therefore, the states, if Congress had no bankruptcy law on the subject, and no power to pass any, they could in the distribution of the estates of bankrupts do great injustice to creditors of the bankrupt residing out of that particular state. Therefore, this power was given to Congress, coupled with the condition that whatever laws it had on the subject should be uniform; they should be applicable to every part of the country.

Now, what do we mean by bankrupt law? We have not had many since the foundation of the government—only three—and they are now considering in Congress whether we shall have another one.¹⁷³ Well, a man has progressed so far in his business that he finds that, in the common phrase, he has run aground; he owes more than he can pay; he cannot meet his debts as they mature, and he probably owes more than he will ever be able to pay.

Now, under a bankrupt law, that man may appear in the proper court and take the benefit of that law. What do we mean by taking the benefit of the law?

Why, that law ordinarily provides that when a man thus breaks down in his business, he can surrender—that is the substance of it—his estate of every kind, with certain exceptions that are important to enable the man to live. For instance, if a merchant tradesman went into bankruptcy, he would be allowed to retain certain things in his household that were absolutely

¹⁷² *Id.*

¹⁷³ Bankruptcy Act (“Nelson Act”) of 1898, ch. 541, 30 Stat. 544.

essential to keep his family from want. The carpenter would be allowed to retain his tools; the lawyer would be allowed to retain his law books; the physician, his medical books; and any other sort of exception that Congress may choose to make it may make. But with those exceptions, the law would require him to surrender all he has got, and when he has done that, and an opportunity given to his creditors to appear and make any complaint that they may choose, he gets his discharge, his discharge from all debts that he may owe.

Further along in the Constitution, you will find a provision to the effect that no state shall pass a law impairing the obligation of contract. A man holds my note for \$1,500. It is my contract to pay him \$1,500. Now, no state can pass a law under any circumstances that would discharge me from that obligation against the will of the creditor, but the United States can. They can, by a general bankrupt law applicable to all the country, provide a mode by which a man who has not got property to pay his debts, who has not committed any fraud, who has not hid his property in the name of his wife with a view to his insolvency, or with his children with a view to his insolvency, the bankrupt law provides a way by which that man can be freed from debt, get his discharge, absolute discharge, from all his contracts. So that if I got such a discharge, and a man who held a \$1,500 note against me, why my certificate of discharge wipes that debt out.

Those laws have their foundation in humanity, and in the best welfare of the state. What interest has the state or the public in keeping a man's nose to the grindstone all the while, to express it in a familiar way? Why, if I have run aground and cannot do any more than I have done, why may I not be discharged and made free to start in my career of life again?

Now, that is one of the effects of the bankruptcy law. They are generally passed after the country has passed through a season of distress and financial embarrassment, and thus under those, all men overwhelmed with debt, way beyond their expectations, and way beyond every possibility of ever being worth, if they live to be much older than men live; the bankrupt law says to those people, now be an honest man, and turn over, with certain exceptions, all you have got, and you shall be discharged from your indebtedness.

I believe in England they have a permanent bankrupt law, and it is the belief of a great many that we ought to have a permanent bankrupt law in this country, by which a man overwhelmed by financial embarrassment may get his discharge, and not be compelled to resort to all sorts of devices to evade creditors. I would suggest to you to take a minute of two cases on

the subject of bankrupt laws—Sturges against Crowningshield, 4 Wheaton, 122,¹⁷⁴ and Ogden against Sanders, 12 Wallace, 213.¹⁷⁵ I would advise you to read those two cases.

Now, the next clause of the Constitution is one of great importance. Congress shall have power “[t]o coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.”¹⁷⁶ What would be the condition of this country if every state in this union had the power to coin money and fix the value thereof? We would not be much better off than they are in China and some other Asiatic countries. Money is connected with everything in this country. Whatever debases our money, debases our morality. This is the power to coin money.

Now, that clause does not refer to paper money, because we do not coin paper money. The word “coin” indicates that the word “money” there refers to the precious metals, gold and silver, and as all values are affected by what things are worth in money, therefore it is of the most importance that the power in this country to coin money should rest with one government, not with forty-odd governments, but with one government. No state in this union has any power to coin money. Only the United States can do that, and to regulate the value thereof, and to regulate the value of foreign coin. We are not to be flooded with the coin of other countries beyond the power of Congress to regulate the value of it.¹⁷⁷

Now, you often hear of the legal tender cases.¹⁷⁸ Those cases do not depend upon that clause of the Constitution. They depend upon other clauses. This is the power to coin what we understand as money, that is, gold and silver, and of the United States, the power to fix the value of it.

Now, passing from that to the next clause, Congress shall have power “[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States.”¹⁷⁹ Whoever assumes to put out a silver dollar or a gold dollar that has not been coined by the United States, but coined by themselves, is very apt to get into trouble. No man has the right to counterfeit the current coin of the United States. It is a penitentiary

¹⁷⁴ *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

¹⁷⁵ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827). Apparently, Harlan misstated the reporter.

¹⁷⁶ U.S. CONST. art. I, § 8, cl. 5.

¹⁷⁷ *Briscoe v. Bank of Ky.*, 36 U.S. (11 Pet.) 257, 257–58 (1837).

¹⁷⁸ *Juilliard v. Greenman* (Legal Tender Case), 110 U.S. 421 (1884); *Knox v. Lee*, *Parker v. Davis* (Legal Tender Cases), 79 U.S. 457 (1870).

¹⁷⁹ U.S. CONST. art. I, § 8, cl. 6.

offense. It is not simply the coin, it is the security.¹⁸⁰

Therefore, no man may counterfeit a bond of the United States, a certificate that may be issued by the Treasury of the United States to circulate as money. Counterfeiting of that is an offense against the United States, and may be punished by the United States, and is punished by the United States.

You will find, in the revised statutes, the punishments for counterfeiting the coin of the United States. It would be of very little value for the United States to coin money, if it had not the power to punish the counterfeiting of the coin, and this is a very tender spot with everybody in the country - counterfeiting. But the people are liable to be deceived by receiving counterfeit coin of the United States. It affects all their business. And hence a man who is before a jury anywhere in this country upon a charge of counterfeiting the coin of the United States, the security of the United States, had better look out, for the ordinary jury will be more certain to punish a man for counterfeiting the coin of the United States than for killing a man, for there are two things that the American jury won't stand, that is, stealing horses and counterfeiting the coin.

And Congress shall have power “[t]o establish Post Offices and post Roads.”¹⁸¹ Is that all? What would it amount to establish a post office, if you could not protect it? A man goes down here and breaks into a post office of the United States and steals something from it, takes letters from it. Where is the authority of the United States to punish that man for that act? Here is the power, simply to establish post offices and post roads. Therefore, Congress may establish a post office in the City of Washington—where does Congress get the power to punish a man for breaking into that post office?

It comes from the clause a little farther on—the Congress shall have power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”¹⁸² What would the power be worth for establishing post offices and post roads unless Congress could also pass laws to protect those post offices and their contents, and the post roads?

What may Congress do under that? It has by statute declared all the railroads in the United States running from one state to another post

¹⁸⁰ See 18 U.S.C. §§ 470–514 (2006).

¹⁸¹ U.S. CONST. art. I, § 8, cl. 7.

¹⁸² U.S. CONST. art. I, § 8, cl. 18.

roads.¹⁸³ Is that all that it may do? Might not the United States build post roads? Might not United States build itself a post road to extend from the Atlantic to the Pacific Ocean? While it has never done so, some people think it should do so; that it ought to own its post roads itself.¹⁸⁴

Has Congress the power to connect the post office system with a telegraph system? Has Congress the power to establish a telegraph line and connect every city and every town in the country with every other city and town in the country? Well, why not? Why may not the government of the United States make a part of its postal system communication from one part of the country to the other by telegraph?

If Congress can provide for the carrying of the mails from the City of New York to the City of San Francisco, why may it not make provision for the communication of people of New York with people of San Francisco by telegraph? A man now has to pay a good round sum to telegraph fifty words from here to the City of San Francisco. Why may not Congress have a system of its own on that subject by which a man may communicate fifty words from here to San Francisco for twenty-five cents, as well as provide facilities for communicating between these points by mail, or car, or some other mode?

The time will come—it is not far off—when that will be considered more seriously than it has been, and when the government may adopt facilities for telegraphing and telephoning from one place to another. Why not? You can talk with a man from here to Chicago by telephone. I have done it. I have recognized the voice at the other end of the line just as distinctly as you recognize my voice now, but it is very expensive, but it may ultimately be concluded by the United States that it will open and extend these facilities of communication from one part of the country to the other. It is a question of policy more than of power.

Some men say that we have got offices enough now. If you establish telegraphic communication as a part of the postal system, and telephonic communications, you will have many more thousands of office holders than you have got now, and it will be a little difficult to manage, and a little dangerous to the people to have that vast power under the control of one man who may be in the White House, who may want to be President not only once but two or three or four times. That is the argument that is made

¹⁸³ See, *e.g.*, Act of June 8, 1872, ch. 335, 17 Stat. 283; Act of Mar. 3, 1853, ch. 146, 10 Stat. 225; Act of July 7, 1838, ch. 172, 5 Stat. 271.

¹⁸⁴ The United States eventually exercised this authority in the Federal Aid Road Act of 1916, ch. 241, 39 Stat. 355, and many later Federal-Aid Highway Acts.

against the policy.

Congress shall have the power “[t]o 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.”¹⁸⁵ Under that they pass the patent laws, by which men get an exclusive right for a limited period for their invention, for their authorship, for their discoveries.

Well, that has been of vast benefit in many ways to the country. What is the meaning of that? It is to stimulate the faculty of invention. There are some men that will work and work, day and night, from the very love of science and the useful arts, for the love of fame that might attend it, but that is not quite enough. These gentlemen who framed the Constitution thought it wise and beneficial to stimulate it with a desire to make a fortune.

But it is not every invention so-called that may be patented. It is that which is useful. It is to promote the progress of science and the useful arts. A man may make an application for a patent for a particular invention. Well, it is new to him, entirely new to him, he is certain that he is the first inventor, but it turns out that some other man across the waters invented that a year before, or made an invention that involves the same principle. He is not the first inventor and he is not entitled to a patent. Sometimes it is very interesting how near these people come to each other. The human mind is groping off in the darkness, and a man here and a man there, and one somewhere else is struggling for the same thing, and the history of invention shows that one man has come out two or three weeks ahead of the other.

Now, why do we give him the exclusive right in these writings and discoveries? Well, as I said, it is to stimulate invention and to reward him. He is given the exclusive right for a given time, for limited time, not for all time. Congress could not give a man a right for all time, an exclusive right. The Congress says to the man who has made a useful invention, good in the arts and sciences, and that will contribute to the welfare and comfort of the people, I will give you the exclusive right to use this for a certain number of years, on condition that when that time expires, unless it is extended by the government, that invention shall belong to the people.

There is a man continually applying to me through the post office, that he is the inventor of a particular filter. I am not using his; I am using somebody's else. He says that his patent gives him the exclusive right for a given period. Well, when two men are contesting for the priority of invention, they come to the court and the court must decide; first, is this a

¹⁸⁵ U.S. CONST. art. I, § 8, cl. 8.

useful invention? Is it an invention at all? Is it anything more than mechanical skill? If it is an invention, and is useful, they will find out who the first inventor is, and they will award it to him.

Some think when they get a patent from the United States, that they have a right to do anything they choose and plead the authority of the United States. Well, a man got an invention for some sort of oil for lighting purposes, and he established his agencies in the State of Kentucky, but the State of Kentucky had a statute to the effect that all sellers of oil in that state should submit them to inspection by the proper person, and that oils of a particular kind, unless they were of a particular kind, should not be sold in that state, and that was upon the ground that any other sort of oil was dangerous to the safety of property.

Well, this man says, "I don't care what the State of Kentucky has to say. The United States has patented this oil. They have given me the exclusive right to this, and I may sell it everywhere." Not so, said the Supreme Court of the United States. It is merely that nobody shall make that oil except upon your license. You have the exclusive right to use it, but when you take it into a particular state, you are subject to the laws of that state, and the state may say it is not reasonable that it should be used, and if it is a reasonable law, it is bound to be respected.¹⁸⁶

Congress shall have power "[t]o constitute Tribunals inferior to the supreme Court."¹⁸⁷ What sort of tribunals? How many? Well, that was left to the discretion of Congress.

It would not have been wise for the men who framed this Constitution to have limited the discretion of Congress in that particular. They would not have been wise to have said that Congress shall establish tribunals upon particular subjects only. They had far-knowledge enough, if I may so describe it, to see into the future, and say that this country has only three or four millions of people when we adopt this Constitution. It may have many more millions of people. Washington, the wisest man of his day, saw before anybody else saw the vast possibilities of the West, and the West then included what now constitutes Michigan, Kentucky, and Ohio, and all the country between there and the Mississippi River. We did not even own the country beyond that, and therefore this was wisely left to the discretion of Congress.

What tribunals has Congress established? Why, the Court of Claims is established in virtue of that authority, a tribunal with limited jurisdiction to

¹⁸⁶ *Patterson v. Kentucky*, 97 U.S. 501, 502, 505 (1878) (Harlan, J.).

¹⁸⁷ U.S. CONST. art. I, § 8, cl. 9.

hear and determine certain classes of cases against the United States, and under that section it establishes commissions sometimes.¹⁸⁸ They will establish a commission to hear certain claims.¹⁸⁹ It is any sort of a tribunal. It is not simply judicial tribunals, but tribunals inferior to the Supreme Court.

Congress shall have power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”¹⁹⁰ Well, you may ask, what has Congress got to do with the high seas? The territorial jurisdiction of the United States extends three miles outside of the shores of the United States.¹⁹¹ What business has Congress to punish piracies committed on the high seas? If you say it of the United States you could say it of other nations. You might say, what business has England to punish it out of the jurisdiction of England?

If every country had not the power to punish piracies, pirates would cover the seas everywhere, and would destroy commerce. A pirate is an enemy of the human race, and by the law of nations, by which I mean the law that is common to all the nations of the Earth, any nation has the right to punish piracies committed on the high seas, and felonies, not every felony, it does not mean that, but it does include these cases. A vessel registered in the United States, flying the United States flag, travelling

¹⁸⁸ In 1855, Congress created the Court of Claims, which had jurisdiction over monetary claims against the United States. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. In 1865, the Supreme Court held that the Court of Claims was created under Article I, rather than Article III. *See Gordon v. United States*, 69 U.S. (2 Wall.) 561, 561 (1865). In 1953, Congress declared that the Court of Claims was created under Article III. Act of July 28, 1953, ch. 253, 67 Stat. 226. In 1982, Congress abolished the Court of Claims, transferred most of its jurisdiction to the United States Court of Appeals for the Federal Circuit, and created the United States Claims Court. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. In 1992, the United States Claims Court was renamed the United States Court of Federal Claims. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516.

¹⁸⁹ For example, in 1871, Congress created the Southern Claims Commission to compensate pro-Union southerners for property confiscated by the United States Army. Act of Mar. 3, 1871, ch. 116, 16 Stat. 521, 524.

¹⁹⁰ U.S. CONST. art. I, § 8, cl. 10.

¹⁹¹ From the 18th century until the mid-20th century, most nations claimed territorial waters extending three miles from their shores. *See Territorial Waters*, BRITANNICA ACADEMIC EDITION, <http://www.britannica.com/EBchecked/topic/588351/territorial-waters> (last visited May 27, 2013). In 1982, the United Nations Convention on the Law of the Sea defined the territorial waters of a nation as a belt of coastal waters extending at most twelve nautical miles from the baseline of a coastal state. The United States still has not ratified this treaty. Robin R. Churchill, *Law of the Sea*, BRITANNICA ACADEMIC EDITION, <http://www.britannica.com/EBchecked/topic/530433/Law-of-the-Sea> (last visited May 27, 2013).

between the City of New York and Liverpool, is, for the purposes of the punishment of felonies upon the high seas, part of the territory of the United States, and a murder committed on one of those vessels running from New York to Liverpool is punishable in the court of the United States, particularly if it be of an American.¹⁹²

Not a great while ago—two or three years only—a small schooner left the City of New York, going down to the southern seas somewhere, and when far out in the ocean—only about six or seven people on board, outside of the mere deckhands—the lives of three persons were taken in a very mysterious manner. The vessel, by order of those that survived, was taken to Halifax, and there certain persons on that boat were arrested and brought to the City of Boston and tried for murder. One Bram was tried in the federal court at Boston for having committed on the high seas a murder on a vessel registered in the United States, and therefore subject to the criminal jurisdiction of the United States.¹⁹³

Some people often say there are too many delays in the administration of the criminal laws, and the courts do often reverse judgments in criminal cases. It makes it, they say, impossible to enforce the criminal law. Well, that belongs to the same class as the complaint very often heard from men who never read the Constitution and never read anything else much, but who are quite content to have a mode of proceeding that would be quick and sharp; end the matter; put this fellow out of the way; if he wasn't guilty he would not be charged; must not have these delays; let some man decide and end it; if he has to be hung, let him be hung, and get over it quick.

That is the feeling of some. That is not the idea of this Constitution. It is not the idea of the law. The scripture says, I believe, or somebody says, better that ninety-nine guilty men escape than that one innocent man should suffer, and therefore the law is merciful.¹⁹⁴ The law is just, but it is merciful. The law is tender in taking a human life, and therefore the law properly administered never loses sight of these guarantees of life. Such, for instance, as the clause in the amendments to the Constitution which says, that no man shall be twice put in jeopardy for the same offense. No

¹⁹² Harlan is probably referring to *Queen v. Lewis*, (1857) 169 Eng. Rep. 968 (Crim. App.). See also *Sparf v. United States*, 156 U.S. 51 (1895); *St. Clair v. United States*, 154 U.S. 134 (1894).

¹⁹³ *Bram v. United States*, 168 U.S. 532, 532 (1897).

¹⁹⁴ Harlan is probably referring to Blackstone's assertion, "better that ten guilty persons escape, than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358 (16th ed., A. Strahan, London 1825); cf. Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997).

man shall be compelled in any criminal case to be a witness against himself. The accused shall be entitled to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed.

If there are delays in criminal cases, it is the delay caused by stupid jurors, and not by the law; it is the delays caused by inefficient men, charged with the administration of the law, who do not do their duty, and therefore up to this time, speaking generally now of all of the state courts as well as the federal courts, there is a purpose not to take life, not to take liberty, not to take a man's property, except in accordance with law, and in accordance with the fundamental principle which, if we once depart from, our liberties are gone, and therefore the complaint is too often made about delays in the enforcement of the criminal law, and the delay comes not from the law but from those who are charged with the administration of it.¹⁹⁵

Congress shall have power “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”¹⁹⁶ Congress shall have power to declare war. Nobody else in this country can declare war but Congress, but that cannot be said of most of the countries of the Earth. The government of England, with all the freedom that its people enjoy, might have war on its hands by the act only of the Queen, or speaking more literally by the act of the cabinet. Germany has more recently occupied part of the territory of China.¹⁹⁷ Russia, it has been said, is going to occupy, for the time for winter purposes, Fort Arthur in China.¹⁹⁸

Well, Great Britain, suppose, comes to the conclusion that it is dangerous to the policy of her plans, getting too near to her possessions in India, and Lord Salisbury would say to the German government, “You

¹⁹⁵ See *Hurtado v. California*, 110 U.S. 516, 545 (1884) (Harlan, J., dissenting) (“And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*,) yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters.” (quoting BLACKSTONE, *supra* note 194, at 344)).

¹⁹⁶ U.S. CONST. art. I, § 8, cl. 11.

¹⁹⁷ In 1897, Germany forced China to provide it a ninety-nine-year lease of Kiaochow. See Guido Enderis, *Germany Weighing Move to Get Back Colonies*, N.Y. TIMES, Nov. 7, 1937, at E5. China canceled the lease in 1914. See *id.* (noting that Germany's lease of Kiaochow was ended by the occurrence of the First World War).

¹⁹⁸ In 1897, Russia forced China to provide it a ninety-nine-year lease of Port Arthur. Wen-Sze King, *The Lease Conventions Between China and the Foreign Powers*, 1 CHINESE SOC. & POL. SCI. REV. 24, 33 (1916). In 1905, Russia surrendered Port Arthur to Japan. *Id.* at 34.

must get out of there,” and to the Russian government, “You must not occupy Fort Arthur.” And those countries refuse. And then, speaking for the Queen, he could say, “We will fire on you,” and they could do it. How far they could carry on that war would depend upon the House of Commons to appropriate money. But when they did fire, it would be war between England and Germany, and England and Russia, without consulting Parliament.

But in this country there cannot be any war except by act of Congress of the United States. Of course, if this country were attacked, it would belong to the President of the United States to defend it, but a state of war would not exist except by act of Congress.

Well, some may think that is too slow, but on the other hand, if the power did not rest with Congress to declare war, but with an ambitious President, we might often be involved in war that we did not want to have; put in a position where countless millions of dollars might be expended, and countless lives sacrificed, because of the notion of some President that we must have war.

We intended to guard against that in this Constitution, and intended that if war ever existed, it must be the act of the Congress of the United States, who would speak more immediately for the people of the United States, and when that did speak, if the President was with them of the subject, we could then be sure of the united voice of the people of the United States. And it was put in there because this country did not start out with the idea of being a people that wanted to make acquisitions of territory. We wanted to avoid the possibility of territory being added to the country except by the consent of the people. We do not want to acquire a territory in and of itself.

Under that clause, there has been a good deal of discussion recently as to what the country ought to do with reference to certain matters now pending not far from us.¹⁹⁹ Well, those are questions of policy that I do not intend to discuss. They will have to take care of themselves, and when the time comes about, if it does come about, for a war between this country and any other country about anything affecting us, all that any of us can hope and desire is that we shall be on the right side, that our cause shall be just, and if it does come, why I take it for granted that the world will find out, if it does not know now, what it is possible for this American people to do if they are brought to war.

¹⁹⁹ Harlan refers to arguments that the United States should intervene in the Cuban Revolution. See, e.g., *To Answer Cuba's Call*, CHI. DAILY TRIB., Dec. 1, 1895, at 4.

Congress shall have power “[t]o raise and support Armies.”²⁰⁰ How large an army? Why as large as we may want. There is no limit. We may call every able-bodied man in the country into the service, and support them while in the service. We have got a very small army now. You do not need a very large one in time of peace. But we can expand it to the extent of the capacity of the country to furnish men, and for what purpose? Why for every purpose to which this government may be competent. For purposes in time of war to send the soldiers out of the country into another country, if need be, but always for the purpose of supporting the integrity of this country; resist not only an attack upon our nation, but resist any attack that may be made upon any part of the country. Not simply one state, but all the country.

“[B]ut no Appropriation of Money to that Use shall be for a longer Term than two Years.”²⁰¹ Why that limitation? Andrew Jackson, I believe it was, who said that “eternal vigilance is the price of liberty.”²⁰² It was seen from the history of other nations that standing armies, with armed men, sometime were turned by ambitious aspiring leaders against the government of the country, and overthrew it and established another government.

Now, the experience of the men who had read the history of the world suggested in that form, we will not put it in the power of any President of the United States to keep and maintain an army that he thinks proper. We will not make an appropriation of money to support the army. The army might need, in a sense, to be disciplined. The military are subordinated to the civil authority.

Now, we will have no army here for which an appropriation shall be made longer than for two years, because we may come to the conclusion at the end of that time that this army is too large; it endangers the peace and the safety of the country. We will cut it down. Whereas we have appropriated one year for one hundred thousand men, we will reduce it to fifty thousand men. It was to keep the power in the hands of the representatives of the people to the civil power from being overturned by the military. Of course, we have had no danger as yet from that source.

²⁰⁰ U.S. CONST. art. I, § 8, cl. 12.

²⁰¹ *Id.*

²⁰² This quotation is often attributed to Thomas Jefferson, but does not appear in any of his works. It is generally attributed to Wendell Phillips, a prominent Abolitionist. WENDELL PHILLIPS, *Speech at the Melodeon, Wednesday Evening, Jan. 28, in SPEECHES BEFORE THE MASSACHUSETTS ANTI-SLAVERY SOCIETY* 3, 13 (Boston, Robert F. Wallcut 1852).

Now, I call your attention to the next clause, which is: Congress shall have power “[t]o provide and maintain a Navy.”²⁰³ There is no condition annexed to that, that the appropriation shall not be for a longer term than two years. Therefore, Congress may make an appropriation for longer than two years for the purposes of the navy. Why the distinction? Well, I don’t know, though it occurs to me that possibly because the Navy was outside of the country and the Army was inside. There might be danger from a large number of troops inside, but not from the navy outside. Now, the whole number of men needed to man our navy would not amount to much in the presence of a population such as we have here.

The power “[t]o make Rules for the Government and Regulation of the land and naval Forces.”²⁰⁴ They have rules and regulations peculiar to themselves. Well, there could be no discipline in the army and navy, if for every offense committed by the soldier in the army or the sailor in the navy, if the case had to be tried by the civil courts. Therefore, the rules and regulations you will find in the revised statutes, which provide for the trial by court-martial, and those rules are easily understood, and they provide for a trial of offenses according to those modes, and in that connection “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”²⁰⁵

Who constitutes the militia? Why, it is every able-bodied man in the United States between certain ages.²⁰⁶ Now, Congress may provide for calling them into service, not perpetually in the service, but for a given period for emergencies. It is a great power, and a very important one. The militia of the United States, added to the army of the United States, makes an enormous force. We hear about the great number of men that the Emperor of Germany can call into the field on short notice, and the Czar of Russia can call on short notice, but this country can put into the field in a short time forces that would equal the combined forces of Germany, Russia, and France.

²⁰³ U.S. CONST. art. I, § 8, cl. 13.

²⁰⁴ *Id.* art. I, § 8, cl. 14.

²⁰⁵ *Id.* art. I, § 8, cl. 15.

²⁰⁶ In 1897, the militia consisted of all able-bodied male citizens, aged eighteen to forty-four years. Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271 (establishing a uniform militia).

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We had reached the clause of the Constitution declaring that Congress shall have power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”²⁰⁷

Now, you will see, upon a moment’s reflection, that the very existence of the union might depend upon the execution of the laws of the union; its very existence might depend upon the suppression of an insurrection. Of course, this means an insurrection against the government of the United States, and so its existence might depend upon the power existing somewhere to repel invasion. That means an invasion by a foreign power. You strike out that section of the Constitution, and you destroy the government of the United States of the power to preserve its existence.

In 1833—I think I state the year correctly—there was trouble in the State of South Carolina. Some laws had been passed by Congress which the people of South Carolina did not like, but they were laws of the United States.²⁰⁸ South Carolina passed counter-legislation, and made it an offense for anybody in that state to attempt to execute certain acts passed by Congress.²⁰⁹ South Carolina claimed as its theory, that it had the right to nullify any act of Congress that it thought repugnant to the Constitution of that state, and they passed a law saying in substance, that the act of Congress shall not be enforced in the State of South Carolina; and South Carolina’s view of the Constitution of the government of the United States was, that the act of the state legislature of South Carolina was the law of the people of that state and not the act of Congress.

That was Mr. Calhoun’s view, but there happened to be in the White House at that time a man by the name of Andrew Jackson, who did not accept that view of the Constitution. He had taken an oath to support the Constitution and laws of the United States, and upon him rested the obligation to execute the laws of the United States, and he said, almost in words, to Mr. Calhoun and to those who agreed with him, “If you stand in the way of the execution of these acts of Congress, I will see what power there is in this government. I warn you.”

He issued a proclamation, a very famous one, to the people of the

²⁰⁷ U.S. CONST. art. I, § 8, cl. 15.

²⁰⁸ Harlan refers to the Tariff of 1832, ch. 227, 4 Stat. 583.

²⁰⁹ In November 1832, a South Carolina state convention declared the Tariff of 1832 unconstitutional and unenforceable in South Carolina after February 1, 1833. South Carolina Ordinance of Nullification (1832), *reprinted in* SELECT DOCUMENTS, *supra* note 31, at 268–71.

United States, but especially addressed to the people of South Carolina, telling them, “If you resist these acts of Congress, I will employ against you the whole power of the United States. I will see that those laws are executed.”²¹⁰ And they were executed. It is well known that that gentlemen then in the White House meant business, and he meant what he said, and that he had the courage of his convictions, and that he was prepared to test the question whether the United States was stronger than the State of South Carolina, and Jackson triumphed and the laws were executed.

And this power was again brought into force in 1861—I refer to this not to discuss war questions but as a part of the history of the country—when our brethren in the states south of us started an insurrection. Mr. Lincoln, under the authority of an act of Congress, called out 75,000 volunteers, and they responded at once, and a great many more than 75,000.²¹¹ We have not had occasion to exercise that authority in any specific case to impel invasion, because we have not been invaded, but if we were, we find authority in the Constitution of the United States for the President of the United States to meet the invasion.

Now, nobody doubts at all at this day that these powers are very essential to the existence of the nation, and their value has been illustrated in many ways, and several times in the history of the government. We have got here now in this country about seventy millions of people, and we have got a great many people in our country that have no idea of law, have no proper conception of liberty; they think liberty means license to do as they please; a great many unruly elements. Why is it that we are as quiet as we are? Why is it that more things are not done in the way of violence towards disturbing the peace of this country than are done? Why is it that

²¹⁰ Andrew Jackson, Proclamation to the People of South Carolina (Dec. 10, 1832), reprinted in *SELECT DOCUMENTS*, *supra* note 31, at 273–83 (“No act of violent opposition to the laws has yet been committed, but such a state of things is hourly apprehended; and it is the intent of this instrument to proclaim, not only that the duty imposed on me by the Constitution, ‘to take care that the laws be faithfully executed,’ shall be performed to the extent of the powers already vested in me by law, or of such others as the wisdom of Congress shall devise and entrust to me for that purpose, but to warn the citizens of South Carolina, who have been deluded into an opposition to the laws, of the danger they will incur by obedience to the illegal and disorganizing ordinance of the Convention; to exhort those who have refused to support it to persevere in their determination to uphold the Constitution and laws of their country; and to point out to all the perilous situation into which the good people of that State have been led, and that the course they are urged to pursue is one of ruin and disgrace to the very State whose rights they affect to support.”).

²¹¹ Proclamation No. 80, 12 Stat. 1258 (Apr. 15, 1861). Lincoln relied on the Militia Act of 1792. Act of May 2, 1792, ch. 28, 1 Stat. 264.

there does not arise in different parts of the country armed opposition to the laws of the United States when they happen to be distasteful to the people of a particular locality?

Why, the main reason is that everybody knows that there exists here on this continent a government strong enough to take care of itself, strong enough to execute every law of the United States, strong enough to put down insurrection wherever it may occur, strong enough to keep the peace of the United States. The power of seventy millions of people with all the wealth of this wealthy country behind it is a power that does not exist anywhere on the Earth outside of this country, and those unruly elements know it, and therefore they are kept quiet, and they are educated in the idea that if anybody does not like a law that may be passed by Congress they must wait until the next election; turn the Congress out that passed it; turn the party out that passed it. If the law infringes the Constitution, infringes the rights of any individual, go into the courts of the country. There is a remedy in the courts of the country for every wrong done to person or property.

Alongside of this, Congress shall have power “[t]o 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.”²¹² The government may not only call to its aid the regular army and navy of the United States, but it may call to its aid the militia of the United States, and may employ them in the service of the United States for any purpose germane to the powers that the government of the United States may possess.

Now, when the militia is called forth—you observe here the clause “reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”²¹³ I think without exception every regiment of volunteers in the late civil war in the army of the United States was commanded by men appointed by the governors of the respective states. The regiments were primarily organized by the states and then turned over to the government of the United States, mustered into the service of the United States, and thenceforth under the authority of the United States, and a vacancy occurring in the Colonel of a regiment was supplied by this governor of the

²¹² U.S. CONST. art. I, § 8, cl. 16.

²¹³ *Id.*

state from which the regiment came.

Congress shall have power “[t]o 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.”²¹⁴ Under that power we have got the national seat of government here, and the history of the location of the seat of government here is not without interest. The seat of government for a time was at Philadelphia, and at the time it was organized, I believe it was in New York.²¹⁵ Washington was inaugurated President of the United States in New York, but the seat of the national government had not been finally established.

Where should it be at the close of the Revolutionary War? It appeared that there was a vast debt upon many of the original thirteen states, a debt contracted by those states in the prosecution of the war, in caring for the soldiers that they furnished, and providing for them.²¹⁶ It was a debt that would not disturb any financier’s sleep more than an hour any night now. We talk about borrowing two or three millions of dollars. Does not disturb us at all. Why, we can do that twenty-four hours after we advertise. We are richer now. Then the debt, looking at it from our present standpoint, was small. The question arose, what should be done with that debt?

Well, a large number of statesmen in the country said that debt was incurred in the common defense and general welfare, and the United States ought to assume it—pay it.²¹⁷ Some states replied, Virginia among them, “We bore our expenses in the war; we do not ask the government of the United States to pay us back anything. We responded to all requisitions made upon us; we furnished all the men and money called for from us, and why should not other states do the very same thing for themselves? Why

²¹⁴ *Id.* art. I, § 8, cl. 17.

²¹⁵ From March 4, 1789 to August 12, 1790, Congress met in Federal Hall, New York City, New York, and from December 6, 1790 to May 14, 1800, it met in Congress Hall, Philadelphia, Pennsylvania. *The Nine Capitals of the United States*, U.S. SENATE, http://www.senate.gov/reference/reference_item/Nine_Capitals_of_the_United_States.htm (last visited May 27, 2013) (citing ROBERT FORTENBAUGH, *THE NINE CAPITALS OF THE UNITED STATES* 9 (1948)).

²¹⁶ During the Revolutionary War, the United States borrowed about \$37 million, and the states borrowed an additional \$114 million. MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781–1789*, at 379 (1950).

²¹⁷ Alexander Hamilton advocated the federal assumption of Revolutionary War debts. 1 ALEXANDER HAMILTON, *Report of the Secretary of the Treasury on Public Credit, Jan. 9, 1790*, in *THE WORKS OF ALEXANDER HAMILTON* 1, 21 (New York, Williams & Whiting 1810).

should that debt be saddled upon the whole country?"²¹⁸

Well, as the discussion extended, great bitterness arose over it. Those debts at that time were bringing a very small sum in the market. Nobody ever thought of investing in those claims of the states where they were seeking for some returns in the way of dividends or interest. Of course, everybody knew or felt at that time that if the government of the United States assumed those debts they would go up at once, and therefore it was said by those who were opposed to the scheme of paying those debts through the national government, that they were being speculated in by politicians, and if you look into McMaster's *History of the People of the United States*, you will see that all sorts of charges were made against parties and statesmen of that day, charging that Senators and Representatives were speculating in those debts, and owned some of them at the very time the question was before them whether the United States should assume them or not.²¹⁹

There may have been some truth in that—probably a good deal of exaggeration—but so it happened there were two parties to that controversy. Mr. Hamilton took the ground—and nobody doubted his integrity; nobody today doubts his personal integrity—Mr. Hamilton took the ground that those debts were incurred for the benefit of the whole country, and the whole country ought to assume them. Mr. Jefferson took the other view, and he was opposed to the government of the United States assuming those debts.

The country was beginning to be divided somewhat upon a sectional line, but Mr. Jefferson and his friends wanted the seat of government south of the Potomac, or on the Potomac. They did not want it in New York at one end of the country; they did not want it at Philadelphia; they wanted it down here, south, around the Potomac.

Now, this is preliminary to saying, that the fact is very well authenticated that the way in which the seat of government happened to be established here on the banks of the Potomac was a sort of understanding between the leaders of the respective sides of this debt question; that if you

²¹⁸ Thomas Jefferson and James Madison led the opposition to Hamilton's assumption plan. See *The Dinner Table Bargain, June 1790*, PBS.ORG, http://www.pbs.org/wgbh/amex/hamilton/peoplevents/e_dinner.html (last visited May 27, 2013).

²¹⁹ 1 JOHN BACH MCMASTER, *A HISTORY OF THE PEOPLE OF THE UNITED STATES FROM THE REVOLUTION TO THE CIVIL WAR* 570–71 (New York, D. Appleton & Co. 1891). In 1789, state securities traded at twenty-five cents on the dollar; Hamilton proposed to pay face value. 1 ALEXANDER HAMILTON, *supra* note 217, at 11.

down here on the Potomac want the national government here, will surrender your opposition to the national government assuming those debts, we will let you have the seat of government.

I don't suppose Mr. Jefferson and Mr. Hamilton ever met each other and came to any understanding in words of that sort, but that some follower of each talked with each other and reached that conclusion, and that that was the reason why opposition to the location of the national government here on the banks of the Potomac ceased.²²⁰ I think it pretty well authenticated, and there was no bribery in it.

It could not be called intrigue and corruption. It very often occurs in the life of statesmen that when they find they cannot get all they want, they take what they can get. A statesman may want to accomplish a half a dozen objects of legislation. He cannot accomplish them all, but he can accomplish two or three out of the five, and if he gets these, he may keep his mouth shut about something somebody else wants, and in that way he makes a little advance in what he wants to secure.

That often occurs in the life of statesmen, without there being any ground to charge corruption, just as a lawyer might say, or a judge might say, "Well, I don't like this doctrine. I don't like this view of the Constitution, but it has been settled by the Supreme Court of the United States; not simply once, but a half a dozen times. Every chance they have had to pass on that question they have decided one way." Therefore, the gentlemen say, "Why the time has come for me to surrender my view on that subject. I acquiesce and go on and execute the Constitution of the United States on that theory."

That is well illustrated in a great many things. Why, go back fifty years ago—certainly sixty years ago—there were a number of statesmen in this country whose memories we revere, men of great ability, who utterly denied the power of the government of the United States to contribute any money to improve the western rivers.²²¹ There was an absolute want of

²²⁰ According to Jefferson, he arranged a dinner with Hamilton and Madison, at which they formed the Compromise of 1790. See Jacob E. Cooke, *The Compromise of 1790*, 27 WM. & MARY Q. 523, 523 (1970).

²²¹ Federal public works or "internal improvements" defined many antebellum debates over the constitutional scope of federal power. See Stephen Minicucci, *Internal Improvements and the Union, 1790–1860*, 18 STUD. AM. POL. DEV. 160, 160 (2004). George Washington and Alexander Hamilton of the Federalist Party proposed internal improvements. See *id.* at 163. Thomas Jefferson and James Madison of the Democratic-Republican Party opposed them. See *id.* at 172. Later, Henry Clay of the Whig Party advocated internal improvements, and Andrew Jackson of the Democratic Party opposed them. See *id.* at 162, 165.

power, they said, to do it. They fought it, but do you know of any statesman today that talks that way? Not a one of them. On the contrary, they are all trying to get appropriations from Congress to improve every creek in their localities.

The great quarrel between Mr. Clay and Mr. Jackson was about the United States bank. Jackson denied the power to the government of the United States to incorporate a national bank, and he had his way for a time, and the United States bank went down.²²² But when the war came of 1861, when the government of the United States was confronted with an organized force covering half the territory of this union, and the forces composed of men of the same blood as those who stood by the government of the United States, and there was before them the enormous task of putting down that insurrection and reinstating the authority of the United States, there was no difficulty in formulating a scheme for national banks.²²³

And who today is prepared to stand up in a court of justice anywhere and deny the constitutionality of a law which organizes the national banks of the country, whatever they may say about the policy of such a system? The fact is that many of the views of Mr. Hamilton have been accepted and incorporated in the policy of the government, many of the views of Mr. Jefferson have been accepted, and the country today is wiser than the country was at that time, the statesmen of today are wiser than they were at that day, although they may not have as great an intellect as the men of that day.

What is the power of the government of the United States over this district? Has any state authority to legislate for this district? No, because the Constitution says, the power of Congress is “exclusive” in legislating for this district “in all Cases whatsoever.”²²⁴ No state has any authority within this ten miles square, and I am glad they have not. Whatever is the line around the district constituting the District of Columbia, the important

²²² In 1832, Senators Henry Clay and Daniel Webster led Congress to reauthorize the charter of the Second Bank of the United States, but President Andrew Jackson vetoed the bill. See Edwin J. Perkins, *Lost Opportunities for Compromise in the Bank War: A Reassessment of Jackson's Veto Message*, 61 BUS. HIST. REV. 531, 533, 538 (1987). Jackson ran for reelection on an anti-Bank platform, and decisively defeated Clay, who ran on a pro-Bank platform. See *id.* at 548. When the Bank's charter expired in 1836, it became a private institution and folded in 1841. See *id.* at 532–33; Bray Hammond, *The Second Bank of the United States*, 43 TRANSACTIONS OF THE AM. PHIL. SOC'Y 80, 85 (1953).

²²³ See National Banking Act of 1864, ch. 106, 13 Stat. 99; National Banking Act of 1863, ch. 58, 12 Stat. 665.

²²⁴ U.S. CONST. art. I, § 8, cl. 17.

thing is that over that territory no state can exercise any authority whatever.

The power to legislate is exclusive in Congress. I said I was glad it is so. Why? When a squad of eighty-odd discontented soldiers during the War of the Revolution appeared around the hall in Philadelphia where the Congress was sitting, and demanded that certain things be done, threatening Congress, and the Governor of Pennsylvania was appealed to to disperse that mob and afford the requisite protection to the Congress, and he replied in substance that he had not the power, what was the result? The Congress of the United States that was controlling the great war of the United States went into the State of New Jersey and met for a time in the town of Princeton.²²⁵

And during the first administration, when an insurrection arose in Pennsylvania on account of an excise law passed by Congress, and a little rebellion arose there, and public meetings were held and mobs and strikes against the officers of the United States, making it uncomfortable for them to live there if they attempted to enforce that law. Luckily for the country, Washington was in the presidential chair, and Alexander Hamilton was Secretary of the Treasury, and Washington saw that if the government of the United States quailed before that rebellion in western Pennsylvania, he might as well quit, and he called out the militia of Pennsylvania, Maryland, and Virginia, warned those people in western Pennsylvania that he had taken an oath to execute the laws of the United States, and that he was going to suppress that disorder or the government should perish in the attempt. And the militia was set in motion—placed under Whitehorse Harry Lee—and when they got inside of Pennsylvania the rebels disappeared. They could not be found.²²⁶

²²⁵ Harlan refers to the Pennsylvania Mutiny of 1783. From 1781 to 1783, the Congress of the Confederation sat at Independence Hall, Philadelphia, Pennsylvania. *See* VARNUM LANSING COLLINS, *THE CONTINENTAL CONGRESS AT PRINCETON* vii (1908). On June 17, 1783, soldiers in the Continental Army sent Congress a message demanding their pay, which Congress ignored. *See id.* at 13. On June 20, about 300 soldiers mobbed Independence Hall. *See id.* at 20. A congressional committee led by Alexander Hamilton asked the Pennsylvania Council to protect Congress from the soldiers, but it refused, so Congress moved to Princeton, New Jersey. *See id.* at 25, 29.

²²⁶ Harlan refers to the Whiskey Rebellion. In 1791, Congress levied an excise tax on distilled spirits. *See* Act of Mar. 3, 1791, ch. 15, 1 Stat. 199. Distillers in Western Pennsylvania refused to pay the tax. In July 1794, the United States attempted to enforce the tax and provoked an armed rebellion. *See* Wythe Holt, *The Whiskey Rebellion of 1794: A Democratic Working-Class Insurrection* 10 (Jan. 23, 2004) (unpublished manuscript), available at <http://colonialseminar.uga.edu/whiskeyrebellion-6.pdf>. President George Washington sent three commissioners to negotiate with the rebels and called up the militia, which he placed under the command of Governor Henry Lee of Virginia. *See id.* at 11. In

Now, we have got here a district ten miles square in which the national government has its principal offices, and where no state has the right to come or to send its forces. Now, let anybody today get up a mob in the city of Washington and march to the Capitol on the hill and threaten the Congress of the United States if they do not do this, that, or the other thing, they will get in trouble.

How long would they stay around the Capitol? They know that the whole power of this great nation could be employed to suppress it, and no state—whatever may be the troubles or disaffection in its midst—has the right to exercise a particle of authority in this district. It belongs to the whole United States, is the seat of the national government, and that was the idea of having a particular piece of ground somewhere in the United States over which the authority of no state extended, over which Congress alone could exercise exclusive legislation.

The District of Columbia is a municipal corporation, and for this reason can be sued, and because it is allowed by acts of Congress to be sued.²²⁷ It is a municipal corporation under the authority of the United States. The City of New York is a municipal corporation, part of the State of New York. It is organized by the State of New York as a part of the machinery by which the State of New York conducts its affairs. Instead of the State of New York attempting to control all the details of the municipal affairs in the City of New York, it organizes a municipal corporation and invests it with authority to attend to this, that, or the other thing.²²⁸ So, we have the District of Columbia, but under the authority of the United States. District Commissioners are appointed by authority of an act of Congress. The laws in force here are those passed by Congress.

No doubt the thought will occur to you, what may Congress do in this District? How far may it go? Well, that is an important question. It is easily answered, however, although I have heard arguments made upon that subject that a little surprised me at the time. For instance, in the case of *Callan against Wilson*, 120 United States, which is a case that went from this district, where the question was whether certain parties who were

October 1794, the militia marched into western Pennsylvania and the rebellion collapsed. *See id.* at 63.

²²⁷ *See* Act of June 16, 1880, ch. 243, 21 Stat. 284 (providing for the settlement of all outstanding claims against the District of Columbia and conferring jurisdiction on the Court of Claims to hear the same); Act of Feb. 21, 1871, ch. 62, 16 Stat. 419 (creating a municipal corporation called “the District of Columbia”).

²²⁸ *See* Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 370–71 (1985).

indicted for a conspiracy to injure AB were entitled to trial by jury. It was argued by learned counsel that they were not entitled to a trial by jury, unless Congress chose to give it.²²⁹ And I put the question to counsel in argument, and he met it like a conscientious, consistent lawyer—cited Article V of the amendments to the Constitution, which says, that no person shall be held to answer to a capital or other infamous crime unless on indictment of a grand jury. Says I, “Can Congress authorize a man to be proceeded against for his life in the District of Columbia, except by indictment of a grand jury?” He said, “Yes.” “Well,” says I, “The same Amendment says private property shall not be taken for public use without just compensation. Can Congress provide for the taking of private property in this District for public use without just compensation?” “Yes,” says he. “Well,” says I, “What may not Congress do then in the District of Columbia?” “Well,” says he, “There is very little that it cannot do.” I put to him the further question, “Can Congress establish an order of people in the District of Columbia with titles and have an order of nobility here in this District?” He said, “Yes.” “Because,” said he, “the Constitution says that Congress shall exercise exclusive legislation in all cases whatever over the District of Columbia.”

Well, our court did not take that view of that provision of the Constitution, and we held in that case that the exclusive power of legislation which Congress had over this District was to be exercised with reference to all of the provisions of the Constitution relating to the rights of life, liberty, and property, and that the citizens of the District of Columbia were just as much entitled to the fundamental guarantees of life, liberty, and property, and to the benefit of all the provisions of the Constitution as the people in the states, and that the power given to Congress to pass exclusive legislation over this District meant that that legislation must be considered with reference to the fundamental provisions of the Constitution.

“[A]nd to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.”²³⁰ If the United States, with the consent of the state of Kentucky, purchased a particular piece of property in the city of Louisville on which to erect a custom house, and the title in fee passed to the United States, the United States could exercise exclusive jurisdiction over that

²²⁹ Callan v. Wilson, 127 U.S. 540 (1888) (Harlan, J.).

²³⁰ U.S. CONST. art. I, § 8, cl. 17.

piece of ground, and all that occurred inside of that building.

But mark you, that does not mean that the United States cannot become the owner of real estate inside of the state, except with the consent of the legislature of the state. The United States wants ground for a fort on the Ohio River in the State of Kentucky. The State of Kentucky may not want it there. The United States may want a piece of ground for the purposes of erecting a custom house or a post office, and the state may not want it there. But the United States may proceed to condemn property for those purposes without reference to the consent of the state. That is well settled.²³¹ In short, whatever is necessary to the execution of the powers of the United States, Congress may do without hindrance from any state. Therein lies the great difference between the government that we now have and the government we had before this.

And that brings us to the last clause of Section 8, which has been the battleground of political parties in this country ever since the organization of the union, and is to some extent today. That is, Congress shall have power, "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."²³²

Now, it has been said by some learned statesmen that that clause of the Constitution was not absolutely necessary, because if that had not been there the courts would have said, the country would have said, that when a power was granted to Congress, that carried with it the power to do whatever was necessary to give effect to the grant of that power. In other words, that when the Constitution gave Congress power to establish post offices and post roads, and stopped right there, that would have carried with it, by necessary implication, authority to do all that was necessary to subserve the purposes for which they were established.²³³

Now, that may be true. It is not necessary to discuss whether it would be true or not, though I may say this, that it is very probable that if this clause that I have just read had not been in the Constitution, from the very necessity of the case the courts would have considered the Constitution as

²³¹ See *Kohl v. United States*, 91 U.S. 367, 368, 371 (1875).

²³² U.S. CONST. art. I, § 8, cl. 18.

²³³ See, e.g., 3 STORY, *supra* note 43, at § 1227 ("It is only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of establishing the national government, and vesting it with certain powers. What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing, but the power of employing the means necessary to its execution?").

giving the power to pass any laws necessary to carry into effect a given grant of power. But all doubt upon that subject is removed by this clause, "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."²³⁴

Here is power to establish post offices and post roads, and the authority to pass all laws necessary to carry it into execution, and Congress may pass laws prescribing what sort of mail matter may be excluded from the mails of the United States. Congress shall have power to regulate commerce among the several states. Therefore, it may also pass laws to give effect to those regulations, that will punish those who obstruct those regulations that may be passed by Congress.

Out of that clause came the school of strict construction and liberal construction, and it is very amusing to hear a man say, with intense wisdom in his countenance, "I am for a strict construction of the Constitution."

"What do you mean by that?"

"Well," says he, "I am for so construing the Constitution that Congress shall not exercise any power that does not belong to it."

"Well," you might very well say, "Do you know of anybody favoring Congress exercising any powers that do not belong to it?"

Well, there he stops. His power of argument is at an end, for he has never seen just that man.

Well, there is another class of men who believe that Congress can do anything, that there is nothing that Congress cannot do under the general welfare clause of the Constitution. Whatever Congress thinks is for the general welfare, that it may do; therefore, they would have you pass a general divorce law applicable to all the states, and therefore they would have you pass a law establishing at the expense of the United States all sorts of reformatory institutions everywhere from one end of the country to the other.

Well now, those people are at the other extreme, but we have been protected in this country by the saving common sense of the American people. They have taken a path between these two extremes of cranks, and they have said, "Do not get excited and do not let your judgments run away, your passions carry your judgments astray; remember that this government has not all governmental power; it has not all legislative power; it is not the only government in this country."

We have got forty-odd other governments here, and this national government was established for specific objects. They are enumerated in

²³⁴ U.S. CONST. art. I, § 8, cl. 18.

this Constitution. The purposes to which the government of the United States is competent are named in the Constitution. The details are not given there. This Constitution is not a code of practice in statesmanship for the United States. It is a general enumeration of the power belonging to a government brought into existence to accomplish certain objects.

Therefore, when the question arose whether an act of Congress is within the competency of Congress under the rules now established and acquiesced in, you may inquire, what is the object of this act? Then you turn to this instrument and see whether there is any object there that will embrace this object at all. There is not; that is the end of it, that act of Congress is a nullity. But if there is the object that is embraced there, we then inquire, is the act necessary and proper?

Very well, what other considerations are you to take into view? Here is the Congress of the United States, brought into existence to determine what is necessary and proper; not absolutely, but within bounds. A bank of the United States was regarded by the Congress of the United States as one of the means to accomplish the ends of the government of the United States, to operate as a fiscal agent of the government of the United States.

Now, the Constitution does not say that Congress shall pass all laws that are indispensably necessary, absolutely necessary, that is not the language, but necessary and proper, and therefore the courts inquire, is there any relation between this act of Congress and this object? Is there any room to doubt that it has some relation to it? If it has, that is the end of the question, so far as the judiciary is concerned. If Congress may employ one or more means, and they are at all germane to the object itself, for Congress to determine which is the best, it is not for the judiciary to sit in judgment upon the acts of the representatives of the people in that regard.²³⁵

You will allow me to say just here that there are many people in this country who think that the function of the courts of the United States is to

²³⁵ See 8 REG. DEB. 1268 (1832) (statement of Sen. Henry Clay) (“The power to establish a bank is deduced from that clause of the Constitution which confers on Congress all powers necessary and proper to carry into effect the enumerated powers.”); Alexander Hamilton, *Opinion on the Constitutionality of the Bank of the United States* (Feb. 23, 1791), reprinted in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 97–100 (M. St. Clair Clarke & D.A. Hall eds., Washington, Gales & Seaton 1832). But see 6 THOMAS JEFFERSON, *Opinion on the Constitutionality of a National Bank* (Feb. 15, 1791), in THE WORKS OF THOMAS JEFFERSON 197–204 (Paul Leicester Ford ed., 1904); Andrew Jackson, *Bank Veto Message* (July 10, 1832), reprinted in 1 ADDRESSES AND MESSAGES OF THE PRESIDENTS OF THE UNITED STATES FROM WASHINGTON TO HARRISON 418, 423–24 (Edward Walker ed., New York, D. Appleton & Co. 1841) [hereinafter ADDRESSES AND MESSAGES].

run this government; is to lay its hand upon every branch of the government; approve this or reject that according to the notion the court may have as to the expediency of the matter brought to their attention.

Now, the Supreme Court of the United States long ago said, and that is the rule of the courts of all the states, that no court shall strike down an act of legislation as unconstitutional and void unless it is clearly so; unless it is palpably so.²³⁶ If the court doubts—here is room for argument on both sides of this question as to whether these means are germane to this object, there is room here for debate—there being room for debate that ends the responsibility of the judiciary. The responsibility rests with the United States and not with the courts. And it will be a dangerous period in the history of this country if we shall ever reach the point when the action of the executive of the United States and of the legislative branch of the United States is to be supervised by the judiciary on the ground of mere expediency and policy.

There are three separate coordinate independent branches of the government: executive, legislative, judicial. The judiciary handles judicial matters, not political matters. The judiciary are to see that the fundamental law, which is the supreme law of the land for all, for Presidents, Congress, Courts, and all others, to see to it that the fundamental law is not violated, is not infringed upon. But when the question arises as to whether a particular law does or does not transcend the authority of the government, if the court doubts, its duty is to hold its hands off; respect the will of the people expressed in the law, and await the action of the people upon the expression of public sentiment.

Section 9. “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”²³⁷

There is an illustration of the hesitancy on the part of the men who framed this instrument about using any word that indicated the recommendation in the Constitution of the institution of slavery in mere words. The word “slave” is not mentioned there; colored persons or

²³⁶ *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (Harlan, J.) (“If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.”).

²³⁷ U.S. CONST. art. I, § 9, cl. 1.

Africans are not mentioned, and yet that clause had its origin out of the relation in a part of this country to that people.²³⁸ The people of some of the northern states were beginning to apprehend trouble on account of the existence in this country of a large class of people, human beings, held in the bonds of slavery, although the Declaration of Independence said that all men are created free and equal, and upon that they went into the War of the Rebellion.

But the statesmen of Virginia said to them in reply, “These people are not here of our seeking; they were brought here against our will, and the ships of the northern states, as they were called, helped to bring them here. Here they are. What are we to do with them? They have become now intertwined with our social organization; large amounts of money invested in this property. We do not want any violent action upon that subject.” And they threatened to divide the members of the convention so that no Constitution could be adopted, and that was put in there as a compromise to the effect that the government of the United States shall keep its hands off of the importation of these persons to this country up to 1808. After that they may prohibit their importation, as we have prohibited it since 1808. If that had not been made a part of the Constitution, it is quite certain that this instrument would not have been adopted.²³⁹

Now, this clause upon which we are now commenting is a clause of considerable importance, because it is a denial of powers both to the federal and state government.

²³⁸ See 3 STORY, *supra* note 43, at §§ 1325–31.

²³⁹ See, e.g., 1 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 443–44 (Gaillard Hunt & James Brown Scott eds., 1920) (showing Madison’s notes from debates on August 22, 1787 in the Federal Convention of 1787).

LECTURE 14: JANUARY 29, 1898

I was inviting your attention at the last meeting to the ninth section of Article I, declaring that “The migration and 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 1808, but a tax or duty may be imposed on such importation, not exceeding \$10 for each person.” I stated to you that this clause had its origin in difficulties which arose at that time as to the importation into this country, or the bringing to this country, of African slaves, and that section was a compromise between those in this country who did not wish the extension of that institution at the time, which had grown to such proportions that it could not well be eradicated from that part of the country without a disturbance of their social conditions; therefore, the men from the South, speaking generally, having agreed that Congress might lay its hands on that subject after the year 1808.

But I ought not to stop with that statement without some further explanation, because you might get the impression that the people of the South were unitedly in favor of the extension of slavery at that time. But the history of those days shows that such was not the fact. There were exceptions on both sides of what we more literally call Mason’s and Dixon’s Line.²⁴⁰

Well, generally speaking, the people of the northern colonies were opposed to the institution of slavery on all grounds, especially on moral grounds. There were persons even in Boston at that time that were engaged in and profited by the importation of slaves from Africa into this country, made it a matter of merchandise.²⁴¹ And during the period of the Revolution you will find in the old newspapers of that day now and then advertisements of runaway slaves, although there were very few at that time, and although the great masses of people were hostile to that institution.

²⁴⁰ See generally PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* (2d ed. 2001).

²⁴¹ See JOANNE POPE MELISH, *DISOWNING SLAVERY: GRADUAL EMANCIPATION AND “RACE” IN NEW ENGLAND 1780–1860*, at 74–76 (1998). Massachusetts officially abolished slavery on March 26, 1788, but the slave trade continued in Boston until 1801. Cliff Odle, *The Rise and Fall of the Slave Trade in Massachusetts Part II*, FREEDOM TRAIL FOUND., <http://www.thefreedomtrail.org/staging/beta/educational-resources/article-rise-and-fall-of-slave-trade-part2.shtml> (last visited June 15, 2013).

So there were exceptions in the South. It is not stating it too strongly to say that all the leading statesmen of the South, with few exceptions, were opposed to the institution of slavery, and regretted that it was there. That was Mr. Jefferson's feeling about it.²⁴² And the most terrific arraignment of the institution of slavery upon high moral and public grounds was made in the convention which framed the Constitution by George Mason of Virginia.²⁴³ Nothing which proceeded in later days from Garrison²⁴⁴ or Wendell Phillips exceeded the denunciation of George Mason, and yet he was a man who had the confidence and affection of all men in the State of Virginia.

But this clause, like many others in the Constitution, although arising out of and suggested by a particular state of case, is much broader in the language used than that occasioned. "The Migration or Importation."²⁴⁵ It is not simply importation. The word "importation" implies that you are bringing something in that does not partake of human life, of human liberty. It was natural to apply the word "importation" to slaves, but there is the other word, "migration."

The migration of such persons as any of the states now existing shall think proper to admit shall not be prohibited by any act of Congress prior to 1808, but since that time, the whole question of migration of persons to this country belongs to the government of the United States. And it is partly

²⁴² See, e.g., Paul Finkelman, *Thomas Jefferson and Antislavery: The Myth Goes On*, 102 VA. MAG. HIST. & BIOGRAPHY 193, 203 (1994) ("Jefferson's 'hatred' of slavery was a peculiarly cramped kind of hatred. It was not so much slavery he hated as what it did to his society. This 'hatred' took three forms. First, he hated what slavery did to whites. Second, he hated slavery because he feared it would lead to a rebellion that would destroy his society. Third, he hated slavery because it brought Africans to America and kept them there. None of these feelings motivated him to do anything about the institution.").

²⁴³ 1 MADISON, *supra* note 239, at 444 (summarizing the remarks of George Mason: "Every master of slaves is born a petty tyrant. They bring the judgment of heaven on a Country. As nations can not be rewarded or punished in the next world they must be in this. By an inevitable chain of causes [and] effects providence punishes national sins, by national calamities. He lamented that some of our Eastern brethren had from a lust of gain embarked in this nefarious traffic. As to the States being in possession of the Right to import, this was the case with many other rights, now to be properly given up. He held it essential in every point of view that the Gen[eral] Gov[ernment] should have power to prevent the increase of slavery.").

²⁴⁴ Harlan refers to William Lloyd Garrison, a founder of the American Anti-Slavery Society and editor of *The Liberator*, an abolitionist newspaper. See *William Lloyd Garrison and The Liberator*, U.S.HISTORY, <http://www.ushistory.org/us/28a.asp> (last visited June 15, 2013).

²⁴⁵ U.S. CONST. art. I, § 9, cl. 1.

under that clause that Congress has passed the Chinese Exclusion Act,²⁴⁶ by which we exclude Chinese from this country absolutely, with a few exceptions. But a good many come nevertheless—they all look alike. A little difficult to enforce that law, particularly because of the invisible line that separates this country from Canada. They can land at Victoria and there is a wide space of country all along between the United States and Canada through which they can come. But the provision suggests something more far-reaching and extensive than the mere exclusion of Chinese.

The power of the government of the United States to exclude any particular people from our shores is beyond question. We could exclude any particular race anywhere on the Earth from our country by an act of Congress, and say “You shan’t come here. Whoever we may want to be here, we do not want you.”²⁴⁷

Well, of course, it is impossible to exclude everybody. We have got too much coast. But we may limit it, and we may limit it if we choose to those people only who can understand our language, who can read our Constitution in our own language. And we can exclude also, if we want—we do in terms, I believe, do so by some act—paupers and criminals. But they are badly enforced, those acts, and the nations of the Earth are unloading upon this country all their criminals, or a good many of them.

A gentleman now high in the public service, one of our ambassadors abroad, told me upon one occasion that he happened to be in an English court, and witnessed the trial of a man for some crime of which he was found guilty. He was beyond question guilty, and it was a felony under the English law, but sentence was postponed on motion of his attorney until he could ascertain whether the county would not assist him to go abroad. The county did assist him, and he went abroad. The English county got rid of the expense of maintaining him there, and got rid of the evil consequences of having such a fellow as a part of its citizenship.

And that is being practiced, I have no doubt, in all the nations of Europe. And we sit idly by while that is being done. And we are having infused into our civilization here vast bodies of men that are disqualified to understand the duties of citizens. And they are collecting in the great cities

²⁴⁶ Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882).

²⁴⁷ See, e.g., *Lem Moon Sing v. United States*, 158 U.S. 538, 543 (1895) (Harlan, J.) (observing that “according to the accepted maxims of international law, every sovereign nation has the power, inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe”).

of the country—New York and Chicago and Boston and Baltimore and Cincinnati and New Orleans—so that to the far-reaching statesman of this day, the most difficult problem we have got before us to solve is how to govern those great cities.

Here is the City of New York today—greater New York—now nearly large enough to have control of each branch of the legislature of that state.²⁴⁸ Cook County, Illinois is large enough in population to enable either one of the political parties there in sending delegates to the state convention to furnish nearly delegates enough to make the nomination of their party.²⁴⁹ And if there happens to be bosses, they have only to stipulate for the vote of a few counties, and they nominate the candidate, and it is a real peril that is before us.

There is no trouble in this country as to its future, outside of these great cities. We can rely with absolute confidence upon the sound judgment of the American people upon any proposition—outside of these great cities—which you will give them time to think about and to formulate in their mind. You have only to tell them what the propositions are, give them an opportunity to hear both sides, and although they may go astray one year, they will come back to their senses the next year, and in the end their judgment will be that which is best for the common interest of all. And we may all express the hope that this power of the government of the United States will be exercised with a closer regard to our institutions, with a closer regard to what is before this country. And what may happen to it if we do not preserve in its integrity those ideas, the idea which underlies our institutions, which is not simply liberty, but liberty regulated by law?

Now, I pass to the next clause. “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.”²⁵⁰

²⁴⁸ In 1900, the population of New York City was 3,437,202 and the population of New York State was 7,268,894. Campbell Gibson, *Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990* (U.S. Bureau of the Census, Population Div., Working Paper No. 27, 1998), available at <http://www.census.gov/population/www/documentation/twps0027/twps0027.html>; Richard L. Forstall, *New York, Population of Counties by Decennial Census: 1900 to 1990*, U.S. BUREAU OF THE CENSUS (Mar. 27, 1995), <http://www.census.gov/population/cencounts/ny190090.txt>.

²⁴⁹ In 1900, the population of Cook County, Illinois was 1,838,735, and the population of Illinois was 4,821,550. Richard L. Forstall, *Illinois, Population of Counties by Decennial Census: 1900 to 1990*, U.S. BUREAU OF THE CENSUS, (Mar. 27, 1995), <http://www.census.gov/population/cencounts/il190090.txt>.

²⁵⁰ U.S. CONST. art. I, § 9, cl. 2.

You know already what the writ of habeas corpus is, I take it. Briefly stated, it is a writ issued by some judge or some court, acting under a statute, directed to the man who has the custody of a human being, and requiring that man to make a return and show the ground upon which he deprives that man of his liberty.

Now, there is no privilege that we enjoy greater than that. There is no feature of our system which more clearly distinguishes our system of government from the continental system than that. It does not exist even in the Republic of France to the extent that we have it here.

Now, what does it mean, if there is a rebellion on hand? Why, the arm of the government is not to be paralyzed by writs of habeas corpus. If there is a rebellion on hand, there must be power somewhere—uncontrolled by the civil tribunals—that can lay its hands upon that rebellion and extinguish it. And the movements of the armed forces of the United States to suppress the rebellion are not to be disturbed by Tom, Dick, and Harry, suing out writs of habeas corpus directed to the general, commanding the forces to stop his movements and cause him to appear in a civil court, and tell by what authority he has got a man under arrest.

Those men were wise men. They knew that the suppression of a rebellion was a serious matter, and that all minor considerations must step aside, and the whole country must put itself behind the government of the country in suppressing that rebellion. We must all stop for the time being talking about abstract questions, and we must say to the general of the army, “Go ahead and put down that rebellion in the only way it can be put down, by armed forces.”

Therefore, if there is a rebellion, the writ of habeas corpus may be suspended. It is a serious question sometimes as to how it is to be done, whether by the President alone or by an act of Congress.²⁵¹ The important question is that it may be suspended, and so in cases of invasion. The same principles apply in that case as in the case of rebellion, but with the exception of these two cases, the privilege may not be suspended.

This is an authority of the states as well as of the United States.²⁵² We have got an immense country here, three thousand miles I believe from one ocean to the other. We have got seventy millions of people or more. This

²⁵¹ See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); *Ex parte Merryman*, 17 F. Cas. 144, 151–52 (C.C.D. Md. 1861) (No. 9487) (Taney, Circuit Justice); 3 STORY, *supra* note 43, at § 1336.

²⁵² The Suspension Clause is generally understood to limit only the United States. See, e.g., *Gasquet v. Lapeyre*, 242 U.S. 367, 369 (1917); *Munn v. Illinois*, 94 U.S. 113, 135 (1876).

Constitution says that no man—whether he is a citizen of this country or not—no human being shall be detained in the custody of any authority in this country, beyond the power of that man to have that matter investigated.

There was a time in the mother country when that was not so. It took a great many years of fighting and struggles, and raises very arbitrary power, that privilege. I have with my own eyes looked down into a dungeon in the old Tower of London—no light in it—in which human beings were once placed by the arbitrary order of a Secretary of State, or King or Queen, and held at their pleasure, sometimes for months or years, with nobody having the right to communicate with him. His wife or children denied even the right to see him. His attorney not being able to see him, and the government under no obligation by existing law to bring him out into the open air into a court of justice to tell by what authority they detain him.

But finally the right to that writ was established in England, and became established before our government was founded.²⁵³ And the principle is incorporated in every constitution in this country, state and federal, so that under the existing statutes, if a man were to apply to me at my chambers for the writ of habeas corpus, alleging that he, or somebody pleading for him, that he was detained by a sheriff in lower California in jail in violation of the Constitution of the United States, I have the authority under the existing statutes of the United States to issue a writ of habeas corpus, addressed to that sheriff in California, and order him to bring that man before me here in the City of Washington, with the reasons for his detention in custody.²⁵⁴

I would not issue such a writ, because I would tell that man to go to the United States judge in the State of California nearby where the man was. But I would have the power to grant it, and what would the officer do? Why he would have to make a return to that writ. He would say, “I am holding this man in custody by virtue of the order of a certain court, granted on a certain day, in a certain case. I submit a copy of the mittimus. That is my authority.”

“Well,” says the petitioner’s counsel, or friend, “that is no authority, that court has acted without jurisdiction, that court has put this man in jail in violation of the Constitution of the United States under a statute which is void under the Constitution of the United States.”

²⁵³ See Habeas Corpus Act, 1679, 32 Car. 2, c. 2.

²⁵⁴ See *Robb v. Connolly*, 111 U.S. 624, 625 (1884) (Harlan, J.).

And upon that, issue would be taken, and if the judge or the court found that was true, that the man was thus held under a statute void under the Constitution of the United States, then the court or judge would hold that he was held in violation of the Constitution of the United States and would order his discharge, set him at liberty.

The most difficult application of this principle, however, arises in our special system here, while the man is in custody under a statute of a state, not federal authority. But the state is bound to respect this Constitution. This Constitution is the supreme law of the land. Never let your minds lose sight of that idea, that this Constitution, on its face, says in words that it is the supreme law of the land. The law that is supreme is the law which is above every other human law. It is a law that has to be respected, and I repeat what I have said before, because it is important for you to never overlook that fact, that every judge of every state court in this union, down to and including every justice of the peace, takes an oath to support the Constitution of the United States.

Therefore, it necessarily follows that an act of a state legislature that is in conflict with the Constitution of the United States is not law, and anything done by an officer or state that is violative of the Constitution is a void act, which nobody is bound to respect. Let me, therefore, suppose the case of a man arrested by a state constable or sheriff on an indictment by a grand jury in a state court, which indictment appears on its face to be based upon an act of the state legislature, upon an indictment and warrant of arrest, and AB is arrested, and not giving bail he is put in jail to answer the indictment at the next term of the court.

Well now, is he remediless because that is done under a state law? By no means. He can appeal to the supremacy of the Constitution of the United States. He can say, if such be the fact, "This whole proceeding against me is null and void. This act of the state legislature is unconstitutional because it is contrary to the Constitution of the United States. Therefore, this indictment is a nullity. This warrant of arrest against me is a nullity. This act of the sheriff is a nullity, and therefore they are holding me in this jail, depriving me of my liberty, in violation of the Constitution of the United States."

Well now, if a man in that condition were to present his application for a writ of habeas corpus to me, I could grant it, and I could have that man brought before me—or in the circuit court where I am sitting, if it be within that judicial circuit—and I could investigate that question. If I came to the conclusion that the man was held in violation of the Constitution and laws of the United States, I could discharge him.

Well now, you will say that is a pretty serious matter, that that judge of the court of the United States could take a man out of the custody of the state authority prescribed under a state law and discharge him from custody. Why should that be allowed? Why should that be done?

Why, it is because of the supremacy of the laws of the United States. And a judge of a court of the United States is under a duty in the case before him to see that that Constitution is respected.

But in the case that I have put to you, when the return was made showing that this man was held under a state prosecution, under a state indictment, under a law passed by the state, I would say—not that I would be bound to say so—but I would say to that petitioner, you must stand your trial in the state court. I will not discharge you. Go back and stand your trial in the state court. The state court may itself determine that that state law is unconstitutional and void. The duty rests upon the state judges, as well as upon the judges of the United States, to enforce the Constitution of the United States as the supreme law of the land.

Therefore, the rule has been adopted by the Supreme Court of the United States, except in a few cases of special character, not to interfere by writ of habeas corpus with the regular proceedings against a man in the state under the state statutes. You can very easily see how great trouble might arise in this country by this cross-firing between the state and federal authorities, because under the statutes as they now stand, a man might be on trial, actual trial, in a court of a state for an offense under the laws of the state. The federal judge, or the federal court, can by writ of habeas corpus send the marshal of the United States into that courtroom and take hold of that man, and bring him before the federal judge, and inquire whether the man is being deprived of his liberty in violation of the Constitution of the United States.

But that would be an unseemly proceeding. That would tend to arouse a conflict between state and federal authorities, and therefore the rule adopted is that if a man is indicted in a state court and has not yet stood his trial, that for the sake of comity between these two governments we will not discharge that man in ordinary cases from the custody of the state authorities, but let him go into the courts of his own state and fight it out. It may be that the state court will discharge him. The state court may hold the statute not to be void. Then take your writ of error to the Supreme Court of the United States, and when the state authorities have got through with you, when they have gone to the utmost limit, if by the final judgment of the highest court of the state and you are still deprived of your liberty,

you then have a remedy by habeas corpus to the highest court of the United States.²⁵⁵

The Supreme Court of the United States has got jurisdiction over the federal judgment of every one of the highest courts of the states of this union to determine the question whether a man has a federal right that has been invaded. Early in the history of the Supreme Court that right was disputed in the case of *Martin and Hunter*, I believe, along about 11 Peters.²⁵⁶ A judgment of the highest court of the state was brought into the Supreme Court of the United States for re-examination. It was a part of the old original Judiciary Act that the Supreme Court of the United States should have the power to review, re-examine, reverse, or modify the final judgment of the highest court of the state denying a man a right claimed by him under the federal Constitution. Virginia said in that case that the Supreme Court of the United States has nothing to do with the final judgments of our highest court.

What have they got to do with them? The Virginia politicians, some of them, said—including Mr. Jefferson—that the Court of Appeals of Virginia have the right to pass on this case, and no tribunal of any other can sit on that. “We have jurisdiction to determine whether or not the federal Constitution has been violated, and if we say it has not been violated, that is the end of it.”²⁵⁷

“No,” says the Supreme Court of the United States, the tribunal established by the supreme law of the land for the final determination of questions of that character, with power to see to it that this supreme law is not violated by any individuals or by states. And that court said, “Of what use is it to declare this to be the supreme law of the land, if any power in any state of this land can deny a right which belongs to a man by this Constitution of the United States?” And that power of review was maintained.

“Well,” says the Court of Appeals of Virginia, “you may review it, if you choose, and you may reverse it and send it back, but we won’t enter your judgment; you cannot lay your hands upon us judges of the Court of Appeals of Virginia and make us enter your judgment reversing it. We won’t do it.”

²⁵⁵ See *Ex parte Royall*, 117 U.S. 241, 241 (1886) (Harlan, J.).

²⁵⁶ *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 323–24 (1816).

²⁵⁷ See generally James Madison, Virginia Resolutions of 1798, reprinted in 4 THE DEBATES, *supra* note 26, at 528.

Well, the Supreme Court was not to be outdone in that way, and they said, “Very well, if you don’t choose to enter our judgment, we will enter the final judgment here. We will make our judgment the final and conclusive judgment in the same, and we will execute it through the marshal of the Supreme Court of the United States.”

One would have supposed that would have ended the controversy, but no. Twenty years ago—as recently as that—the first term of the Supreme Court of which I had the honor to be one of its members—and I would not have you suppose from that that I am an old man at all—reversed the final judgment of the Court of Appeals of Virginia, and the court refused to enter that judgment. Well then, we entered the judgment; we made it final and put it in a shape that we thought was the end of the litigation.²⁵⁸

Now, there was another side to this question you ought to know about. Perhaps the question has come into your minds already. If the federal courts in executing the federal Constitution may take a man out of the custody of the state authority by habeas corpus, why may not the courts of the state take a man out of the custody of the federal authorities upon the ground that he is held by the federal authorities in violation of the Constitution of the United States?

Well, that is a pretty fair question. That looks reasonable at first blush, but the rule is well settled that a state order cannot disturb the custody of the United States authorities in their possession of a man held under proceedings in the United States court. Therefore, when a state judge in Wisconsin issued a writ of habeas corpus to a general commanding the army of the United States at a particular point in Wisconsin for that general to appear before him to show cause why he had a young boy in the army as a soldier of the United States, proceeding upon the ground that the boy was under the age fixed in the statutes of the United States, and there was no authority in the general to hold him. The general replied—treated the writ respectfully—said in substance, “I am an officer of the United States, and I am holding this boy by authority of the United States, and I cannot produce him into court; I am not allowed to do so by the orders under which I am acting.”

Now that was Tarble’s case in 13th Wallace, and there it was settled that the state authorities could not disturb the United States authorities.²⁵⁹ Why the difference? One reason of the difference is—and that is an all-sufficient one—that one is the supreme government of the country, the

²⁵⁸ *Williams v. Bruffy*, 102 U.S. 248 (1880).

²⁵⁹ *Tarble’s Case*, 80 U.S. (13 Wall.) 397 (1871).

highest government of the country. The laws of the United States are the supreme law of the land, and therefore it is incongruous that the authorities of the state should discharge from the custody of the laws of the United States. But that is not the end of the matter.

We can go through the courts of the United States and finally bring it to the Supreme Court of the United States, and that court is not foreign. Do not get that idea in your heads, that the courts of the United States are courts of a foreign government. A judge of the court of the United States, sitting in the State of New York, sits there to administer in part—and that is the most that he does—the laws of the State of New York, the court getting jurisdiction by reason of diverse citizenship. And a federal court sitting in the State of New York is in every sense a court of the State of New York, and the Supreme Court of the United States is a court for all the states and all the people of all the states.

Two cases I want you to take a minute of. I want you to read on these questions:

Ex Parte Royall, 117 United States, 241.²⁶⁰ Mr. Royall is a lawyer of Virginia, most estimable gentleman, still lives. He was arrested under a statute of Virginia because he was practicing law without a license. He went to jail without giving bail, and applied to the Supreme Court of the United States for a habeas corpus. We held that he must stand his trial in the state court before the United States would interfere.

New York against Eno, 155 United States, 89.²⁶¹ That was a case of a gentleman indicted in one of the state courts of the United States for alleged fraudulent acts as an officer of a national bank, and as soon as he was indicted he had business in other lands. He retired in good order to Canada, and after being there twelve, fifteen years, or more, he came back to the State of New York. Of course, it was all an arranged affair, and he surrendered himself to the custody of the state authorities, I believe, and then sued out a writ of habeas corpus, alleging that the prosecution against him in the courts of the State of New York were in violation of the Constitution of the United States, and covered a subject with which the state could not deal, and he was discharged by the court below.

We reversed the matter and said the court below ought not to have discharged him, “Appear in the state court and make your fight there. That state court may discharge you, and if it does not, take the case to the highest court of the State of New York. If they do not discharge you, then

²⁶⁰ *Ex parte Royall*, 117 U.S. 241 (1886) (Harlan, J.).

²⁶¹ *New York v. Eno*, 155 U.S. 89 (1894) (Harlan, J.).

come to this court upon a writ of error, but do not talk about interference with the state proceedings until you have resorted to all of those methods.”

Take one other case in that connection—Robb against Connolly, 111 United States, 624.²⁶² That was a case in which it was laid down that the state court is under precisely the same obligation to support the Constitution of the United States that the federal courts are, and that their duty is to enforce that instrument just as well as in the federal court.

²⁶² Robb v. Connolly, 111 U.S. 624 (1884) (Harlan, J.).

LECTURE 15: FEBRUARY 5, 1898

“No Bill of Attainder or ex post facto Law shall be passed.”²⁶³

A bill of attainder is one which taints, in a legal sense, the blood of a subject or citizen. That cannot be done in this country. Every man in this country stands upon his own person, his own right, and he is not to be affected by the fact that his ancestor may have been guilty of some crime for which he may have been convicted.

A man is not to be tainted in this country because he is a convict. He is tainted in a large sense. His character is destroyed when he is convicted of a felony and put inside of the walls of a penitentiary, but whatever bad influence or effect comes from that, it is confined to him. It does not affect the rights of his wife, or his children, or any descendent.

The government of the United States has the power by legislation to declare the punishment of treason against the United States, but the Constitution expressly declares that no attainder of the person shall work corruption of the blood or forfeiture, except during the life of the person attainted. In the last civil war, there was some legislation that forfeited the estate of those who were engaged in active rebellion against the government, but it was well settled and recognized that the real estate of the person thus engaged in rebellion could not be taken absolutely away from his tribe or family, and that he could only forfeit his life estate.²⁶⁴ Upon the termination of that life estate, the heirs came into possession of it.

“No . . . ex post facto Law shall be passed.”²⁶⁵

There is a common impression that this is a civil matter and matter of contract. A man not acquainted with the word sometimes says a law passed by the legislature relating to a particular civil matter or particular contract is ex post facto.

Well now, the phrase has nothing to do with civil matters at all. Ex post facto laws are those which relate to criminal proceedings.²⁶⁶ The meaning of an ex post facto law was well settled at the time the Constitution was adopted, well settled by judicial decisions in England, and

²⁶³ U.S. CONST. art. I, § 9, cl. 3.

²⁶⁴ See Act of July 17, 1862, ch. 195, 12 Stat. 589; Resolution of July 17, 1862, no. 63, 12 Stat. 627 (“[N]or shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life.”); Act of Aug. 6, 1861, ch. 60, 12 Stat. 319; see also *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1870).

²⁶⁵ U.S. CONST. art. I, § 9, cl. 3.

²⁶⁶ See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

to state it shortly, an *ex post facto* law is one which makes that criminal today which was not criminal when that act was done. *Ex post facto*, that is, after the deed.

Now, if today I do a certain thing that everybody regards as criminal in its nature, as dishonorable in its nature, if there is no law in force at the time I commit that deed which subjects me to punishment for it, it is beyond the power of any legislative body in this country to affix a crime to that. I am to be punished according to the law in force at the time the crime was committed.

A particular injury if committed today is punishable say by five years confinement in the penitentiary. Well, by the time a man is tried, a law has been passed which fixes the punishment at twenty years. Well now, he is to be tried by the law in force when he committed the offense, and you cannot say he shall be put in the penitentiary for twenty years if found guilty of that crime, if by the law in force when he committed the crime the utmost penalty in the way of punishment was five years.

A case in the Supreme Court of the United States—not a very old case—was of this sort.²⁶⁷ When an offense was committed in the state where that particular one was committed, there was no such thing as solitary confinement as a part of the punishment for any length of time, but by the time that man was tried there was a statute of the state which provided for solitary confinement from the time of the conviction until the execution, and the question was whether that was *ex post facto*. Did that add to the man's punishment; did it increase the punishment?

A majority of our court held that it did; that according to the testimony of scientific men everywhere, no punishment is more terrific than that of solitary confinement. To think of being in a narrow cell or place where no human being could see you, or talk with you; from which for a large part of the twenty-four hours light was excluded; where the sun never shone at all; where you never saw a human face; where when your meal was brought, a little door was lifted and it was shoved in to you—you would see a man's hand but you would not see his face. And those who have studied that subject say that it is terrific in its operation upon the human mind. The majority of our court held that, as to the crime for which that man was convicted, it was not competent for the state to add the additional punishment of solitary confinement, even for a few months.

Now, observe that this inhibition applies not only to Congress but to the states as well. Congress cannot make an *ex post facto* law, the states

²⁶⁷ *In re Medley*, 134 U.S. 160 (1890).

cannot, and therefore a man may bring to the Supreme Court of the United States a case from the highest state court, where that court is adjudged to have enforced against the person a law that is *ex post facto* in its nature.

“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”²⁶⁸

What is a capitation tax? Why, it is derived from a Latin word which means head. It is called in some of the states a head tax. In some of the states, they impose a head tax of a dollar on each man—or of two dollars—and in some states they won’t allow a man to vote unless he pays that head tax. It is quite an offensive tax in many localities, though it ought not to be. Every man ought to be able in some way or other to pay a tax of two dollars a year.

“[O]r other direct, Tax”²⁶⁹

That is to be laid on the basis of inhabitants enumerated. Now, if you want to find a discussion on the subject of what are direct taxes, if you will look to the case of *Pollock against the Farmers’ Loan and Trust Company*, at the close of 157 United States, and the same case in 158 United States, you will find there all that the Supreme Court of the United States, and each of its members, had occasion to say awhile back upon an income tax.²⁷⁰ I do not intend to enter upon a discussion of what an income tax is. I have elsewhere said on that case all that I propose to say, unless another case comes up.

Perhaps you ought to know why there happens to be two reports on that case. When it was at first before the Supreme Court, they considered only one question, and upon the determination of that question held the income tax law to be unconstitutional.²⁷¹ Upon the rehearing, it was held that there were other questions, and a rehearing was granted and the court had one more member at the last hearing, and then the court expanded its decision.²⁷² You will see when you get to that case that there was a tax

²⁶⁸ U.S. CONST. art. I, § 9, cl. 4, *amended by* U.S. CONST. amend. XVI (1913) (“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.”).

²⁶⁹ *Id.*

²⁷⁰ See generally *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895), *vacated on reh’g*, 158 U.S. 601 (1895), *overruled by* *South Carolina v. Baker*, 485 U.S. 505 (1988).

²⁷¹ *Pollock*, 157 U.S. at 442 (holding that a tax on income from real estate is a direct tax and that a tax on income from a municipal bond is impermissible).

²⁷² *Pollock*, 158 U.S. at 601 (holding that a tax on individual income is a direct tax). When *Pollock* was first argued on March 7, 1895, Justice Jackson was absent. While a majority of the justices agreed that a tax on income is a direct tax and that a tax on income

levied upon the income deriving from real estate, and the question was whether that was a direct tax. The court held that it was a direct tax, that a tax upon the income of real estate was in the sense of the Constitution the same as a tax upon the real estate itself. And the court in the last case held that a tax upon bonds, stock, *et cetera*, was a direct tax.

Practically, it would not amount to much whether direct or indirect, but for the basis prescribed—a direct tax is to be laid upon the basis of population among the states. Take for instance any state that is full of income derived from real estate, and full of bonds and stocks. You put the tax on that state in proportion that the number of inhabitants of that state bear to all the inhabitants of the union. Now, the result might be that a tax on bonds—for instance, an income from real estate might be put on the inhabitants of another state in proportion to its population, and it would have to be borne by a very few, because a very few would own bonds and stock from which an income was derived. Now, read that case if you wish to get the views of the majority and the minority of the Supreme Court.²⁷³

“No Tax or Duty shall be laid on Articles exported from any State.”²⁷⁴

Why was that? Suppose any state in this union could lay a tax upon articles exported from that state to any other state. Suppose each state of the union could do that. That would disturb the freedom of commerce, and the ability of people to find a market in other states for the products of their farms or skill and get the very best prices for them.

Now, a man may raise a lot of horses. If he raises them in the State of Tennessee he can take them out of that state and into any state of this union without asking the State of Tennessee or any state into which he takes them, unless they are diseased. Tennessee cannot make you pay a tax for

from a municipal bond is impermissible, they were split on whether a tax on individual income is a direct tax, and the Court issued a narrow opinion on April 8. The parties asked to reargue the case when Justice Jackson returned, and the Court agreed, hearing arguments on May 6, and issuing a new opinion on May 20. See David G. Farrelly, *Justice Harlan's Dissent in the Pollock Case*, 24 S. CAL L. REV. 175, 176 (1951); Note, *William Jennings Bryan and the Income Tax: Economic Statism and Judicial Usurpation in the Election of 1896*, 16 J.L. & POL. 163, 180 (2000).

²⁷³ Harlan strongly objected to the Court's holding that a tax on individual income is a direct tax, largely because he saw it as an assertion of states' rights. *Pollock*, 158 U.S. at 638 (Harlan, J., dissenting) (“The recent Civil War, involving the very existence of the nation, was brought to a successful end, and the authority of the Union restored, in part, by the use of vast amounts of money raised under statutes imposing duties on incomes derived from every kind of property, real and personal, not by the unequal rule of apportionment among the states on the basis of numbers, but by the rule of uniformity, operating upon individuals and corporations in all the states.”)

²⁷⁴ U.S. CONST. art. I, § 9, cl. 5.

the privilege of taking them out of the state to sell, and that sometimes may become a very onerous tax and its effects far-reaching.²⁷⁵

For instance, I have heard it said by gentlemen who were well skilled in that matter, that if we were to reduce—for instance, if we had a tax on the importation of coffee and sugar coming into this country and were to reduce that tax, it would not affect the price of coffee or sugar. Now, ordinarily, as a general rule, putting a tax on goods imported into this country does make it a little more costly for us here to buy them, but gentlemen who have looked into it say that it is not the same with coffee and sugar. “Why?” I said. One of them said, “As soon as you reduce the importation of coffee, why the government of Brazil imposes a tax on coffee, and so when it gets here, a man to whom it is consigned in this country must sell it for just what he did before, although he pays less tax here than his government. He has to do that to meet the tax put upon the coffee by Brazil.”²⁷⁶

If that principle were applied between the states of this union, our trade would get into confusion. For purposes of trade, there are no state lines; you do not know a state line. No state can erect a barrier between itself and another state in reference to merchandise going from one state to another. The utmost it can do in the protecting of products from one state coming into another is where it imperils the health or morals of the people of the state. They can protect that.

“No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another”²⁷⁷

The government of the United States shall have all the ports of this country upon the same footing.

“[N]or shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.”²⁷⁸

A boat may start from St. Paul, Minnesota, for New Orleans, and in its journey it will pass Iowa, Illinois, Missouri, Kentucky, Tennessee, Arkansas, Mississippi, and Louisiana. She is not bound to stop at a single port on those great waters. They may hail her and ask her to stop, but she may say, “I don’t want to stop.” No state can compel one of those vessels to stop and pay it a duty for the privilege of passing along the borders of that state on those great navigable waters. If a boat has landed on the Ohio

²⁷⁵ See *Shelton v. Platt*, 139 U.S. 591, 600 (1891) (Harlan, J., dissenting).

²⁷⁶ See *Field v. Clark*, 143 U.S. 649 (1892) (Harlan, J.).

²⁷⁷ U.S. CONST. art. I, § 9, cl. 6.

²⁷⁸ *Id.*

River at the City of Louisville, it does not have to ask the privilege of the State of Kentucky. It is not required to pay a single cent, except this, that if the boat has used a wharf belonging to the City of Louisville, which the city has established at her expense, she may be required to pay for the use of that wharf reasonable compensation because she is using the property of somebody else.²⁷⁹

“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”²⁸⁰

Now, that is a provision that would not attract the attention of the ordinary student of the Constitution, particularly if he had not been long in this life. He would say, how can that be, and why should it be? Suppose the President of the United States and Secretary of the Treasury were of opinion that \$5,000 might be expended just here for a particular purpose for the good of the United States. Why should we not trust them for that?

Recently a distinguished gentleman, who is President of the Republic of Hawaii, and his good lady, have been here, guests of the nation.²⁸¹ They are at the Arlington.²⁸² They will have no bill to pay. The United States will pay it, because they are our guests. How does the United States pay it? Our excellent President does not pay it out of his own pocket; he could not repeat that very often at his present salary. But he does so, I suppose, out of a fund in the hands of the State Department.

At every session of Congress there is a sum, not a large one, placed in the hands of the Secretary of State to be employed by him in his discretion in connection with our foreign affairs, and to further the good relations between this and other countries. I think there is a fund of that sort, and out of that those expenses may be incurred, but if there is no fund of that sort, I do not see how they can be incurred. The mandate of that Constitution is that not one five-cent piece belonging to the government of the United States, and in the Treasury of the United States, shall be used by any officer

²⁷⁹ See *Transp. Co. v. Parkersburg*, 107 U.S. 691, 710 (1883).

²⁸⁰ U.S. CONST. art. I, § 9, cl. 7.

²⁸¹ Sanford B. Dole was the first and only President of the Republic of Hawaii, which existed from 1894 to 1900. See David C. Farmer, *The Legal Legacy*, in BIOGRAPHY HAWAII: FIVE LIVES, THE LEGACIES OF SANFORD BALLARD DOLE 2–4, <http://www.hawaii.edu/biograph/biohi/doleguide.pdf> (last visited June 15 2013).

²⁸² In the 1880s and 1890s, the Arlington was the toniest hotel in Washington, D.C. John DeFerrari, *Lost Washington: The Arlington Hotel*, GREATER GREATER WASH. (Aug. 17, 2010, 2:15 PM), <http://greatergreaterwashington.org/post/6836/lost-washington-the-arlington-hotel/>. Built in 1869, it was located on Vermont Avenue, between H Street and I Street. *Id.* It was demolished in 1912, and was replaced by the Department of Veterans Affairs building in 1918. *Id.*

of the government of the United States except in pursuance of appropriations made by law.

The Constitution of the United States says that the salary of the President of the United States shall not be diminished during his term of office, and there is a similar provision to the effect that the compensation given to the Justices of the Supreme Court of the United States shall not be diminished during their term of office.

Now, suppose there is no appropriation made by Congress for the payment of the salaries of the President and the judges. Where do they get them? Why, they don't get them at all. They are to do without them. If a Secretary of the Treasury were to pay money out of the Treasury for the salary of the President or for the salary of a judge, without a statute authorizing it, he would be a felon under the law and could be incarcerated in a penitentiary for that misappropriation of money.

At every session of Congress you will find an appropriation act, legislative, judicial, and executive appropriation act, and in a diplomatic appropriation act, or in a sundry civil bill, or in some other form, you will find an appropriation for that one fiscal year of money to meet the salaries of the officers of the United States. Salaries of the judges are fixed by law, and at the end of every month the Secretary of the Treasury can cause that amount to be paid.

I tell you, in these days of extravagance and waste, in these days when a million of dollars appears more insignificant than a thousand dollars did to the representatives of the people seventy-five years ago, it is well that there is a constitutional guarantee of that sort for the protection of the money in the Treasury from use otherwise than pursuant to a statute on the subject. And that statute says what it is for: so many thousand dollars to pay diplomatic salaries, judicial salaries, Representatives and Senators. Therein the purpose is expressed in the law, and the people can see what becomes of their money.

And in that connection another safeguard and regulation: “[A]nd a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”²⁸³

I take it for granted that none of you are ever concerned in those accounts enough to look into that published statement, but there is one down to every five-cent piece. You can see an account of it somewhere, unless somebody has stolen something that they do not give account of, but for every service paid there should be a voucher somewhere.

²⁸³ U.S. CONST. art. I, § 9, cl. 7.

You say, why publish it? Well, publicity is a great thing in the affairs of government. The idea of publicity keeps many a man in either house of Congress from voting in one way, or in any particular way, when if there was no publicity about it, he might subserve some selfish purpose in voting another way.

Everybody does not see these statements. They throw away these reports in the wastebasket and say, "What do I care about them? All I want to see is to read the discussions of the Secretary of the Treasury on great problems." But there is somebody that does care. You may rely upon it that there is somebody in the party that is in the minority that is watching the majority, that is looking with keen eyes into every document showing an expenditure of the public money, and when he finds it there, brings it out in his speech in Congress or in the public prints, and that is why those wise statesmen put that provision in the Constitution.

"No Title of Nobility shall be granted by the United States"²⁸⁴

Well, you might think that was entirely useless. Would anybody ever think in this country of granting a title of nobility?

Well, I think not at this day, but at the time this Constitution was adopted there were people of high character in high public positions in those days that would not have been shocked at all at the idea of there being introduced into our free system of government an element of title and nobility. Many men thought our fathers made a great mistake when they established this leveling government, based upon the idea that all the men are created free and equal, and that all the men are to stand equal before the law. They believed in having one branch of the government with an element of aristocracy in it, or nobility. Those men were beaten. They said, we do give up in form, but we think a mistake has been made, but we will see after a while.

In the library you will find a book called *Maclay's History of the First Senate of the United States*.²⁸⁵ You will find there a very serious dispute as to how the President of the United States should be addressed; in what form.²⁸⁶ The practice at that time was for the President of the United States to come down in person to the Senate, and confer with the Senate, and deliver his messages to the Senate. Sometimes, he would send them in writing, and the question was how the Senate or Congress should address

²⁸⁴ *Id.* art. I, § 9, cl. 8.

²⁸⁵ WILLIAM MACLAY, *JOURNAL OF WILLIAM MACLAY, UNITED STATES SENATOR FROM PENNSYLVANIA 1789–1791* (Edgar S. Maclay ed., New York, D. Appleton & Co. 1890).

²⁸⁶ *Id.* at 1–44.

him in return.

Well, some gentlemen very deliberately and carefully insisted that they should address the President of the United States as “His High Mightyness,” and other phrases of that sort, and that did not run its career until after one or two sessions.²⁸⁷ The debate on the subject got over into the House of Representatives, and the point was raised there, how should the House of Representatives address the President when answering one of his messages. But it was soon ended by the common sense and the sagacity of Mr. Madison, who expressed surprise that there should be any question upon that subject. “Why,” says he, “address him in the words of the Constitution. The Constitution says that he is President of the United States. Why shall we not address him as ‘Mr. President,’ or ‘To the President of the United States’? That is the simple constitutional mode.”²⁸⁸ And it seemed to have ended the trouble at once, and from that day to this we say “Mr. President.”

“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.”²⁸⁹

One of you, if you were abroad and were to do some act that would commend itself to a King or a government there, could accept from him some title of nobility, some gift, as an expression of gratitude on the part of that government for the particular service you had performed. You would have the right to do that, but I would not. Why? I hold an office of trust under the United States, and the command of the United States is directed to me and to all men holding office of profit and trust.

Now and then, one of our war vessels is in the harbors of some great cities, and some occasion may arise when the commander of that vessel may be able to do some great service to those people. Maybe some great plague or some great fire, and that officer and his men may be able to do

²⁸⁷ *Id.* at 25–26 (“At length the committee came in and reported a title—*His Highness the President of the United States of America and Protector of the Rights of the Same.*”).

²⁸⁸ 1 ANNALS OF CONG. 333–34 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison) (“I am not afraid of titles, because I fear the danger of any power they could confer, but I am against them because they are not very reconcilable with the nature of our Government, or the genius of the people. Even if they were proper in themselves, they are not so at this juncture of time. But my strongest objection is founded in principle; instead of increasing, they diminish the true dignity and importance of a Republic, and would in particular, on this occasion, diminish the true dignity of the first magistrate himself.”).

²⁸⁹ U.S. CONST. art. I, § 9, cl. 8.

some great service, perhaps perform gallant service in saving the life of some officer of the government.

Well, shortly there would arise in that government a desire to express their thanks to this gallant American officer and these gallant American sailors, and they would offer to make them presents and confer titles upon them. They would all have to decline it. But they could accept it by consent of Congress. At nearly every session of Congress, acts are passed authorizing A, B, and C, named officers in the service of the United States, to accept a particular present from a government abroad.

We had first a declaration of the powers granted to the government of the United States. We have now gone through section 9, which contains prohibitions both upon the state and nation. And now we come to specific prohibitions that are put upon the states. They are very simple.

“Section 10. No State shall enter into any Treaty, Alliance, or Confederation”²⁹⁰

No state in this union can enter into any treaty with any other country on the face of the Earth. More than that, no state of this union can enter into a treaty with another state of this union. New York and Pennsylvania, two great states, could not constitutionally form an alliance by which they would agree to stand by each other in the Congress of the United States and stand with each other for this, that, and the other measure, or against those measures, and an alliance of that sort would impose no obligation upon each other.

Nor “grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”²⁹¹

Now, all of these, except one, I have gone over, but I have as yet said nothing about the last clause, which is becoming one of the most far-reaching and most important in the Constitution. No state shall pass any law impairing the obligation of contracts.

You will find very little said in the debates of the convention about that clause. It was not passed, of course, without examination, but I doubt whether any man of that day dreamed of the consequences of that clause, how important it was to the country, and what vast interests it would embrace from time to time. The primary object was to protect the people of the different states against the hostile and selfish legislation of some of

²⁹⁰ *Id.* art. I, § 10, cl. 1.

²⁹¹ *Id.*

the states, in favor of their own people against people of other states. One state, for instance, would pass a statute assuming to exempt one of its own citizens from contracts made between him and a citizen of another state, and say that the courts should be closed against the citizen of the other state for enforcing that obligation.²⁹²

A state may repudiate its own contracts, because if it does there is no way to enforce it by direct suit against the state.²⁹³ You cannot bring a state to the bar of any court in this country against its will and compel it to answer a suit. And the state may put out its bonds and borrow millions of dollars in the belief on the part of those who invest their money in those bonds that the state's sense of honor may not repudiate it. But it may get so low down that it will refuse to pay them, and when it does there is no remedy for it.²⁹⁴

A and B may have a contract with each other, and that contract may be the subject of a suit and get up to the highest court of the state, and the highest court of the state may misinterpret it and say it does not mean this but that, and it may be so plainly wrong to your own sense that you will have a suspicion that that is not the meaning, but there is no remedy for it. This is simply not that a state shall not misinterpret contracts by its courts, but that no state shall pass a law impairing the obligation of a contract.

Let me explain that a little more fully. A and B have a contract today made in a state, and suit is brought upon it. The Supreme Court of the state says that the right to make that contract depends upon the meaning of a certain statute of that state which was in force when the contract was made, and they construe the contract in a certain way, and under that construction the contract falls.²⁹⁵

Now, that presents no federal question. That presents no case that is subject to review in the federal court. But suppose a statute passed by a state after a contract has been entered into between parties, and that statute does impair the obligation of the contract, then you have got a case under the Constitution. That obligation of a contract, the obligation comes from the Latin word that means to "tie," a thing which ties together. The obligation of a contract is that which ties the parties together to do a particular thing or not to do a particular thing.

²⁹² See, e.g., *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

²⁹³ See U.S. CONST. amend. XI.

²⁹⁴ See *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (Harlan, J., concurring).

²⁹⁵ See, e.g., *Lehigh Water Co. v. Easton*, 121 U.S. 388, 390 (1887) (Harlan, J.).

Now, this injunction is that that obligation shall not be impaired. Not impaired a little, not impaired much, but shall not be impaired at all. It must stand as the parties have made it. If it was lawful when made, it is not in the power of any state to make it unlawful.²⁹⁶

“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection Laws”²⁹⁷

Maryland requires all the tobacco raised in that state to be brought into the City of Baltimore to be inspected and branded. It has been held that it could do that.²⁹⁸

“[A]nd the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.”²⁹⁹

“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.”³⁰⁰

That brings me to the second Article of the Constitution, which treats of the executive power of the United States.

²⁹⁶ See, e.g., *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 589, 592 (1819).

²⁹⁷ U.S. CONST. art. I, § 10, cl. 2.

²⁹⁸ *Turner v. Maryland*, 107 U.S. 38, 58 (1883).

²⁹⁹ U.S. CONST. art. I, § 10, cl. 2.

³⁰⁰ *Id.* art. I, § 10, cl. 3.

LECTURE 16: FEBRUARY 12, 1898

*Lecture delivered by Judge William A. Maury*³⁰¹

I regret to announce, gentlemen, that our friend Mr. Justice Harlan is not able to be here this evening, in consequence of an engagement elsewhere. And in an unguarded moment, I must say, I promised to take his place and appear before you this evening without reflecting that I should have no opportunity whatever to make the necessary preparation. But still I made the promise with some faint hope that I might be able to induce Professor Johnson to come here this evening with his harrow and go over the field. But unfortunately an engagement prevented him from coming to my relief, so nothing was left but for me to be as good as my word and appear before you.

I have often been amused at the story of the individual who, on being asked if he could play on the violin, said he didn't know, as he had never tried. But I never supposed that it was in store for me to make a still greater exhibition of self-confidence by giving a public performance on an instrument which I had never tried, the Constitution of the United States. You need not be surprised, therefore, if you find that the strings of that instrument are swept this evening by a hand which knows no approach to the masterly touch to which you are accustomed.

The subject appointed for discussion this evening, as my colleague informs me, is the executive power of the Constitution of the United States. But it has seemed to me perhaps a proper thing to do before entering upon that subject to advert for a few moments to the distribution of powers made by the Constitution, in order that we may see the relations which those powers hold towards each other, and particularly the relation which the executive holds toward those other powers.

Now, all the powers of the government which are conferred by the Constitution of the United States are confided to three departments, three separate departments: the legislative, the executive, the judicial. Now, while of course the Constitution professes to make a distribution of these powers, it is soon apparent upon an examination of the instrument, and

³⁰¹ William A. Maury was appointed Assistant United States Attorney General by President Arthur. Later, he served on the faculty of Columbian University School of Law. In 1901, Maury was appointed as a member of the Spanish Treaty Commission. Maury died on June 15, 1918. *Chew Heong v. United States: Chinese Exclusion and the Federal Courts, Biographies: William A. Maury*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/tu_exclusion_bio_maury.html (last visited June 15, 2013).

particularly of the working of the government, that a sharp distinction or partition between these three departments of government is impracticable, is impossible. While the legislative department professes to be entirely separate and distinct from the other departments, judicial and executive, we find that any such arrangement as that is wild and visionary.

The classification into which the powers of government are distributed by the Constitution is necessarily imperfect. It was intended to be so, as will be seen. The Constitution does not aim at a perfect distribution and classification of the powers of government, and it will be apparent that a certain amount of overlapping and interference of those powers is absolutely necessary to the strength and efficiency of the Constitution as a practical instrument.

Well now, we have but to look at it, and it will only be necessary for me to remind you of things which are well known, beginning now with the executive power. That power participates in the legislative power, and just enough to steady the legislative power, to make it more effective and to make it safer as the depository of legislative power. The executive veto, you observe, puts an interdict upon legislation to a certain extent, because unless that veto is overborne by a two-thirds vote of both houses, why, it blocks the legislation to which the veto applies completely.

Well now, you see that the interference of the executive with the legislative department of the government in that case brings the legislature to its sober second thought. The legislature itself is constructed with a view to preventing precipitate action. The Senate, by its constitution, is more conservative than the House, but still it was deemed necessary to lodge in the hands of the executive a power to put an interdict upon legislation to a certain extent, analogous to the power of the Roman Tribune. Only the Roman Tribune could put an absolute interdict upon legislation, and yet under the Roman Tribune, why, we see how long that commonwealth lasted, and to what power it attained and what vitality it had.³⁰²

Now then, take another instance. The Senate is not exclusively a legislative body. The Senate is the high court for the trial of impeachments of officers who are charged with high crimes and misdemeanors under the Constitution.³⁰³ Therefore, the Senate participates in judicial power.

³⁰² Roman tribunes were officials elected by the plebians. Among other things, tribunes could veto the acts of magistrates. *See, e.g.*, M. CARY & H.H. SCULLARD, A HISTORY OF ROME (3d ed., 1975); MICHAEL CRAWFORD, THE ROMAN REPUBLIC (1978).

³⁰³ U.S. CONST. art. I, § 3, cl. 6.

The House of Representatives and the Senate both participate in judicial power in other respects. Why, look at the vast amount of claims against the United States with which Congress has been flooded from the organization of the government, to such an extent that it was necessary that Congress should establish a court for the purpose of entertaining those claims to a certain extent.³⁰⁴ But there is a large class of claims which is outside of that court, a large class of claims which it is still necessary for Congress to pass upon.³⁰⁵

Is not it perfectly apparent that Congress, in passing upon those claims, exercises a judicial function? Manifestly so. Is it not apparent that each house of Congress, in deciding upon the election and qualification of its members, participates in judicial power?³⁰⁶ I cannot say that it always exercises that judicial power in a way calculated to reflect credit upon it, and we would do well—if I may be allowed to digress for a moment in that respect—we would do well if we imitated the British Parliament, which relegates all those questions to the courts of justice, and consequently takes away from Parliament the scandals which always attach to a very considerable extent to the trial of these contested seats, and questions involved in these contested elections.³⁰⁷ We would do well to have an amendment to the Constitution providing that the judicial department of the government should decide all those controversies, and then a decision of a controversy of that sort would not be according to policy or the wishes of any party controlling either house of Congress.

Again, the executive department participates still further in legislative

³⁰⁴ In 1855, Congress created the United States Court of Claims to hear private claims against the United States. *History of the Federal Judiciary: Court of Claims, 1855–1982*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/courts_special_coc.html (last visited June 15, 2013). Initially, the Court of Claims had jurisdiction to hear monetary claims based upon a law, a regulation, or a federal government contract. *Id.* It reported its findings to Congress and prepared bills for payment. *Id.* In 1863, Congress authorized the Court of Claims to issue final judgments. *Id.* In 1887, Congress expanded the jurisdiction of the Court of Claims to include all claims against the United States, except claims sounding in tort, equity, and admiralty. *Id.*; 28 U.S.C. § 1491 (2006).

³⁰⁵ WILLIAM A. RICHARDSON, *HISTORY, JURISDICTION, AND PRACTICE OF THE COURT OF CLAIMS* 12–13 (2d ed., Washington, Gov't Printing Office 1885).

³⁰⁶ U.S. CONST. art. I, § 5, cl. 1.

³⁰⁷ Under the Grenville Act of 1770, 10 Geo. 3, c. 16 (Eng.), Parliament tried election petitions by select committee. In the Parliamentary Elections Act, 1868, 31 & 32 Vict., c. 125, § 11 (Eng.), Parliament delegated the trial of election petitions to the Queen's Bench. Currently, election petitions are tried by an Election Court, which is created to hear the petition and dissolved after it issues its decision. The Election Court for an election petition challenging a Parliamentary election consists of two High Court or Court of Session judges. Representation of the People Act, 1983 c. 2, § 123 (U.K.).

power. Has not the executive department, has not the President of the United States—in whom is centered all the executive power—has not the President of the United States the express power given him by the United States to negotiate treaties with the advice and consent of the Senate? And are not those treaties—when they are duly ratified and promulgated—are they not made the law of the land as much as a legislative enactment? Certainly they are.

And then again with reference to the treaty making power, we find it necessary for the legislative power to cooperate because, of course, a treaty which requires an appropriation of money or which calls for legislation of any kind—as for example, suppose a treaty provides for a commission to sit and adjudicate upon claims against each of the governments that are parties to the treaty. Why, it is necessary, of course, that Congress should legislate in order to provide salaries for the commissioners, in order to provide appropriations for the other expenses of the commission.

Now, it is very true that the appointment of officers is a purely executive act. And as we see that with reference to many of the offices under the Constitution of the United States, that the Senate participates in that appointment, that the advice and consent of the Senate are necessary before the appointment can be consummated.

And even the courts of justice may have a share of the appointing power, because the Constitution expressly provides that “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.”³⁰⁸ There we find that an executive power is expressly provided for the courts of justice, if Congress should deem it proper to confide that power to them.

And then we have the judicial department exercising legislative power to a certain extent. The exercise of all judicial power involves, more or less, that almost imperceptible, unseen and impalpable judicial legislation which is going on all the time and which, by the way, is the best legislation we have.

And then we find the executive exercising judicial power—necessarily so. Why, is not the whole domain of the law which the President is charged by the Constitution to faithfully execute? How can that law be executed? How can it be applied without exercising the judicial function of interpreting it? And that executive interpretation is beyond the reach of judicial control.

³⁰⁸ U.S. CONST. art. II, § 2, cl. 2.

Then again, the House of Representatives may be called upon to elect a President and Vice President of the United States, should the electors fail to do so.³⁰⁹ So that, gentlemen, you see that from the necessity of the case there is an overlapping of all these departments among one another, and that it is impossible, impracticable, and undesirable that there should be a strict line of demarcation dividing the powers of the three departments of the government.

Why, just suppose that the executive had to go to the judiciary for the purpose of interpreting every law which the executive is charged with the duty of executing. That would embarrass and hamper the government. What a clog that would be upon the administration of the government, to have any such dependence of the government as that of one department upon the other.

Now, the Constitution tells us that all executive power shall be centered in the President of the United States of America.³¹⁰ All executive power, but the Constitution does not mean by that declaration that the President shall participate actually in the performance of every executive act. Why, it would be a superhuman person who should undertake to perform any such Atlantean task as that.

The President of the United States is felt in the execution of the laws, in the performance of his duty to see that the laws shall be executed. He is felt in all the ramifications of the executive department of the government, because he is charged with the duty and responsibility of filling all places under the government with competent persons. And if the appointing power—as is done by Congress under the Constitution—is committed to the hands of the heads of departments so far as their respective departments are concerned, nevertheless, although the President has nothing to do with the appointment of the subordinates of the heads of the executive departments, he can hold the head of each department responsible, and he can remove him if he fails to fill the offices which are within his gift with faithful and proper persons. So that, while he cannot intermeddle with every executive act—while it is impossible that he should intermeddle with every executive act—still the ultimate responsibility all centers upon him. It is perfectly consistent with what I have said that, although the President cannot participate in every executive act, still the ultimate responsibility is with him as to all officers over whom he has no control immediately, because he has direct and immediate control over those who have

³⁰⁹ *Id.* art. II, § 1, cl. 3.

³¹⁰ *Id.* art. II, § 1, cl. 1.

appointed the subordinates who are beyond his reach.

The executive department, then, is the co-equal of the other departments. The whole theory of the government proceeds upon the idea of coordination. Each department is independent of the other. No one of the three can trench upon the domain or province of the other. The President is not subject to the control of the judiciary. Congress is not subject to the control of the judiciary. Congress cannot interfere with the judiciary. The executive cannot interfere with the judiciary. And a notable instance of the abstinence of the judiciary from interference with the executive power is furnished by those cases where an appeal was made—or application to the Supreme Court under its original jurisdiction—to interfere with President Johnson in the legislation which was called the Reconstruction Act. Why, the Supreme Court said that the fact that no such bill as was filed in that case had ever been filed before was strong that no such bill ought to be filed, that the judicial power had no right to restrain the executive with reference to that legislation.³¹¹

If the President of the United States is unfaithful to his trust, he is responsible to the great constituency of the United States. And not only so, he is liable to be arraigned by the House of Representatives before the Senate, the great court of impeachment, for trial for the imputed offense. He can never be reached for any mistake in exercise of discretion. He can never be reached for anything which falls short of a high crime or a misdemeanor.

Now, of course, the wants of the government necessitate the establishment by law of a large number of executive offices, and which laws provide for the appointment of a large number of subordinate officers. Now, those officers, if they are entrusted with discretion, they are as much beyond the reach of judicial control as the President of the United States himself is, and the only instance in which an executive officer can be controlled by the judicial department of the government is where that officer is charged with a plain simple duty, admitting of no discretion whatever. In such a case as that he is amenable to the courts.

And such a case was the case of Schurz against the United States, where a patent had been issued, but not delivered, to an individual who

³¹¹ *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866) (“It is true that a State may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.”).

claimed the land which was described in a patent.³¹² And the Secretary refused to deliver the patent to the claimant, and he went before the courts for a writ of mandamus to compel the Secretary to deliver that patent. And the Supreme Court of the United States, on appeal from the local court here, held in that case that, inasmuch as all executive discretion had been exercised by the Secretary of the Interior, as the patent had been made of record, that the title had passed to the patentee, and that the duty of the Secretary was a plain ministerial duty to deliver that patent to the patentee, and so a writ of mandamus was issued compelling him to surrender the patent.

Now, there are some powers which are committed to the hands of the executive. There are some powers which do not require any legislation whatever, and which may be executed by the executive in virtue of its inherent power.³¹³ For instance, there is a treaty, which may be executed by the executive, if the treaty is of such a character as not to require supplemental legislation by Congress.

So, the President can receive foreign ambassadors by virtue of his inherent power.³¹⁴ So, the President can furnish information to Congress by virtue of his inherent power.³¹⁵ So, he can recommend measures to Congress by virtue of the same inherent power. So, he can convene Congress or either house at his will.³¹⁶ And so, in case the houses of Congress cannot agree upon a time of adjournment, the President has the right to adjourn them by his own command, by the express provision of the

³¹² *United States v. Schurz*, 102 U.S. 378, 379 (1880).

³¹³ The inherent powers of the President of the United States are derived from the clauses, "The executive Power shall be vested in a President of the United States of America," U.S. CONST. art. II, § 1, cl. 1, and "he shall take Care that the Laws be faithfully executed," *id.* art. II, § 3, cl. 1.

³¹⁴ THE FEDERALIST NO. 69 (Alexander Hamilton) ("The President is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner, than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor.").

³¹⁵ U.S. Const. art. II, § 3 ("He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . ."); *see also* EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION 136–37 (1947) (observing that the President alone negotiates treaties and decides what information to furnish the Senate).

³¹⁶ U.S. Const. art. II, § 3 ("[H]e may, on extraordinary Occasions, convene both Houses, or either of them . . .").

Constitution.³¹⁷

Now, it is interesting to note the extreme delicacy with which Congress, when the legislation was made which set on foot the government and set it in operation—it is interesting to see the delicacy with which Congress treated the executive power. For example, when it established the Department of State, Congress did not undertake to prescribe the duties of the Secretary of State in respect to foreign international matters. When Congress established the Navy Department, it did not undertake to prescribe the duties of the Secretary of the Navy, so far as the government of the Navy was concerned. It did not undertake to prescribe the duties of the Secretary of War, so far as the army was concerned, when it established the War Department.

The President of the United States is invested with all authority with reference to our foreign relations, receiving ambassadors, negotiating treaties, and sending ambassadors and consuls abroad to represent this country.³¹⁸ He is entirely beyond the reach of the legislative department.

Now, it is very interesting to see those provisions of law. For instance, the statute establishing the State Department, which is now embodied in Section 208 of the revised statutes, the Secretary of State shall perform such duties as shall from time to time be enjoined on or entrusted to him by the President relative to correspondence, commission of instructions to or with public ministers or consuls from the United States, or to negotiate with those from foreign states, or to such other matters respecting foreign affairs as the President of the United States shall assign to the Department, and he shall conduct the business of the Department in such manner as the President shall direct.³¹⁹ You see how scrupulously there Congress has abstained from any appearance of interference with executive authority.

Then, when we come to the War Department, revised statutes section 216 says the Secretary of War shall perform such duties as shall from time to time be enjoined on or entrusted to him by the President relative to military commissions—perform such duties as shall from time to time be enjoined on or entrusted to him with reference to the business of the Department—in such manner as the President shall direct.³²⁰ Showing that, in the view of Congress, as was undoubtedly correct, that the Secretary of

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ 22 U.S.C. § 2656 (2006); Act of Sept. 15, 1789, ch. 14, 1 Stat. 68; Act of July 27, 1789, ch. 4, 1 Stat. 28; *see also* United States *ex rel.* Boynton v. Blaine, 139 U.S. 306, 319–20 (1891).

³²⁰ Act of Aug. 7, 1789, ch. 7, 1 Stat. 49; *see also* 10 U.S.C. § 113 (2006).

War was the mere hand of the President, and whatever he does, does not proceed from him, but is the act of the President's, and the President is supposed to have a hand in everything which is transacted either in the State, or War, or Navy Departments. Section 417, with reference to the Navy Department, says the Secretary of the Navy shall execute such orders as he shall receive from the President connected with the Navy Department.³²¹

Well now, we have seen the harmful consequences that may flow from the attempt of the other departments of the government to interfere with the executive. Why, in recent days at the very present time, now and then we see a movement in Congress with reference to foreign affairs, which may be extremely harmful. Because how is it possible for Congress to act upon these matters without having the data before them which the President has, and which is secret, and which for public purposes he does not disclose to any other department of the government?³²²

Now, one of the most important powers which are committed to the President is the appointing power. “[A]nd he shall,” says the Constitution,

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.³²³

Well now, it was maintained at the beginning of the government under this present Constitution that all appointments—movements in the directions of appointments—should be initiated in the Senate. And the argument was that these appointments are to be with the advice as well as the consent of the Senate. How can the Senate give any advice after a

³²¹ Act of Apr. 30, 1798, ch. 35, 1 Stat. 553; *see also* 10 U.S.C. § 5013 (2006).

³²² Maury was probably referring to congressional intervention into diplomatic relations with Spain and Cuba. On June 12, 1895, President Cleveland signed a proclamation of neutrality. Grover Cleveland, A Proclamation (June 12, 1895), *reprinted in* 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 591–92 (James D. Richardson ed., Washington, Gov't Printing Office 1898). But on February 28, 1896, Congress passed a resolution supporting Cuba; on March 24, it sent \$50,000 to Cuba; and on December 21, it recognized the independence of the Republic of Cuba. Rebecca Edwards, *1896: U.S. Foreign Relations*, VASSAR C., <http://projects.vassar.edu/1896/foreignrelations.html> (last visited June 15, 2013)

³²³ U.S. CONST. art. II, § 2, cl. 2.

nomination is made? Before the nomination is made is the time for advice. That is the time to give the President good counsel as to who he shall select.³²⁴

But that view, of course, has not prevailed. And we may say the word “advice” is commanded to silence in the Constitution, and consent—or it is the equivalent of consent because of the hand which the Senate has in the exercise of the appointing power is by giving consent to the nominations which are laid before it by the executive.

The nomination in an appointment is the initial step. The confirmation is the next step. The appointment, mark you, is the next. It does not follow because there is confirmation that there must be appointment. There may be disappointment, for the President may change his mind, and he may recall all that he has done and send in a new name.

But when the appointment is made, then the commission issues, which like a title deed is held by the appointee as a high and controlling evidence of his authority to exercise the functions of the office which is referred to in the commission. And that was the great mistake which Mr. Jefferson made when he came in as President of the United States for the first time. He found a lot of commissions of various officers, commissions which had been signed by President Adams.

Well, President Adams was a Federalist, and Mr. Jefferson thought that it was his whole duty to destroy all those commissions. That gave rise to the case of *Marbury v. Madison*, and the decision of the Supreme Court with reference to appointing and the steps necessary to a complete appointment.³²⁵ And the Chief Justice, in that great judgment of his, held there that the commission was not analogous to a deed, that the appointment was made before the commission was signed, that there was power in the courts to compel the Secretary of State to deliver these several commissions to the various appointees named in them.

To be sure, no such process was issued in that case, because the court held that they had no jurisdiction to issue it. But the mistake made by President Jefferson was in following the analogy of a deed and holding that the commission was as necessary to transfer title to office as the delivery of a deed is to transfer title to real estate. But that was not so.

And the same doctrine was laid down in the case of *Schurz*.³²⁶ The Supreme Court held that the title had passed before the patent was issued,

³²⁴ See 1 ANNALS OF CONG., *supra* note 288, at 581–82.

³²⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

³²⁶ *United States v. Schurz*, 102 U.S. 378, 403 (1880).

that it had passed by matter of record, and therefore that the Secretary had no alternative but to deliver the patent to the patentee.

Well now, one of the great questions which embarrassed the statesmen of the early days of the Republic was as to the power of removal in those cases where the advice and consent of the Senate was necessary in order to an appointment.

Now, they said that certainly the agencies of the government which it is necessary should cooperate in order to appoint, that those agencies should also cooperate in order to remove.³²⁷ But the settled construction of the Constitution from the earliest time of the Republic under the present system is that, although the concurrence of the Senate may be necessary to an appointment, the President may remove the appointee without consulting the Senate at all.³²⁸

Now, during President Johnson's administration, when there was so much collision between him and the Congress, Congress passed an act in 1867, for the express purpose of putting fetters upon the executive.³²⁹ In other words, by legislative enactment they insisted upon the interpretation which was early insisted upon, that the Senate should concur in the removal of officers, where their concurrence was necessary to the appointment of such officers. And so the act of 1867 provided that, in case Congress was not in session, that the President might for any cause that seemed fitting to him suspend an officer until the Senate should reassemble, but should not remove him. And if the Senate did not agree with the President, why then that officer should walk back into his office and there stay.

Now, for nearly a century of practical interpretation of the Constitution to the contrary Congress undertook to put these fetters upon the executive. Well, afterward Congress repealed that law, so that it is no longer in the way.³³⁰

Why, things must be settled in some way. There are many questions under the Constitution which can never be submitted to judicial

³²⁷ 1 ANNALS OF CONG., *supra* note 288, at 576–91.

³²⁸ See *Myers v. United States*, 272 U.S. 52, 119–26 (1926).

³²⁹ Tenure of Office Act, ch. 154, 14 Stat. 430 (1867) (providing that federal officials whose appointment required the advice and consent of the Senate could not be removed without the consent of the Senate). On August 5, 1867, President Johnson asked Secretary of War Edwin Stanton, a Lincoln appointee, to resign. Douglas O. Linder, *The Impeachment Trial of Andrew Johnson*, UNIV. OF MO.-KAN. CITY SCH. OF L., http://law2.umkc.edu/faculty/projects/ftrials/impeach/imp_account2.html (last visited June 15, 2013). Stanton refused, so Johnson removed him from office. *Id.* The Senate refused to consent to Stanton's removal and began impeachment proceedings. *Id.*

³³⁰ Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

arbitrament. If they are never settled, if after years the questions may be re-agitated and opened, why, what a state of turmoil we would be in all the time. When, therefore, the meaning of the Constitution is settled by years of practice, nobody is a friend of his country who attempts to unsettle it.

There is another provision here with reference to the executive which has given rise to a great deal of interesting discussion, and that is this provision: "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."³³¹

Well now, a question very naturally arises of this kind: after the Congress adjourns, the President removes an officer. Well now, is that vacancy a vacancy that happens? Does happening mean something that is accidental? Can the President himself produce that state of things which shall give rise to his power under this provision? Can he remove a man and say that that vacancy happens in the recess of the Senate?

Well now, the construction of the Constitution is that it does happen, that it is a vacancy that happens in the sense of the instrument.³³²

"The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate"³³³

Well now, suppose the President does not fill up a vacancy during the session of the Senate, and when the Senate adjourns, then makes an appointment. Is that a vacancy happening in the recess of the Senate when he has deliberately allowed the Senate to sit and then adjourn without taking any step whatever towards filling up the vacancy? Well, some of the courts have held, not the Supreme Court, that the President has power to fill up that vacancy after the adjournment of the Senate, although the vacancy existed before the Senate adjourned.³³⁴

³³¹ U.S. CONST. art. II, § 2, cl. 3.

³³² See *Vacancy in Office*, 19 Op. Att'y Gen. 261 (1889); *Filling Vacancies in Office*, 18 Op. Att'y Gen. 28 (1884); *Appointments During Recess of the Senate*, 16 Op. Att'y Gen. 522 (1880); *Temporary Appointments by the President*, 15 Op. Att'y Gen. 207 (1877); *Temporary Appointments in the Army*, 14 Op. Att'y Gen. 562 (1875); *Case of the Collectorship of Customs for Alaska*, 12 Op. Att'y Gen. 455 (1868); *President's Power to Fill Vacancies in Recess of the Senate*, 12 Op. Att'y Gen. 32 (1866); *President's Power to Appoint to Office*, 11 Op. Att'y Gen. 179 (1865); *President's Appointing Power*, 10 Op. Att'y Gen. 356 (1862); *Power of President to Appoint to Office During Recess of Senate*, 4 Op. Att'y Gen. 523 (1846); *Power of the President to Fill Vacancies*, 3 Op. Att'y Gen. 673 (1841); *Power of President to Fill Vacancies*, 2 Op. Att'y Gen. 525 (1832); *Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. 631 (1823).

³³³ U.S. CONST. art. II, § 2, cl. 3.

³³⁴ See *In re Yancey*, 28 F. 445, 450 (C.C.W.D. Tenn. 1886); *In re Farrow*, 3 F. 112, 116 (C.C.N.D. Ga. 1880).

Well now, take that case of where a vacancy is said to happen when it is caused by a removal made by the President during the recess of the Senate. Why that interpretation of the Constitution must now be regarded as settled and it should not be allowed to be disturbed.³³⁵

Now, another question arises, which is one of very great importance and one which has given a great deal of cause to a great deal of controversy and discrepancy of opinion, and that is as to how far the President is called upon to execute an unconstitutional law. Now, can he take upon himself the responsibility of determining whether a law is void or not? He may say, well, I am not called upon to execute an unconstitutional law.

Well, is the law unconstitutional? The judicial department is charged with the duty of interpreting and applying the laws. Well, would it not lead to anarchy almost if the President should take it upon himself to say that a law should not be executed because he regarded it as unconstitutional? Is it not his plain duty to give effect to the law?

Well now, of course, that matter may be carried too far. For instance, suppose Congress attempts to invade his constitutional functions. Suppose Congress attempts to hamper him in the exercise of a constitutional power. Why, there he owes it to the country, he owes it to the Constitution, he owes it to himself to resist that attempt, and to refuse to yield to it. And so if Congress should pass an act which is palpably beyond all boundaries and limitations of the Constitution, it is to be supposed that in a case of that kind that the President of the United States would be justified in refusing to enforce the law.

But then when it comes to the question—and a doubtful question—as to whether a law is unconstitutional or not, why, it seems to me that it is going rather far to say that the President of the United States shall sit in judgment upon the acts of Congress. In the first place, every act done by either one of the three coordinate departments of the government is presumed to be properly and constitutionally done. The Supreme Court of the United States will never declare an act of Congress unconstitutional if there is a doubt about it, because it acts upon the presumption that Congress has kept within the constitutional limitations which confine its

³³⁵ See *Myers v. United States*, 272 U.S. 52, 176 (1926) (holding that “the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so”). See generally T.J. HALSTEAD, CONG. RESEARCH SERV., RL33009, RECESS APPOINTMENTS: A LEGAL OVERVIEW (2005), available at <http://fpc.state.gov/documents/organization/50801.pdf>.

powers.

Hence we see that, time and again, that the executive has resisted the attempts of Congress. But then see to what an extent this doctrine has been carried by Mr. Jefferson, then by General Jackson following him, General Jackson insisting in the idea that the Bank of the United States was unconstitutional, that Congress had no authority to create the institution, after the Supreme Court, after solemn argument, decided that the act was constitutional.³³⁶

Well now, it has been laid down by high authority, and it is by no means a settled question, that each department of this government is independent of the other, and that it has a right to expound the Constitution for itself. Now, you observe the Supreme Court of the United States has no power to expound the Constitution except where it comes in question in a controversy between John Doe and Richard Roe. Each department of the government is bound to construe that instrument for itself, as it has been said: the President for himself, Congress for itself, and the judiciary for itself.

Would anything be more monstrous than for the Supreme Court of the United States to issue an injunction to operate upon Congress to prevent it from carrying into effect any constitutional project in the way of legislation? Why, it would be absurd. Well, how far is that to be carried, because if you take an extreme view of it, why then you have a government that consists of three departments, each one independent of the other, and each one at liberty to construe the Constitution of the United States to suit itself. Why, the bare suggestion of such a thing suggests anarchy.

³³⁶ For example, Jefferson drafted the Kentucky Resolutions of 1798 and 1799, which declared the Alien and Sedition Acts unconstitutional. Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in* 4 THE DEBATES, *supra* note 26, at 540–45. The Supreme Court held that the Bank of the United States was constitutional in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425 (1819). Jackson declared the Bank unconstitutional in his Veto Message Regarding the Bank of the United States, July 10, 1832, *reprinted in* ADDRESSES AND MESSAGES, *supra* note 235, at 418.

LECTURE 17: FEBRUARY 19, 1898

I regret very much that I was not able to be with you on last Saturday evening. I congratulate you that you had an opportunity to hear my brother Maury about that which we had reached in the Constitution, that relating to the executive power.

You remember that I called your attention to the division of the powers of the government of the United States among three departments. We had finished the consideration of those clauses of the Constitution which enumerated the powers granted to the Congress of the United States—the legislative branch of the government—and we now come to Article II, relating to the executive power of the government.

You cannot too often remember that these different powers of the government are coequal—or rather that these departments of the government are coequal—and that we are not to suppose that one is of more consequence than the other. The legislative department cannot interfere with that which is committed to the executive department of the government, nor the executive department interfere with that committed to the legislative department. And neither of these departments can interfere with that which is committed to the judiciary department of the government.

These three departments embrace all the powers that can emanate from any government, and with few exceptions they stand upon their separate ground marked out for them by the Constitution of the United States. And neither may rightfully encroach upon the domain of the other without danger to our institutions. If the Congress of the United States should order the President of the United States to do something that he had no right to do, he could simply refuse to do it, and there would be no power to compel him.

The executive power is the power to execute. The President does not make laws. He executes the laws which have been passed by the legislative department of the government. He does that which is essential to carry into effect the will of the people of the United States as expressed in the Constitution and in the acts of Congress.

Now, we vest this power under the Constitution in one man. Why not in two? Why not in three or four? Why not in legislative council? Well, that question has been answered in the experience of the world. No government is likely to last if the executive power of that government is in more than one person.

We have a pretty fair illustration of a triple-headed executive in this District. We have three Commissioners, very reputable gentlemen and of

character, and want to do what is right, but with very little power to do anything. The theory of the law is that they all cooperate, they all concur in everything that is done. And the mere theory is kept up. But in the division of their labors they have assigned one branch to one Commissioner, another to another, and another to another. And when they get into trouble, or differ, there is division in the executive power. And that difficulty is increased from the fact that they are without power to pass any laws. There are very few ordinances they can pass, and we are moving along in this District without any head, except that which the people have in the government of the United States and the law of itself.³³⁷

It is sometimes said that the best municipal law in the world is found here in the City of Washington. Why, no mobs are here? Well, it is because the men who would be in the mob would be in the eye of the White House. It is the fear of the government. The disorderly spirits in our midst do not make trouble. They know there is an army and navy here, if need be, to keep up the peace. Not because there is any executive head of the government, but it is because of the power that is around it and behind it.

Now, the matter was thoroughly considered when the Convention framed the Constitution, and it was believed to be wisest to have this executive power in one man.³³⁸ But I think it is fair to say that that one man has grown to a consequence far beyond anything anticipated when the Constitution formed. Very few men of that day supposed that at this time we would have seventy millions of people. Very few of that day supposed there would be one or two hundred thousand men in this country who would hold their offices at the will of one man. And he is now a very potent individual.

He can do a vast deal, but I do not think that we are to become uneasy by reason of that fact. He may exert, if he chooses, a power in the elections. He may have an army behind him, in the shape of officeholders to carry out his will. But I think we have found from experience that the

³³⁷ From 1874 to 1967, the District of Columbia was governed by a three-member Board of Commissioners. Aaron E. Price, Sr., Comment, *A Representative Democracy: An Unfulfilled Ideal for Citizens of the District of Columbia*, 7 UDC/DCSL L. REV. 77, 83–84 (2003). The Commissioners were appointed by the President of the United States, and consisted of two civilians and one officer or captain with experience in the Army Corps of Engineers. W.B. BRYAN, FORMS OF LOCAL GOVERNMENT IN THE DISTRICT OF COLUMBIA 26 (1903). John Wesley Ross was the President of the Board of Commissioners from 1893 to 1898, and John Brewer Wight served as the President of the Board of Commissioners from 1898 to 1900. *See id.* at 51.

³³⁸ *See* 1 MADISON, *supra* note 239, at 49–56.

President of the United States is not strong before the people because he has got officeholders behind him.

On the contrary, human nature is such that all that have not offices are apt to combine against those that have. The outs want to get in, and want to get the ins out, and the result is that a man is not ordinarily as strong if he wants a second term as he was before he got the first. And he will not be apt to get the second term unless he has so managed his high office as to commend himself to the people of the country as a wise, safe, and prudent man.

So, I do not think there is any danger from that source. But whatever may be the power behind him—whatever is the nature of that power—the great fact in this Constitution is that he, like the balance of us, is subject to law. He cannot budge an inch outside of the law without there being power somewhere to check, if not him, the man whom he may employ. He may appoint a bad man to office, but there is power existing elsewhere to impeach that man for high crimes and misdemeanors in office, and turn him out. He may order this, that, or the other thing to be done, but there is power in one department of the law to say to him, “Thus far thou shalt go and no farther.”³³⁹

Now, the value of this single-headedness, if I may so express it, lies in the fact that it gives directness and point and energy in the execution of that office. If this country should ever get into war, for instance, it is well for the country—it would be well for us—that the executive power of the nation in that contingency is in the hands of one person. Not two persons, no divided council, the whole responsibility as far as that is concerned resting in one man, and he having the power to wield the entire executive power of the United States in order to accomplish the safety of the nation.

Now, I think that is well, and particularly well in this free country. In this country, where men think as they please, talk as they please, and very often act as they please. We want the power somewhere, with all that is behind it, to lay its hand upon ourselves, if need be, when we get out of temper, and when we depart from sound sense—when we give way to passions and oppose the law. It is well in this free Republic that this power

³³⁹ See *Four Letters on Interesting Subjects*, in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760–1805, at 368, 385 (Charles S. Hyneman & Donald S. Lutz eds., 1983) (“No country can be called *free* which is governed by an absolute power; and it matters not whether it be an absolute royal power or an absolute legislative power, as the consequences will be the same to the people. That England is governed by the latter, no man can deny, there being, as is said before, no Constitution in that country which says to the legislative powers, ‘Thus far shalt thou go, and no farther.’”).

is in the hands of one man, so far as he may wield the Constitution and laws of the government. And he holds his term for four years, not a minute longer. Not until his successor is qualified, but for four years.

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 an Elector.³⁴⁰

It is a very common mode of speech in this country for a man to say that "I voted for William McKinley for President of the United States," or "for William J. Bryan for President of the United States." There was not a single vote cast at the last election for either one of them. They voted for electors in the several states. Each party had electors, and they voted for those electors. And it was supposed when the Constitution was adopted that the country would secure the best President possible if the election was through a board of electors in each of the states, that would meet on the same day throughout the country and cast their votes for the best man that they could think of, or the best one for the country.³⁴¹ That theory disappeared, and although we do not vote for the President, we vote for men who, if they do not vote as they agree to vote, will get into trouble. Here are a dozen candidates for electors, and they pledge themselves if elected that they will vote for this man. And they meet in the electoral college and they vote according to popular indication at the election.

"[E]qual to the whole Number of Senators and Representatives to which the State may be entitled in the Congress"³⁴²

Now, there is a gap right here in the Constitution that is a pretty serious one. Further along in the Constitution, in Article 12 of the Amendments, there are provisions as to how these electors shall discharge the duty committed to them.

³⁴⁰ U.S. CONST. art. II, § 1, cl. 2.

³⁴¹ Article II, section 1 of the Constitution originally provided that [t]he 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

Id. art. II, § 1, cl. 3. This provision was superseded by the Twelfth Amendment, which was ratified on June 15, 1804. *Id.* amend. XII.

³⁴² *Id.* art. II, § 1, cl. 2.

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 government of the United States, directed to the President of the Senate.³⁴³

Now, I have not probably told you what was the occasion of the Twelfth Amendment. The original Constitution did not require the electors to vote separately for a President and separately for a Vice President. It provided—the provision was so general in its nature—that the man receiving the highest number of votes should be the President and the next the Vice President.³⁴⁴

In 1801, the party then called the Republican Party—headed by Mr. Jefferson, that is—their representatives had a ticket, Thomas Jefferson for President, Aaron Burr for Vice President. There was no question in the minds of any honest man at that time that the Republican Party wanted Jefferson for President and Burr for Vice President. The opposing candidates were John Adams for the Federalists for President, and Pinckney for Vice President.

The result of the election was that Jefferson and Burr got a larger vote than Adams and Pinckney, and that Jefferson's and Burr's votes were exactly even. And the result was the election went into the House of Representatives. And it is a blot upon the memory of Aaron Burr that will

³⁴³ *Id.* amend. XII.

³⁴⁴ Article II, section 1 of the Constitution originally provided that [t]he Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by the States, the Representation from each State having one Vote In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot of the Vice President.

Id. art. II, § 1, cl. 3. This provision was also superseded by the Twelfth Amendment. *Id.* amend. XII.

never be erased, that although he knew that his party did not vote for him to be President, he schemed in that House to have himself elected President over Mr. Jefferson. He tried to get the Federalists to join and elect him President, so as to give him the highest number of votes, and he would be President, and Jefferson Vice President.

The head of the opposite to Mr. Jefferson at that time was Alexander Hamilton. He and Mr. Jefferson were unalterably opposed to each other. They differed fundamentally on many questions. On some matters Jefferson doubted Hamilton's patriotism, and on some matters Hamilton doubted Jefferson's patriotism. But Hamilton doubted Burr's integrity. He believed that it was not safe for this country that Burr should be in the White House. And it is a fact well authenticated by the history of the time that he interposed in that contest with the members of his own party, and he got two of them to vote for Jefferson for President of the United States. And no doubt, Mr. Jefferson owed his election to his life-long opponent, Alexander Hamilton.³⁴⁵

Now, this article was put in the Constitution as the result of that trouble, so as to render it impossible for any such trouble to occur again. But that is not all the gap that I referred to.

Twelfth Amendment. On a given day, the Senate and House of Representatives meet together in the House of Representatives. The President of the United States is there, with the Speaker of the House. The direction of the Constitution is, "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."³⁴⁶ That is all the Constitution says.

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

³⁴⁵ See generally Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 YALE L.J. 1959 (1999).

³⁴⁶ U.S. CONST. art. II, § 1, cl. 3, amended by U.S. CONST. amend. XII.

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.³⁴⁷

Now, it never occurred to the framers of the Constitution when it was adopted that there would ever be any dispute over the simple arrangement that this certificate shall be opened, and the President of the Senate shall count the votes in the presence of the two Houses. You will understand that if an election is over in a state, the return is made to the proper officers at the capital of the state. And the electors there certify to the United States that certain electors received so many votes, and certain others received so many votes. That is the certificate that is sent.

The framers of the Constitution never supposed there would be any difficulty in the President of the United States reading those votes, and saying which was the larger number. But suppose that in some state there is an election board at the capital of the State composed of scoundrels that are ready to do anything for party, and that that election board will deliberately miscount the vote of that state. That they will throw out the vote of this county upon some technicality, and that county upon some mere technicality, that does not affect the integrity of the vote. And the result of the action on their part is to change the vote of that state, and to cause a certificate to be sent to Washington that is not in accordance with the vote really cast by the people of the state. And suppose that it further turns out that that false and fraudulent certificate from that state changed the election and put a man in the White House that was not really elected.

Now, you can very well see how uncomfortable that might make the people of the United States. You can very well understand that if that sort of thing was repeated very often in this country, why in the end there might be revolution.

Now, no provision is made in the Constitution to meet a case of that kind. No mode is provided to test the question as to what was the vote really cast by the state.

Now, of course, there will be no trouble as long as the majority one way or the other is so large as to make such an inquiry inconsequential. We might say, "This state was counted wrong, but here are enough votes

³⁴⁷ *Id.* amend. XII. The last clause of the Twelfth Amendment was superseded by the Twentieth Amendment, which was ratified on January 23, 1933. *Id.* amend. XX.

besides to elect the man declared elected.” But we may get to the point, as we once were, where one vote turns the scale, and where people are supposed on either side to suspect the integrity of everybody on the other side. There ought to be an amendment to the Constitution of the United States that would provide some mode by which, in advance of the fourth of March, to determine the integrity of this certificate from the several states.

“[B]ut no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”³⁴⁸

An elector must not owe anything to the United States other than that which comes from his being a citizen of the United States, if he wants to be an elector.

“The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”³⁴⁹

That is plain enough. It does not need any explanation in order to make it plainer.

Relative to the votes for Hayes and Tilden, according to the face of the returns, Hayes had 186 and Tilden 185.³⁵⁰ Well, Mr. Tilden’s friends said that that was rascality, and Hayes’s friends said as to some of the returns there were rascalities, and very serious trouble was about to arise. I recall the time very well. I could read in the face of the people almost as I walked along the streets that we were upon the brink of a volcano that might burst out at any time and tear our institutions to pieces.

Who was to settle it? The Senate of the United States by itself could not settle it. The House of Representatives by itself could not settle it. The whole requirement of the Constitution was “The President of the Senate should count the vote.”³⁵¹

Well, when the Senate and House of Representatives were together in

³⁴⁸ *Id.* art. II, § 1, cl. 2.

³⁴⁹ *Id.* art. II, § 1, cl. 4.

³⁵⁰ Harlan refers to the 1876 presidential election between Republican Rutherford B. Hayes and Democrat Samuel J. Tilden, which turned on twenty disputed electoral votes from Florida, Louisiana, South Carolina, and Oregon. *See* Brooks D. Simpson, *Ulysses S. Grant and the Electoral Crisis of 1876–77*, RUTHERFORD B. HAYES PRESIDENTIAL CENTER http://www.rbhayes.org/hayes/content/files/hayes_historical_journal/ulysses_s._grant.htm (last visited June 15, 2013). On January 29, 1877, Congress created a fifteen-member Electoral Commission to resolve the dispute. *See id.* The Commission awarded the disputed electoral votes to Hayes, who was inaugurated on March 4, 1877. *Id.*

³⁵¹ *See* U.S. CONST. ART. II, § 1, cl. 3. (“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 House of Representatives, and the certificate was opened that came from Louisiana, for instance, and one that came from Florida, and one from the state of South Carolina, and one from the state of Oregon, they had nothing before them but those four pieces of paper. They said so and so. “But,” said one of the parties, “that is a fraudulent return from Louisiana; this is a fraudulent return from Florida, that is not the way Louisiana voted or Florida voted, or Oregon voted.”

Well, how were they to settle it? The Constitution was silent. And finally they devised the scheme of the electoral commission, composed, I believe, of fifteen: five Senators, five Representatives, and five members of the Supreme Court of the United States, all men of high character and standing.

But such were the times—such was the temper of the times—that it was hard to find anybody that had the fairness and the patience to judge of a man on the opposite side of politics fairly and justly. It so happened that upon every question in that case—perhaps with one exception—that was material upon which the result depended, that the Democrats voted all one way, and the Republicans the other.

One of the members of the Supreme Court of the United States was on that commission, and no purer, better man ever lived than he was. He was a man who had strong political convictions, but he never meddled in politics, and he did not know what politics he had when he got on the bench. I allude to Mr. Justice Clifford of Maine.³⁵²

One day he met one of his brethren who was not on the commission, and Brother Clifford, with perfect simplicity, said to that brother judge, that he was sick at heart. Why, what was the matter? “Why, up to this time every question that has been considered here, the commission is divided on

³⁵² Associate Justice Nathan Clifford (August 18, 1803–July 25, 1881) was born in New Hampshire and moved to Maine to practice law. *Clifford, Nathan*, U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/People/Listing/C/CLIFFORD,-Nathan-%28C000518%29/> (last visited June 15, 2013). He served in the Maine House of Representatives from 1830 to 1834, and was the Speaker from 1832 to 1834. *Id.* From 1834 to 1838, he served as Maine Attorney General. *Id.* In 1838, he was elected as a Democrat to the United States House of Representatives, and served until 1842. *Id.* In 1846, President James K. Polk appointed Clifford Attorney General of the United States. *Id.* In 1848, Clifford became United States Envoy Extraordinary and Minister Plenipotentiary to Mexico and negotiated the Treaty of Guadalupe Hidalgo, which made California part of the United States. *See id.* In 1857, Clifford was nominated for the Supreme Court by President James Buchanan, and in 1858, he was confirmed. *See id.* Clifford voted for Tilden, and never accepted the Electoral Commission’s decision in favor of Hayes. *See PHILLIP GREELY CLIFFORD, NATHAN CLIFFORD, DEMOCRAT (1803–1881) 319–24 (1922).* He served on the Supreme Court until 1881, when he died of a stroke. *See id.* at 341–42

the line of politics.” “Yes,” said his brother Republican friend, “I observe ‘Cliffy’ that all of you Democrats vote together every time a vote is cast.”

Now, he had not observed that. He had not been aware that he had any politics in the matter. And I believe that every judge that participated in that question voted the same way. But there were vast numbers of people in this country that did not believe that.

It was a misfortune for the country that the division was exactly on party lines. It would have been well for the country if it had not been so, but it was so. And it suggests to my mind the thought that I hope it never will occur again in the history of this country. I hope that the condition of this country never will be such as to make it necessary for the Congress of the United States to create a commission to determine quasi-political questions, upon which a member of the Supreme Court will be required to sit. For it has made an impression with a great many men that will take some years perhaps for it to die out, that even in that high tribunal which is supposed to be above party—which I think is above party—members will not forget that they have particular political principles. If there is one element of safety for the future of this country, and of our institutions, it is in the belief, which I hope will always obtain, that that court of last resort in this country will give its judgment upon the law of the case without the slightest reference to the politics of the litigants or to its effects upon the politics of the country.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.³⁵³

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.³⁵⁴

Until a few years ago, there was a good deal of uneasiness arising out

³⁵³ U.S. CONST. art. II, § 1, cl. 5.

³⁵⁴ *Id.* art. II, § 1, cl. 6, amended by U.S. CONST. amends. XX, XXV.

of that provision of the Constitution. In case of the death of the President and Vice-President both, the President of the Senate would become President of the United States. Mr. Lincoln was assassinated in 1865. Andrew Johnson became President of the United States then. The Republican Party, having control of the Senate, elected one of their number President of the Senate. Mr. Johnson got into a quarrel with his political party. They became mad at him, and he became mad at them, and he did many things that were distasteful to his party and, as they thought, dangerous to the country.

One of the results of the quarrel was articles of impeachment and trial by the Senate of the United States. There then, Andrew Johnson was being tried by the Senate of the United States, composed of the party that he did not recognize at the time fully, and which party—in the event that they put him out of office—would have had a representative in the White House in Mr. Wade of Ohio, and I am not sure but that he voted in that question himself.³⁵⁵

Now, don't you see what a temptation there was to put Mr. Johnson out of the White House, in order that one of their own number could get into the White House, and they could carry through the projects that they had in hand? Now, one of the results of that has been the passage of the law that takes away the desire, if any ever had it.

But now there is nothing to be accomplished for a political party by the death of the opposing President and his Vice-President, because under the law as it now stands, if President McKinley should die, and Vice-President Hobart should die, the President of the Senate would not go into the office, but the Secretary of State would become President of the United States, the Secretary of the Treasury next, I believe, the Secretary of War after that.³⁵⁶

³⁵⁵ Harlan refers to Senator Benjamin Wade of Ohio, the President Pro Tempore of the Senate, who would have become President if Johnson had been convicted. See *Benjamin Wade* (1800–1878), LATIN LIBR., <http://www.thelatinlibrary.com/chron/civilwarnotes/wade.html> (last visited June 15, 2013). Wade did vote to convict Johnson. *Id.*

³⁵⁶ President William McKinley was assassinated on September 5, 1901, while visiting the Pan-American Exposition in Buffalo, New York. See *William McKinley*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/about/presidents/williammckinley> (last visited June 15, 2013). He was succeeded by Vice President Theodore Roosevelt. See *Theodore Roosevelt*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/about/presidents/theodoreroosevelt> (last visited June 15, 2013). Vice President Garret Hobart had died of heart failure on November 21, 1899. See *Garret A. Hobart* (1897–1899), MILLER CENTER, <http://millercenter.org/president/mckinley/essays/vicepresident/1847> (last visited June 15, 2013).

They are named in the statutes in the order of time that those departments were created. And so it is absolutely certain that when a political party elects a particular man to the Presidency, that party can count of having the offices of the government for the whole four years.

“The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”³⁵⁷

The President of the United States, when he enters upon his office, is entitled to receive the salary then fixed by law. He can count under this provision upon that amount being paid him until the end of his four years, and Congress cannot diminish it during that time. It gives him a sense of independence. It is to take away from Congress the power of starving the President into surrendering to their will. It is to say to the President, stand on your own rights and the amount that we agreed to pay you at the start we will pay you until the close. That is a wise provision. The President of the United States cannot, however, while he is doing that receive emoluments from states. The state of Ohio could not employ Mr. McKinley to represent them in a case and pay him for it, although he could come into our court and argue a case, if he thought it consistent with his high office, we would hear him, but he could not receive compensation for it.³⁵⁸

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.³⁵⁹

Mr. Lincoln said to our brethren of the South, before the war actually opened,

I have upon my soul an oath to protect and defend the United States, to preserve the Constitution of the United States. I cannot

³⁵⁷ U.S. CONST. art. II, § 1, cl. 7.

³⁵⁸ No sitting President has argued a case before the Supreme Court. John Quincy Adams, James Knox Polk, Abraham Lincoln, James Abram Garfield, Grover Cleveland, Benjamin Harrison, William Howard Taft, and Richard Nixon argued cases before the Supreme Court before or after they served as President. See Robert Nedelkoff, *Nixon, Lincoln, Et Al Before the High Court*, NEW NIXON, (Aug. 31, 2010), <http://blog.nixonfoundation.org/2010/08/nixon-lincoln-et-al-before-the-high-court/>.

³⁵⁹ U.S. CONST. art. II, § 1, cl. 8.

permit you to destroy the authority of the United States, to take possession of its property, and resist its laws, without violating my oath. You have got no oath upon your souls such as I have upon mine. I beg you to halt and think before you go further.³⁶⁰

And that is his oath today. Wherever—anywhere between the two oceans and the lakes on the North and the Gulf on the South—anybody is defying the laws of the United States, the President of the United States—in conformity of course with the statutes of the United States—may proceed and employ the power of the United States, to maintain its authority wherever it is assailed.

“Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States”³⁶¹

Commander-in-Chief, we know what that is. We do not need any words to define that. He commands that army, and he commands that navy, wherever it is. He is the military commander. I see nothing in the Constitution of the United States that will prevent the President of the United States, if we had war, if he chooses to go to the actual scene of conflict and take command.

There is no defined authority. We have not two Commanders-in-Chief, or three Commanders-in-Chief, and whatever military authority is to be exercised it is with one man. The authority is with him. The responsibility is with him. And whether that navy is lying in the harbor of New York, whether it is over on the Asiatic coast watching the interests of our country there, or whether it is in the waters of the Southwest here, gathering around the hulk of that magnificent vessel recently destroyed, it is still the navy and he may command it.³⁶²

Now, I do not think that I can better close what I want to say tonight than by saying to you that we are now in times when people ought not to lose their heads, as some people are in Congress, and out of Congress. I cannot perform any better service to you, I am sure, than to advise you to keep cool, and not to pass judgments upon grave questions when you have not the facts before you. If there is anything that our profession teaches us, it is wait until the case is presented before you to reach a final conclusion.

³⁶⁰ Harlan is summarizing Abraham Lincoln’s First Inaugural Address, delivered March 4, 1861. Abraham Lincoln, Inaugural Address (Mar. 4, 1861), in GREAT WORDS FROM GREAT AMERICANS 155 (New York, G.P. Putnam’s Sons 1890).

³⁶¹ U.S. CONST. art. II, § 2, cl. 1.

³⁶² Harlan refers to the *USS Maine*, which exploded and sank in Havana Harbor, Cuba, on February 15, 1898. *Warship Maine Destroyed*, SALT LAKE HERALD, Feb. 16, 1898 at 1.

You will understand very well to what I allude, the great calamity that has occurred in the waters nearby. It is idle for any man to say that he knows how that calamity occurred. And any man belittles his nature and lowers himself in the estimation of his fellow men if he expresses the anxiety that it will turn out that that was treachery, rather than an accident. Brave, generous men do not want to think so badly of their fellow men.

We do not want to believe that that was an act of treachery and duplicity. We hope it will turn out otherwise. And we ought all to have this feeling. If it turns out to be accidental, we should rejoice. If it turns out not to be accidental, we will not hear any more of North, South, East, or West in this country, but we will only hear of Americans.

LECTURE 18: FEBRUARY 26, 1898

We are still engaged in the examination of that part of the Constitution relating to the executive power of the United States, one of the coequal, coordinate departments of the government. We closed at the last evening by reference, in a general way, to Section 2 of Article II, which states that "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 Service of the United States." The only other observation I care to make on that subject is to remind you that, although the general rule is that in time of war the laws are silent, in time of peace they are not silent, that the Commander in Chief of the Army and Navy is subject to the law just as we are, and that whatever authority is in him as Commander in Chief of the Army and Navy in time of peace must be exerted by him with reference to all the other parts of the Constitution. He cannot because he is Commander in Chief violate any of the rights of citizens, nor override the guaranties of the Constitution that are provided for the protection of life, liberty, and property. As Commander in Chief of the Army he cannot order an arrest of a citizen any more than one of you may do so. He is subordinated to the law, to the civil law.

Now, of course, in time of war different considerations come in. The Constitution says that Congress shall have power to declare war in this country.³⁶³ It means that there are rules of war that govern in time of war. Some things may be done in a time of war and within the limits of the operation of an army that may not be done in time of peace. It would be an endless discussion if I were to attempt to go over that whole field in all its details and tell you what might or might not be done in time of war. Suffice it to say that in a time of peace the army and the navy, and the President as its Commander in Chief, are subject to the civil law and must proceed according to the civil law in their intercourse on the outside of the army and navy with citizens. The army and navy are subject to peculiar rules and regulations which have been established by Congress. Now, one of the express powers given to Congress is to make rules for the government and regulation of the land and naval forces. The President may not make them, but Congress may, and when they are made, they are binding not only upon the army and navy but binding upon him and upon citizens where their rights may be involved.³⁶⁴

³⁶³ U.S. CONST. art. I, § 8, cl. 11.

³⁶⁴ *Id.* art. I, § 1, 8.

“[H]e 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”³⁶⁵ If a matter arises before him for consideration relating to the finances of the country, for instance, somebody may suggest to the President—and there are always any number of people ready to make suggestions as to the best mode of improving the conditions of this country upon the subject of currency—he may suggest a plan. Well, the President can write on the back of that paper, and he may refer it to the Secretary of the Treasury, with the direction that he give his opinion in writing about the practicability and the feasibility of that plan, and the Secretary of the Treasury will proceed to give his opinion. The President may be asked to do this or that in reference to the army or navy. Well, he would refer one to the Secretary of War and the other to the Secretary of the Navy and ask their opinion. He may be asked something that involves a question not of public policy but of law. Well, he would refer that to the Attorney General with a request that he give his opinion.

That provision of the Constitution was first brought into recognition, if I remember correctly from my reading, when the first act was passed establishing the Bank of the United States. Washington was President, and he referred that act of Congress to the heads of Departments, and asked each one of them his opinion about it.³⁶⁶ He asked it in order that he might be advised as to his duty to approve it or veto it. That was a very memorable occasion in the history of the country. All the heads of Departments gave their opinions. None of them were very long or full except one, and that was by the youngest man in the cabinet of Washington, Alexander Hamilton, who was at that time only about thirty-

³⁶⁵ *Id.* art. II, § 2, cl. 1.

³⁶⁶ *George Washington—First Term*, PROFILES OF U.S. PRESIDENTS, <http://www.presidentprofiles.com/Washington-Johnson/George-Washington-First-term.html#ixzz20LHvtMsQ> (last visited June 15, 2013) (“Although brief, the debate in the House was heated enough and the opposition’s arguments were plausible enough to make Washington uneasy about the measure’s constitutionality. To dispel such misgivings, he solicited the advice of Attorney General Edmund Randolph, who pronounced the bank unconstitutional. Still undecided, Washington turned to his secretary of state. A constitutional fundamentalist and fiscal conservative, Jefferson set forth in his opinion on the bank a rigidly literal and strict construction of the Constitution that would have virtually strangled the national government in its infancy. Still undecided, the president sent copies of Randolph’s and Jefferson’s opinions to the secretary of the treasury, implicitly requesting him to refute them. Although he was confident of Hamilton’s ability to do so, Washington could not have forecast the masterfulness of the essay in constitutional law that he received in reply.”).

four or thirty-five years of age.³⁶⁷ The question presented to Washington was, Has Congress the authority to create a national bank, or a bank of the United States? Does the power belong to it under the Constitution? Of course, it was important to have it settled upon the right ground. Washington was not a lawyer. He was a planter, not versed in the principles of constitutional law, except in the way that every American was of that day. The question was, did the Constitution authorize it?

Now, the tradition is that Mr. Hamilton wrote his answer to the question propounded to him in one evening, that he sat up all night—substantially all night—completed it and sent it to the President.³⁶⁸ Time was important because the bill would become a law within the ten-day limit if it was not approved or sent back. Well, it was a marvelous document, that prepared by Mr. Hamilton. It covered the whole theory of the Constitution as he understood it.

But observe that these opinions are not law in the sense of the judgment of a court is law. They are given for the information and guidance of the President. He has called his cabinet around him. He has tried to select men qualified to head these departments. Some of them would perhaps have special knowledge on the special subjects belonging to their departments, and therefore the framers of the Constitution said it was wise and proper that the President of the United States should have the benefit of the views of all the members of the cabinet, or any one of them that he might call for. He might conclude to follow the opinion of the head of the department, but that did not make it law.

If what was done was called in question in a court of law it would have been no answer to say that the President did this because he was advised by the Attorney General that it might be legally done. There is only one state in the union, I believe, that has that system in its Constitution, that is the

³⁶⁷ This document has come to be known as Hamilton's "Opinion on the Constitutionality of a National Bank," written in response to then-Secretary of State Thomas Jefferson's own opinion attacking the constitutionality of a national bank. See Alexander Hamilton, *supra* note 235, at 95. Hamilton supported the notion of a strong national government and construed Congress's Article I, Section 8 powers broadly, whereas Jefferson believed in small, decentralized government with limited national power. See *id.*

³⁶⁸ This appears to be incorrect in its details. President Washington sent the opinions of Secretary of State Jefferson and Attorney General Edmund Randolph, both rejecting the constitutionality of a national bank, to Hamilton, and then requested Hamilton to write his own opinion. Although Justice Harlan here states the response was crafted overnight, research suggests Hamilton's approximately 15,000 word response took just over a week, with Hamilton's wife, Eliza, recalling that she "sat up all night [copying] out his writing" before delivering it to Washington. RON CHERNOW, *ALEXANDER HAMILTON* 351–53 (2004).

state of Massachusetts. Their Constitution permits either branch of the legislature, if a bill is pending before it, for instance, to be adopted or rejected, and involves a grave question of law, that body is entitled to send that bill to the Supreme Judicial Court of Massachusetts, or rather to the members of that court collectively, and ask their opinion, is this law consistent with the Constitution of the Commonwealth of Massachusetts?³⁶⁹ They get that opinion, not to control them, but for their guidance. Of course, the presumption would be that if the members of that court before the bill passed said it would be constitutional, the probability is that they would adhere to that view when the case arose in court, unless for good reasons their minds were changed. I do not know but what it is a good system.

Now, it might be supplemented by another change if it was thought wise, and some think it would be, and that is instead of the heads of departments being confined to giving opinions to the President in writing, to allow them a seat on the floor of the two Houses. Some very wise men have said that ought to be the arrangement here; not that the heads of those departments being there could vote—by no means—but they might be there to answer questions, and the answer to those questions would give the Representatives a great deal of information which they could not otherwise obtain previous to the passage of the law.

They have that system in England today. All the members of Lord Salisbury's cabinet, I believe, are members of one of the two Houses of Parliament.³⁷⁰ Lord Salisbury himself is a member of the House of Lords. The leader of the House of Commons is Mr. Balfour. The usage now is that questions may be propounded to these heads of departments that are sitting there, not at one meeting and the head of department expected to get up on the spot and give his answer, but they are filed and that gives notice, and the head of foreign affairs in that branch of Parliament would know, for instance, when Parliament meets next week, here is a question I have got to answer.³⁷¹

³⁶⁹ MASS. CONST. of 1780, pt. 2, ch. 3, art. II.

³⁷⁰ Cabinet members are Members of Parliament, and are thus accountable to the House of which they are a member. *See* 1 JOSEF REDLICH, THE PROCEDURE OF THE HOUSE OF COMMONS 71 (A. Ernest Steinthal trans., 1908).

³⁷¹ At the time of Harlan's lecture, the general idea of "question time" had been put into parliamentary standing orders, which are procedural rules for Parliament. As with much of the Parliament's history, the tradition of "question time" began as unwritten and informal custom and only later became officially recognized in a standing order. *See* HOUSE OF COMMONS, STANDING ORDERS OF THE HOUSE OF COMMONS, 2012, H.C., at 29, 31 (U.K.), available at www.publications.parliament.uk/pa/cm201213/cmstords/240512.pdf.

And how much may he answer? Well, he may say to the House of Commons, "I cannot, consistent with the public interest, answer this question at this time. Correspondence is now going on between this country and America, for instance, at this time about this matter. It is not concluded. It would not be wise and not good for the public interests that I should speak of that public matter, and I must decline to answer." Well, ordinarily that is accepted. A man true to his government would not embarrass the executive of the government, and would not ask why.

Now, one advantage of these questions is to keep the public informed of what is going on, and there is a publicity in public affairs up to a certain extent that is valuable, to be recognized and valued, and there is a reticence often in public affairs which it is important to observe if we wish to bring things to a proper conclusion.

"[A]nd he," that is, the President, "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."³⁷²

Now, observe that the power to grant reprieves and pardons here is only for offenses against the United States. A man may be convicted in the state of Connecticut, for instance, of larceny, grand or petit, or murder, or burglary—an offense against the laws of that state. The United States has nothing earthly to do with that case or with that offense, and a pardon by the President of the United States against an offense committed against the state of Connecticut would not be worth any more than a pardon by one of you. It relates only to offenses against the United States.

Well, what is a reprieve? Why, it is a document that delays the execution of the sentence. A man may be condemned in the Indian Territory, or some other territory of the United States, or here in the District of Columbia, to be hung on a given day in the future. Now, the President may, for reasons satisfactory to himself, postpone the execution of that sentence for ninety days.³⁷³ There may be reasons for it. He may doubt, upon looking into the case, whether this man ought to be hung. He has not had time to look into the case; there is something that he wants to find out that is not developed in the record, and he does not want an innocent man hung. He wants to be sure that he is in the right if this man is hung. And, therefore, he says I delay this execution for sixty days until I look further

³⁷² U.S. CONST. art. II, § 2, cl. 1.

³⁷³ Jerry Carannante, Note, *What to Do About the Executive Clemency Power in the Wake of the Clinton Presidency*, 47 N.Y.L. SCH. L. REV. 325, 328 (2003) ("Reprieves typically postpone executions until death-row inmates can give birth, recover from illness, or be heard on a final appeal.").

into the case. So in the case of the payment of a fine which may be due, he may postpone the payment by a reprieve.

What is a pardon? It is a document that wipes out the offense altogether. A man convicted of murder in this District may be pardoned by the President of the United States, and when that pardon is presented it discharges that man from prison or from arrest and he goes free. It wipes out that offense.

When may he pardon? Now first let me suppose a man today commits what is supposed to be the crime of murder here on the streets in the city of Washington. Perhaps it is murder according to technical law. The grand jury has not met though and no indictment has been found. Can the President pardon that man the day after this offense is alleged to have been committed? Yes. He does not pardon a man from a trial, from an indictment, from a judgment of a jury or court. He has a right to pardon the offense, and if the offense exists, that it exists whether the man has been indicted or not, and the President may pardon the offense, and that will prevent the man from being indicted, or if he is indicted for that offense why he has nothing to do except to plead that pardon. Here is a pardon which wipes out that offense, and therefore you cannot proceed against me with this indictment.

Now, of course, that is rarely done, because every man will see in a moment that when a grand jury has indicted a man the President ought not to interfere. If the grand jury has not indicted the man, the President ought to wait until the grand jury acts, and if they indict the man, wait and see if he is guilty. If he is guilty there is no need to interfere. If he is convicted, that proves that the President ought not to have interfered before any trial. But there may be cases, though they would be extreme cases, that would justify the President to interfere before indictment and trial and pardon an offense against the United States.

Now, sometimes a question has arisen—it has not been decided I think in the Supreme Court of the United States, it has been decided on some of the circuits—as to whether a man could be pardoned on condition.³⁷⁴ Well, it has sometimes been done. For instance, if a man were convicted of an offense here in this District, the President might issue a pardon conditioned that that man should leave the United States in thirty days and never return to it, and if he did return he would be subject to arrest and prosecution.

³⁷⁴ This statement is inaccurate. The Supreme Court settled this issue several decades prior: “In this view of the constitution, by giving to its words their proper meaning, the power to pardon conditionally is not one of inference at all, but one conferred in terms.” *Ex parte Wells*, 59 U.S. (18 How.) 307, 315 (1855).

Now, some courts have held that the President may annex a condition of that sort to his pardon. I need not discuss whether that is sound or not. It is certain that the Constitution does not in words say that that cannot be done. There is no qualification made to the power to pardon, therefore, it may be fairly stated that there is no objection in the Constitution to a pardon on a condition of that sort.

“He,” the President, “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”³⁷⁵

It was a matter of great deliberation, the subject of frequent discussion in the conventions, as to where that power should be lodged to make treaties.³⁷⁶ Who should be allowed to make treaties? It was the view of some that the power should be vested in a triple-headed body.³⁷⁷ Well, the answer to that was, if the power to make a treaty was given to a body composed of three persons, for instance, and it needed the concurrence of all three to make the treaty, a treaty would never be made. At last they fell upon this plan to give the President, with the consent of the Senate, the power to make treaties.

Now let me suppose that the Senate and House of Representatives should by a joint resolution unanimously declare that the following treaty written out shall be made between this country and England. And let me suppose that that joint resolution was approved by all the Justices of the Supreme Court of the United States. And in this way obtaining the concurrence of the legislative and judicial branches of the Government, would that be a treaty, would that amount to the paper upon which it was written?

No, simply because these judges of the Supreme Court of the United States are not allowed by this Constitution to participate in the making of treaties, nor is the House of Representatives invested with authority to make a treaty. Nobody is invested with authority to make a treaty except the President of the United States, and not he alone. He makes the treaty, but he can only make it in the sense of the Constitution with the advice and consent of the Senate. The Senate may resolve every day in the year in favor of a particular document as a treaty, but unless the President of the

³⁷⁵ U.S. CONST. art. II, § 2, cl. 2.

³⁷⁶ For background commentary, see David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1132–49 (2000).

³⁷⁷ See Statement of Patrick Henry (June 18, 1788), in 2 THE DEBATES, *supra* note 26, at 376–77.

United States assents to it, it cannot be a treaty.

All the judicial power in this country combined could not compel the President to assent to that treaty made by the Senate. He must initiate all movements for a treaty, and until he does, until he agrees to a treaty with a foreign government nothing can be done in that way. And when he does it through his agent, whoever it may be—it may be the Secretary of State or somebody else—that treaty must then go to the Senate, and then it requires two-thirds of the Senators present to concur.

Therefore, if when they come to vote in the Senate on the Hawaiian Treaty, if some Senator has not made up his mind how he ought to vote, or wants to vote, why he can get sick and remain at home, or he can be absent if he chooses, then it is two-thirds of the Senators present.³⁷⁸ If they concur, then it becomes a treaty, and all that remains is to exchange ratification of that treaty between the two governments.

Now there is one question right along there to which I ought to call your attention. It may seem to you a little anomalous that such is the fact. I have often read to you the clause of the Constitution to the effect that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof,” that is all valid enactments, “and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”³⁷⁹

Now when the President makes a treaty and the Senate, by the requisite vote, concurs, that treaty is the supreme law of this land as long as it is in force. Of that treaty every port in this country must take notice whether it is pleaded or not. The judges are judicially informed of that fact, and they will enforce that treaty as the supreme law of the land. Yet it is settled, and there is no authority to the contrary, that a treaty may be repealed by an act of Congress; that is, when by an act subsequent to the making of the treaty in which both houses concur, and in which the President concurs, abrogating a treaty between this country and another country, that act supersedes the treaty. And that is because Congress and the President together constitute the machinery which makes law. And when the people of the United States, speaking through its legislative branches in the mode prescribed by the Constitution, say that this treaty made by the President and Senate alone shall no longer be the law of the land, that is the end of it.

We have no secret treaties with any country. It is sometimes said that

³⁷⁸ U.S. CONST. art. II, § 2, cl. 2.

³⁷⁹ *Id.* art. VI, cl. 2.

there is a secret treaty of alliance between two nations. Perhaps there is. It has often been said in the history of diplomacy that two nations would have a secret understanding between themselves about a particular subject, a particular point. Each of them knows what that is, but the other nations dealing with them do not.

Well now, there is no such thing in this country. You cannot conceive of the idea of law in this country that is to bind everybody, of which everybody must take notice, that is not open on the statute books. And there is no such thing possible under our Constitution, for the President and Senate of the United States to have a secret understanding with any government without its being known to the people of the United States.

Can the United States government protect citizens of all other nations directly? The United States would have no more authority than the Czar of Russia to protect the citizens of other nations. The obligation, or rather the right to be protected in life, liberty, and property belongs primarily to the states in which we live. Every man must look to that.

A mob might spring up in the city of New Orleans, an organized mob, and destroy the lives of every foreign-born man in the city of New Orleans in one blow, but the government of the United States has nothing to do with that.³⁸⁰ It cannot send a soldier there for that purpose to protect it or to prevent it. The duty is upon Louisiana to give that protection to life, liberty, and property that belongs to human beings that are there, and there is no greater misconception abroad than is abroad with some than that which would suggest the idea that it belongs to the government of the United States to right all the wrongs to humanity in the country. These things belong to the states primarily.

Now let me make one exception to that. The Fourteenth Amendment to the Constitution of the United States says that

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

³⁸⁰ Harlan is referring to the events surrounding the assassination of New Orleans police chief David Hennessy in 1890. See CARL SIFAKIS, *THE MAFIA ENCYCLOPEDIA* 329–31 (3d ed. 2005). The assassination was the first widely publicized incident involving the Italian Mafia in the United States. Following a sensational trial in which many of the men indicted for Hennessy's murder—all of whom were Italian—were acquitted, a mob formed outside the prison where the men were being held. See *id.* at 329–31. All in all, eleven Italian men were lynched and another five prisoners died in the assault. See *id.* The U.S. government paid \$25,000 to the Italian government as compensation for the deaths and anti-Italian sentiment that swept the nation in the aftermath of Hennessy's assassination. See *id.* at 331.

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.³⁸¹

If Louisiana should pass any laws by which it would deny to men in that state the equal protection of the law, thus denying to one class those rights which they give to another, or deprive any person, foreign or native, of his right to life, liberty, or property without due process of law, and that case should get into the courts of the United States, the courts of the United States would strike out that law. The United States paid a given amount of money as an act of grace to the Italian government for the lives of its citizens murdered in New Orleans.³⁸² It paid the money merely as a matter of grace and to maintain the friendly relations existing between the two governments.

The primary duty of every state in this union is to give protection to life, liberty, and property to all within its bounds, and people are not to suppose that because of a wrong done here or there that therefore he is to turn his face to the city of Washington and appeal to the authorities to come within the limits of that state and exert an authority which they have no right to exert, and if it were not that way we would not have the government we have. The United States is absolutely incompetent to take care of the minor details that may occur in the life of every man in it, and the safety depends upon each local government attending to it in the way they ought to, and to keep their hands off and only interfere when the states by some law or organized action do something that is violative of the rights that belong to men under the Constitution of the United States.

Under what authority did President Cleveland call out the troops to suppress the Chicago strike?³⁸³ Suits were brought in the courts of the United States to enjoin certain men there from interfering with the process of the mails of the United States, and with the progress of interstate commerce which Congress has got power to regulate, and the process of

³⁸¹ U.S. CONST. amend. XIV.

³⁸² See *supra* note 380.

³⁸³ In the Pullman Strike of 1894, striking Pullman Palace Car Company workers were broken up by 12,000 Army troops on the grounds that the strike interfered with the delivery of U.S. mail, violated the Sherman Antitrust Act, and represented a threat to public safety. See William J. Adelman et al., *The Pullman Strike: Yesterday, Today and Tomorrow*, 33 J. MARSHALL L. REV. 583, 592–93 (2000). Thirteen workers were killed and another fifty-seven were injured during the strike. See *id.* The impetus to repair fractured relations with organized labor resulted in the passage of legislation to make Labor Day a national holiday. See *The Origins of Labor Day*, PBS NEWSHOUR (Sept. 2, 2001, 8:01 PM), http://www.pbs.org/newshour/updates/business/july-dec01/labor_day_9-2.html.

injunction was issued, an injunction from a court of the United States.³⁸⁴ Now is it possible that—if the authority of the United States thus being executed, thus being manifested by an order from a court of the United States—is it possible that there is not any power in the executive offices of the United States to go to the side of the marshal of the United States and see to the enforcement of the order of the United States? I suppose that was the reason. He has taken an oath to execute the laws of the United States, and the existence of these courts and their orders were a part of the laws of the United States.

Now, I am not talking about the policy of that litigation. I care nothing about that, nor about the justice or injustice of strikes. I do not stop to consider, for I do not know what the facts were, whether or not the strikers against the railroads or Pullman Palace Car Company had just grounds for it or not, but I do undertake to say that if the regular and peaceable and orderly transmission of the mails of the United States from one part of this country to the other in the regular, peaceable, and orderly conduct of commerce among the states of this union can be interrupted by any organized band of men for its purpose, and if there is no power anywhere in the authorities of the United States to protect these federal rights, why the sooner we amend the Constitution and give that power the better.

In the New Orleans case, if the Louisiana government had declared themselves incompetent to deal with the matter, could the United States then take hold under the Fourteenth Amendment?

Not under the Fourteenth Amendment, but there is power in the United States when called upon by the state in regular form to suppress insurrection. You present a very difficult question, one not so easily answered. Suppose a state is incompetent to suppress a disorder of that sort, and there is a governor of that state that is not worth the powder that would blow him up, he sits idly by and does nothing, the legislature of the state is preparing for the next presidential campaign and it does nothing, and here is a mob that has got possession of the state and paralyzing all the industry of the state, but not interfering with anything of a federal character at all, do not stop the mails, do not interfere with commerce, is not violating any federal law at all, but has simply paralyzed that state. Let me ask, what is to be done there? Well, I do not know any other answer to give than to say that the country has got to stand still and see that people work out their own salvation. If they can stand the condition of things of that sort, the people of the other states can afford to stand it a while at any

³⁸⁴ Adelman, *supra* note 383, at 592–93.

rate. I know of but one provision in the Constitution to meet a case of that sort, and that is one that has never been interpreted. I hope there will never be any occasion to interpret it. It is the last section of Article 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."³⁸⁵ Now, if a governor of the state calls on the President of the United States, saying that there is domestic violence here that is paralyzing all the arms of authority in the state, I cannot do anything about it, I have not the power to do it, the militia are on the other side, and I can do nothing, then the United States, if Congress has passed an act on the subject that covers it, could interfere, and so if the legislature of the state acknowledged its incompetency, and said that the state was at the mercy of a mob and could do nothing, then the President could interfere if Congress passed an act on the subject, but no act has been passed on the subject in order to guarantee a Republican form of government. We have never yet determined as to what is a republican form of government.

"[A]nd he," the President, "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."³⁸⁶ All that power belongs to the President. Could we add a given number of judges of the Supreme Court of the United States, as some want to do?³⁸⁷ Some think we have got too many now, and some want more, but can Congress increase the court to fifteen and say who shall be those judges in order to bring about a particular decision? No, because the Constitution says they shall be appointed by the President. Congress cannot create an ambassador, and say who shall fill it. The President has the appointment of all officers of the

³⁸⁵ U.S. CONST. art. IV, § 4.

³⁸⁶ *Id.* art. II, § 2, cl. 2.

³⁸⁷ The number of Supreme Court justices was fixed by Congress at nine in the Judiciary Act of 1869, and could presumably be changed again. Judiciary Act of 1869, ch. 22, 16 Stat. 44. President Franklin D. Roosevelt famously attempted to increase that number through a "court-packing" scheme in an attempt to have New Deal initiatives passed and upheld, but the measure was politically unpopular on both sides of the aisle and never came to fruition. See *Franklin Delano Roosevelt's "Court Packing" Plan*, U.S. SENATE COMMITTEE ON THE JUDICIARY, <http://www.judiciary.senate.gov/about/history/CourtPacking.cfm> (last visited June 15, 2013).

United States, with the single exception that he may invest the appointment of inferior officers in the heads of departments. A great many in the Treasury Department are not confirmed by the Senate at all. A great many are appointed by heads of departments, and their names are not sent to the Senate at all.

It is said in the section below, “[H]e,” the President, “shall receive Ambassadors and other public Ministers.”³⁸⁸ What do we mean by the President receiving Ambassadors? You very often see in the papers that Mr. so-and-so, with an unpronounceable name, has arrived here as the Minister from a certain country in South America, Africa, or Asia, and he has stopped at the Arlington or the Shoreham. Now, we know to a moral certainty that this is so. We know that he has been sent here to represent his country, and we could be certain of it if we asked to see him and read his commission, if we could read it. But he might be here with a commission from Queen Victoria of England or Emperor William of Germany at the Arlington or at the Shoreham. He might have all his retinue about him, put on all the style he chooses to put on peculiar to his country, but he is not here up to that moment as the official representative of his country. He has got to be recognized by the President of the United States; he has got to be received by the President of the United States.

We see that account in the paper of a particular gentleman accompanied to the White House by the Secretary of State, and presented to the President; he presents his commission, and makes a speech, often not a word of it that the President can understand, but the President responds to it in a written address, not a word of which the foreign man understands. That being done, the Ambassador is received. This country then put its seal upon him as the official representative of his country, and every citizen of the United States, and every officer of the United States, is bound to know that that man represents his country.

So that little ceremony that you see described in the paper of receiving has some legal significance attached to it. But out of those few words has come, in recent days, a controversy of very great significance not yet determined, I mean officially. No case has ever come into a court of justice that gave the courts an opportunity to speak upon the subject. There are some gentlemen who assert—and valued men too, patriotic men—who assert that it belongs to the President alone to determine whether we shall have ambassadors from this country to another, or whether an ambassador shall be received by him for a particular country. The whole Christian

³⁸⁸ U.S. CONST. art. II, § 3.

world was recently stirred to the very foundations by the cruelties practiced in Armenia by the Turkish government towards the Christians there.³⁸⁹ There was hardly a man in this country from one end of it to the other whose indignation was not aroused, and so of the people of England.

Well, this republic is not in such a condition under its Constitution where it can interfere way off yonder with matters of that sort. All we can do is to cry aloud through our public prints, through our legislative departments by resolutions, through our President by proclamation—call the attention of the civilized world to the atrocities. Now suppose the Congress of the United States should pass a statute to this effect: that the government of Turkey was an outlaw, that it was a government that ought not to be respected by civilized nations anywhere, and that we would not show such respect to that government as would be implied in having a minister from it located here in the national capital, and that the lawmaking power of the United States cuts off all diplomatic intercourse with such a barbarous and uncivilized country as that. And suppose that joint resolution should become a law.

There are gentlemen who assert—and they have asserted it on the floor of Congress, and from the State Department—have asserted that the President of the United States, in defiance of a public policy of that sort, if Mr. AB, commissioned here from the government of Turkey, after he presents his credentials, that it was in the power of the President of the United States to receive him as such against the declared will of the Congress of the United States.

Well, I don't believe in any such nonsense as that. I don't believe that we have got in this country an executive officer who can by his fiat declare what are to be the public relations between this country and any other government on the face of the Earth. So long as this country does not in the usual form declare against such relations, I grant that the President may receive him. And when the country through the legislative department has said we will have no diplomatic relations with a particular country, it does not belong to the President of the United States to upset that.

³⁸⁹ Abdul Hamid II, thirty-fourth sultan of the Ottoman Empire, faced the weakening of the Empire following Russia's military successes in the Russo-Turkish War. Hamid soon began blaming the woes of the Ottoman Empire on the Armenian Christians, which ultimately led to the state-sponsored massacre of 80,000 to 300,000 Armenians, many of whom were children. See TANER AKÇAM, *A SHAMEFUL ACT: THE ARMENIAN GENOCIDE AND THE QUESTIONS OF TURKISH RESPONSIBILITY* 42–46 (Paul Bessemer trans., 2006).

LECTURE 19: MARCH 5, 1898

There are a few concluding observations I wish to make about the second article of the Constitution. That article, as you will remember, relates to the executive power of the United States, which is vested in the President of the United States.

“He,” that is, the President, “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.”³⁹⁰

In the early history of the government that was done in part by the President of the United States visiting the Capitol and occupying the place, for the time being, of the President of the Senate, and expressing from his position there orally such views as he had about public questions, and making such recommendation as he saw proper. You will find from a reading of the history of that time that President Washington delivered his first annual message in person in the Senate of the United States. That custom has left us, and now the President communicates by messages.³⁹¹

The language of the Constitution is, “He *shall* from time to time give to the Congress Information of the State of the Union.”³⁹² It is peremptory—mandatory—that he shall do it. If he fails to do so, or declines to do so, there is no mode of compelling him, but there is no difficulty in these latter days in the execution of that article of the Constitution. The President is always glad of an opportunity to communicate his views to Congress. He does so sometimes at very great length, and he recognizes such measures as he deems necessary and expedient. They are recommendations only. They are not bound to accept his recommendations. Congress can do as it pleases about it. If any member of Congress thinks that the only way he can keep control of patronage of his district will be to fall in with the recommendations of the President, why he can do so, nothing to prevent him. And perhaps some do so, I don’t know.

Then, “[H]e may, on extraordinary Occasions, convene both Houses

³⁹⁰ U.S. CONST. art. II, § 3.

³⁹¹ President Washington delivered the first State of the Union Address before a joint session of Congress on January 8, 1790. See *Historical State of the Union Messages*, NAT’L ARCHIVES, <http://www.archives.gov/legislative/features/sotu/> (last visited June 15, 2013). President Jefferson discontinued the practice of delivering the address in person, instead delivering a written address to be read by a clerk. See *id.* In 1913, President Wilson re-established the practice of delivering the State of the Union Address in person. See *id.*

³⁹² U.S. CONST. art. II, § 3 (emphasis added).

[of Congress] or either of them.”³⁹³ If Congress is not in session and some extraordinary emergency arises in our history which cannot be met except by legislation on the part of Congress, the President by special proclamation convenes the two houses.

You probably will want to understand what the words “or either of them” mean. Can he convene one House of Congress and not another? Yes. At the close of every presidential term, or immediately after the close of it, the incoming President calls an extraordinary session of the Senate of the United States. That is to the end that his appointments may be confirmed. The House has nothing to do with confirming the appointments of the President. Of course, the incoming President wants his own cabinet. He does not want the cabinet of his predecessor, even if he is of the same political party, and he wants his nominations for cabinet positions confirmed. Then perhaps the incoming administration wants a change in the principal affairs of the government, and in our ambassadors and ministers abroad. In connection with that the presence of the Senate only is necessary, and not the House.³⁹⁴

Then, “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.”³⁹⁵ The Senate wants to adjourn to one period. The House says, “No, we won’t agree to that. We propose to adjourn to another day.” Well, the Senate won’t agree to that. And here is a hung jury, to use a popular phrase. And the time of the country, and the money of the country, is not to be wasted in fruitless endeavor of these two Houses to agree as to the time to which they shall adjourn. Now, in that state of case the President may interfere and say, “I adjourn you both to a certain day in the future.” That is lawful.

“[H]e shall receive Ambassadors and other public Ministers.”³⁹⁶ I have already explained to you the ceremony of receiving ambassadors at the White House.

Now comes a clause of the Constitution of greater importance than any of those that I have just read. “[H]e shall take Care that the Laws be

³⁹³ *Id.*

³⁹⁴ The ratification of the Twentieth Amendment on January 23, 1933 and the increase in the length of regular sessions of Congress have made extraordinary sessions of the Senate obsolete. See RICHARD S. BETH & JESSICA TOLLESTRUP, CONG. RESEARCH SERV., RL33677, LAME DUCK SESSIONS OF CONGRESS, 1935–2010 (74TH–111TH CONGRESSES) 2 (2011).

³⁹⁵ U.S. CONST. art. II, § 3.

³⁹⁶ *Id.*

faithfully executed.”³⁹⁷

If you will turn back to the former part of the Constitution, you will see that the President solemnly swears, among other things, that he will “preserve, protect and defend the Constitution of the United States.”³⁹⁸ Here, the Constitution adds the further idea, which is really involved in his oath, that he shall take care that the laws of the United States are faithfully executed.

Take care how? According to his arbitrary will, to do whatever in his judgment may be necessary to that end? No, because when he is executing the laws of the United States, he must understand there are certain things he cannot do. There are other provisions of the Constitution involving the safety of life, liberty, and property which he cannot, in executing the laws, forget or overlook or override. He must take into view the whole Constitution of the United States, but take care that the laws—that the statutes passed in pursuance of the Constitution of the United States shall be executed. That is a very general phrase. It was left general purposely because the framers of the Constitution could not foresee exactly in what way the laws might be obstructed in their execution, but stated generally, take care that the laws are faithfully executed.

That provision of the Constitution had an illustration in part in a very celebrated case in the Supreme Court of the United States. Several years ago—I forget the number of years, inside of eight or nine years—one of the Justices of the Supreme Court of the United States went to his circuit. You will understand that the United States is divided into nine judicial circuits, and to each circuit is assigned a Judge of the Supreme Court of the United States.³⁹⁹ This Supreme Court Justice went out to his circuit in the state of California—I allude to Mr. Justice Field—went out there to hold his court, to discharge his duties as a Circuit Justice.

He had before that rendered federal decisions in that circuit, and they had aroused the animosity of two people: Judge Terry and his wife, formerly a Mrs. Hill. Cases in which they were concerned, which involved large amounts of property. Judge Field, holding the Circuit Court in the state of California, had rendered certain decisions that were very distasteful to them. They upset their plans to get possession of the estate of a gentleman in California. Reaching San Francisco, and holding court there

³⁹⁷ *Id.*

³⁹⁸ *Id.* art. II, § 1, cl. 8.

³⁹⁹ In 1866, Congress reorganized the states into nine judicial circuits. Judicial Circuits Act of 1866, ch. 210, § 2, 14 Stat. 209.

for a day or two, he then started to hold his court in the lower part of that district, San Diego I believe, or Los Angeles.

Before he went on this last journey, the Attorney General of the United States—the Department of Justice—was informed that it was the purpose of Colonel Terry to take the life of Judge Field, if he got a chance, because of decisions he had rendered. And that Judge Field's life as he went through the circuit there in the discharge of his duties as a Justice of the Supreme Court of the United States was constantly imperiled from these people. The Attorney General instantly ordered the Marshal of the United States of the District of California to see to it that Judge Field was not molested or interfered with. And when he went on this trip to lower California to hold court there he was accompanied by a Deputy Marshal.

He got through his work there and was on his way back to San Francisco to resume his duties there. A certain station on the way was reached, and he got out with this Deputy Marshal, and went into the railroad station to get his breakfast. And they were sitting at the table together, the Judge and the Deputy Marshal. Well, while they were sitting there, Colonel Terry, a man of large physical proportions and undoubted courage—at least he had the reputation of that—approached Judge Field from the rear and, with a wave of the hand, slapped his jaw. The venerable judge turned. It is supposed that the purpose of Terry was to provoke Judge Field to resent that and then kill him.

Well, it so happened that this Deputy Marshal, who was very quick and active, saw this blow being given to Judge Field. Instantly he arose and warned Terry, "I am a Deputy Marshal of the United States, sir." Something that Terry did indicated that he didn't care for that; he was going to hurt this Judge. And this Deputy Marshal fired his pistol and it went to its destination. This giant dropped and died instantly.

Immediately he was indicted in the state court, this Deputy Marshal, for murder. And it happened to be a state court in a county where the influence of this dead man was supposed to be overshadowed. He sued out a writ of habeas corpus in the federal court based upon the ground, "I have discharged my duty as a Deputy Marshal of the United States. I have done nothing but to protect this Judge in the discharge of his duty as a Judge of the court of the United States, and I deny the right of this state court to try me for murder."

Well, he was brought under the writ of habeas corpus into the federal court at San Francisco, and discharged because he had acted in the execution of his lawful duty as an officer of the United States. Afterwards, the case came to the Supreme Court of the United States, and that judgment was affirmed, in part upon the ground that the President of the United

States, speaking through the Attorney General, had ordered this Marshal to protect that Judge in the discharge of his duty. And that was in execution of the laws of the United States, and those laws of the United States were the supreme law of the land, and therefore that Marshal was simply in the line of his duty.⁴⁰⁰

Now, if you want to read that case and take a minute of it, it is one of considerable interest, I will give you a reference to it. The case is entitled *In re Neagle*, 135 United States, page 1, opinion by Mr. Justice Miller.⁴⁰¹ I may repeat here what I have stated to you often: that you will derive great profit in understanding the Constitution of the United States in the study of great cases. And if you study that case, you will then understand as you have not understood before the full scope of this constitutional requirement that the President of the United States shall take care that the laws be faithfully executed.

“Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”⁴⁰²

It is the glory of our system of government that there is no man, no matter what office he holds, who is above our law. And that cannot be affirmed of any other government that exists on the Earth. No matter what the King or the Queen of England may do, they cannot be impeached. The joint vote of the House of Lords and the House of Commons together could not remove Victoria from her office. It is quite true that if the House of

⁴⁰⁰ David S. Terry was a Justice of the California Supreme Court from 1855 to 1859, and the Chief Justice from 1857 to 1859. Kenneth W. Hobbs, *Terry, David Smith*, TEXAS STATE HISTORICAL ASS'N, <http://www.tshaonline.org/handbook/online/articles/fte29> (last visited June 15, 2013). Terry was born in Kentucky and grew up in Texas. *Id.* He served in the First Regiment of Texas Mounted Riflemen during the Mexican War and joined the California gold rush in 1849. *Id.* In 1855, Terry was elected to the California Supreme Court on the American Party ticket, with Democratic Party support. *Id.* His political career ended in 1859 when he killed United States Senator David C. Broderick in a duel. *Id.* Terry served in the Confederate Army during the Civil War and returned to California in 1868. *Id.*

In the 1880s, Terry represented Sarah Althea Hill, who claimed to be the wife of millionaire William Sharon and sued him for divorce. *Id.* When Hill lost, she married Terry. *Id.* Justice Field heard the appeal and sentenced Terry and Hill both for contempt. *Id.* On August 14, 1889, Terry assaulted Field at a train station in Lathrop, California. *Id.* Field's bodyguard, United States Marshal David Neagle, shot and killed Terry. *Id.* California arrested Neagle and charged him with murder, but the United States obtained a writ of habeas corpus, which the Supreme Court ultimately affirmed. *Id.*

⁴⁰¹ *In re Neagle*, 135 U.S. 1 (1890).

⁴⁰² U.S. CONST. art. II, § 4.

Commons and the House of Lords were united in declaring that she should no longer be recognized as Queen, people would be apt to follow them, but it would not be done inside of the law. That would be a civil revolution.⁴⁰³

But in our country, without revolution, without disturbing the course of the law, the people of this country, speaking through this Constitution, can lay their hands upon every official in this country—or any one of them, from the President down—and say that if you are tried, if you are impeached by the Senate and House of Representatives in the required mode, you shall get out of this office. That applies to the President, to the Chief Justice of the United States, and to all the members of that Court, and to every civil official of the United States, every one of them, for any one of them can be put out of office for the commission of high crimes and misdemeanors.⁴⁰⁴

Now, that brings us to the consideration of the third article of the Constitution, in some respects the most important of all. It relates to “[t]he judicial Power of the United States.”⁴⁰⁵ What do we mean by the judicial power of the United States? It is the power to determine disputes in an appointed mode, in regular form, according to the established modes.

Not all judicial power is here referred to, but the judicial power of the United States. That does not embrace all the judicial power exercised in this country. The largest part of the judicial power exercised in this country is by the states, not by the government of the United States, the states dealing with questions under their own judicial organization and with questions that do not concern the United States. This Constitution, dealing only with the government of the United States—its powers, its functions, and the rights that arise under the Constitution of the United States—distributes the judicial power of the United States alone.

Well now, by whom is that to be exercised? This instrument says it

⁴⁰³ On November 22, 1641, Parliament stated its grievances against King Charles I in a Grand Remonstrance and attempted to impeach Queen Henrietta Maria, who eventually fled England. Maurice Ashley, *Charles I*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/eb/article-9022559> (last visited June 15, 2013). The English Civil War began in 1642 and ended in 1648, when Oliver Cromwell’s New Model Army defeated the last of Charles I’s supporters. *Id.* On January 20, 1649, Parliament charged Charles I with treason. *Id.* While Charles I refused to recognize Parliament’s jurisdiction, he was sentenced to death and executed on January 30, 1649. *Id.*

⁴⁰⁴ While the Constitution provides federal judges with their offices during “good Behaviour,” U.S. CONST., art III, § 1, it does not expressly provide for their removal. It is assumed, however, that judges may be impeached as “civil Officers of the United States.” See Report of the National Commission on Judicial Discipline & Removal, 152 F.R.D. 265, 282 (1993).

⁴⁰⁵ U.S. CONST. art. III, § 1.

“*shall be vested*”—not may be vested—“in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”⁴⁰⁶

Can the Congress of the United States abolish the Supreme Court of the United States? Why, if they tried it, we could declare that law to be unconstitutional. And we would so declare it, not because we had the power to declare it simply, but because the Constitution says there shall be one Supreme Court. That is the only thing in our organization that Congress cannot get rid of. The scriptures, I believe, say—these young gentlemen here that read their Bible every morning will correct me if I am wrong—that the poor ye have always with you.⁴⁰⁷ And so you have the Supreme Court of the United States always with you. It cannot be abolished.

Now, observe that this judicial power shall be vested in one Supreme Court. Not two Supreme Courts, but one. And some gentlemen, whose statesmanship and wisdom and great legal knowledge everybody respects, have suggested that the Supreme Court of the United States ought to be increased—might be increased—to fifteen, and then let the court sit in two parts and have two Supreme Courts.⁴⁰⁸ Well, there may be serious ground to doubt the constitutionality of a law of that sort of if you have Supreme Courts. That Congress may increase the Supreme Court to fifteen nobody can doubt, but it is the fifteen that must together constitute one court. You cannot make two Supreme Courts out of it.

You will not suspect me of lauding or praising a court to which I happen to belong when I say that that court—or rather the organization of that court, and the putting it into the Constitution of the United States—is today the amazement of statesmen in Europe and all over the world. They do not understand it. I have talked with judges of great distinction in England, and men in public life there, but they have said to me in a personal conversation, “I wish we had in our country a court like that.” He

⁴⁰⁶ *Id.* (emphasis added).

⁴⁰⁷ “For ye have the poor with you always, and whensoever ye will ye may do them good: but me ye have not always.” *Mark* 14:7 (King James). “For ye have the poor always with you; but me ye have not always.” *Matthew* 26:11 (King James). “For the poor always ye have with you; but me ye have not always.” *John* 12:8 (King James). *See also* “For the poor shall never cease out of the land: therefore I command thee, saying, Thou shalt open thine hand wide unto thy brother, to thy poor, and to thy needy, in thy land.” *Deuteronomy* 15:11 (King James).

⁴⁰⁸ *See* Edward J. Phelps et al., *Minority Report on the Relief of the United States Courts*, 5 ANN. REP. A.B.A. 363, 368–69 (1882) (proposing that Congress divide the Court into two sections and suggesting an increase in the number of Justices to twelve or fifteen).

was not complimenting the personnel of that court at any particular time, but he was referring to the fact that it was a vital part of the American system of government. That there was a tribunal imbedded in that system that had the power to declare what the law of this land was—not to make it, but to declare what it was—and that its judgment could be enforced over every foot of American soil. “Why,” says one of the great English judges to me, “Parliament here can do anything.”

As one of their leading men, still alive, has said in his book on the American Commonwealth—I allude to Mr. Bryce, and he is the only Englishman in the last five hundred years that has exhibited the slightest capacity to understand our form of government here or know anything about it—he says there that the British Parliament can do anything in the world, except turn a man into a woman or a woman into a man.⁴⁰⁹ And so it can, speaking from a standpoint of law. And this judge says there is no check upon Parliament.

I thought I saw in his words, and from other circumstances, that there was something in his mind that he did not fully express, because he had then been recently made a member of the House of Lords. What was in his mind, as one of the titled men of England, was the sound that was coming from the advance in England of what they call the democracy of the people. He saw that they had in England already reached the period when the voice of the House of Commons was all-powerful. When the Commons of England, coming immediately from the people by election, were to have more and more each year their own way. And that the House of Lords, with its Lords and Earls, was losing its power. And that everything in England was at the mercy of the democracy of the House of Commons.

Therefore, he wanted, although he had never said so publicly, he wanted a written Constitution as we have got here that defines the powers of government. That tells what Congress may do and what it may not do.

⁴⁰⁹ 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 44 (London, MacMillan & Co. 1888) (stating that Parliament “is to-day the only and the sufficient depository of the authority of the nation; and is therefore, within the sphere of law, irresponsible and omnipotent”). James Bryce was born in Belfast in 1838 and became the first Viscount Bryce. He was also an academic, jurist, historian and Liberal politician. See *James Bryce, Viscount Bryce*, *ENCYCLOPÆDIA BRITANNICA*, <http://www.britannica.com/EBchecked/topic/82530/James-Bryce-Viscount-Bryce> (last visited June 15, 2013). The assertion that Harlan attributes to Bryce was actually made by Jean Louis de Lolme, Swiss author of a 1788 treatise on the English Constitution. See ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 40–41 (Elibron Classics 2005) (1902) (quoting de Lolme’s “grotesque expression which has become almost proverbial”).

That tells what neither Congress nor the states can do. That defines the principles that protect life, liberty, and property in this country. And that creates as a separate, independent, coordinate department of the government—a judicial system—which can see to it that this law is supreme.

Therefore, these men do not understand how it is that we wild fellows on this side of the ocean, that this ungovernable American democracy, could ever have conceived of the idea of having a form of government which made a part of it a system which was a check upon all other branches of government.

Well, that is conservatism that Europe does not understand. It gives a sense of security to every human being in this country. To every man that values his own right to labor. To every man that owns a dollar of property in the United States. He knows that there are limits to the power of a state legislature, there are limits to the powers even of the Congress of the United States. That if Congress and the President combined should put before the people a particular statute as a law of the United States, still the humblest man in this land whose rights—as he conceived—were infringed by that law could come to a tribunal, separate and apart from all the other departments of the government, and appeal to that tribunal. And could say to a court that this act of Congress tramples upon my rights of property. This act of Congress deprives me of my property. In its largest sense, this act before stated transgresses my rights of property or liberty, and I appeal to the judicial tribunal to say whether that is not true. And when the highest court of the land says that it is true—that this written Constitution is the supreme law of the land and binds Congresses and state legislatures as well—that written Constitution says that this law is void. And being so declared that is the end of it.

Now, ought not an American to be proud that he lives in a country that has a system of that sort? Is it too much to say that the perpetuity of our institutions and the liberties of the people depend in no small degree upon the power vested in the judicial branch of the United States to enforce this Constitution, the supreme law of the land, against Presidents and Congresses?

“[A]nd in such inferior Courts as the Congress may from time to time ordain and establish.”⁴¹⁰

What inferior courts are there referred to? Well, they did not know. They said inferior courts; inferior to this one Supreme Court. What courts

⁴¹⁰ U.S. CONST. art III, § 1.

of the United States have we got now, that are inferior to the Supreme Court? Well, there is a Circuit Court of the United States. There are nine circuits. There are the district courts of the United States. Under that clause Congress creates the Supreme Court of the District of Columbia, the Court of Claims, the Court of Appeals of the District of Columbia, the Circuit Courts of Appeals of the United States, one in each circuit.

How many may Congress create? Why, as many as it wants. If it chooses, we could have a Circuit Court of the United States in every county in the United States. Of course, any Congressman who voted for such an act would not come back a second time. But the power exists: no limit to the number of these inferior courts that may be established.

Where did the idea of the judicial system we have here now originate, and how was it worked out in its present form? Well, that is a little difficult to answer. The question is a very proper one, and one that would suggest inquiry.

We are amazed today—and rightly—when we think of the results of this Constitution. And when we look back and recognize the fact that this Constitution was adopted in 1788—the final vote was given, accepted by the people—we are amazed that these men were as wise as they were. They had before them only the example of the English government. But upon that they builded this structure. And they were able, in part of their own foresight and wisdom, to see that a system of this sort was necessary.

They did not believe in establishing what was called a parliamentary government, a government in which the legislative department could do as it pleased. They cast about, considered and reflected what check was necessary upon the arbitrary power of the legislature, and reached the conclusion embodied in this instrument.

How much the framers of the Constitution had read, I do not know. But if you have not got it in your library, I advise you to look tomorrow in the secondhand bookstores and see if you cannot buy one for half price, for it is worth its weight in gold. It is a single volume called *The Federalist*.

When this Constitution was adopted by the convention and put before the people, it was assailed by a great many men, and a great many men whose patriotism nobody doubted. Patrick Henry started the ball in motion probably before any other man. Yet he was opposed to the acceptance of this Constitution because he thought it would endanger the rights of the people. And other people were of the same opinion. But their views did not prevail. And when this Constitution was put before the people there was a hand-to-hand struggle from one end of the old states to the other.

There were at that time three young men, young in years relatively: John Jay, James Madison, and Alexander Hamilton. No one of them at that

time was forty years of age, if I am not mistaken. I am quite sure Madison was not more than thirty-six, and Hamilton was not more than thirty-one, and Jay perhaps about forty.⁴¹¹

This Federalist contains articles written by those three young men, urging the people to accept the Constitution of the United States, meeting all the attacks upon it, explaining it. Probably the best of the articles—the strongest—was written by the youngest one of the three, Alexander Hamilton.⁴¹²

Now, that book today is an authority with every court in this country. It is cited in the Supreme Court of the United States, and in every state in this union. And when you read these articles, you will probably be able to answer the question put to me better than I can. But I can no more answer it than I can answer the question, where did Alexander Hamilton acquire the knowledge which he had?

At eighteen years of age he stood before a crowd in the city of New York advocating the cause of his country against British aggression.⁴¹³ At twenty-six years of age he was on the staff of Washington, and the man upon whom Washington leaned perhaps more than he did upon any other.⁴¹⁴ At thirty-one years of age he was expounding this instrument.⁴¹⁵

⁴¹¹ The Constitutional Convention adopted the Constitution on September 17, 1787. *Teaching with Documents: Observing Constitution Day*, NAT'L ARCHIVES, <http://www.archives.gov/education/lessons/constitution-day/> (last visited June 15, 2013). John Jay was forty-one years old and was born on December 12, 1745. *See John Jay*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/301875/John-Jay> (last visited June 15, 2013). James Madison was thirty-six years old and was born on March 16, 1751. *See Irving Brant, James Madison*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/355859/James-Madison> (last visited June 15, 2013). It is unclear whether Hamilton was thirty-two or thirty-four years old, as he was born on either January 11, 1755 or January 11, 1757. *See Alexander DeConde, Alexander Hamilton*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/253372/Alexander-Hamilton> (last visited June 15, 2013).

⁴¹² Harlan is probably referring to THE FEDERALIST NO. 12 (Alexander Hamilton).

⁴¹³ On July 6, 1774, Hamilton made a speech attacking British policies at a public meeting in New York City, and on December 15, 1774, he published his first political essay, *A Full Vindication of the Measures of Congress* (Dec. 15, 1774), in THE REVOLUTIONARY WRITINGS OF ALEXANDER HAMILTON (Richard B. Vernier ed., 2008).

⁴¹⁴ Hamilton joined Washington's staff as a Lieutenant Colonel in March 1777. *See Alexander DeConde, supra* note 411. He served as Washington's chief of staff until 1781, and led the final assault at Yorktown. *Id.*

⁴¹⁵ Hamilton was one of three New York delegates to the Constitutional Convention in 1787, although his direct influence on the drafting of the Constitution was limited by New York politics. *Id.* He also wrote fifty-one of the eighty-five essays promoting the ratification of the Constitution now known as *The Federalist Papers*, published in *The*

At about thirty-four years of age he was Secretary of the Treasury of the United States.⁴¹⁶ And while Secretary, he wrote his report on manufactures,⁴¹⁷ and his opinion on the national bank of the United States,⁴¹⁸ and other documents that today are the textbooks for every statesman and judge in this country who believes in Hamilton's interpretation of the Constitution of the United States.

I can only answer the question in a general way, put to me by the statement that he seemed to be—from our reading of the history of the human family, that whenever a great crisis came upon any people, Providence was kind enough to raise up the man to meet the emergency. In the last civil war—the greatest that any country has ever seen—before that war was half over, the American people found out who were the men to lead the union. Who was the man to take charge of that vast machinery, and who were the men to be his subordinates. And the man that did take charge, and the men who were his subordinates, were all under forty years of age.⁴¹⁹ And so it happened when this Constitution was adopted.

Where the thought originated of one Supreme Court, I do not know. They certainly did not borrow it from any country on the Earth. There is one supreme court in England today—the House of Lords—but the House of Lords is composed of a vast number of people who do not know much about law.

The House of Lords as a body constitutes the court of last resort, although only a few of them that are lawyers participate in the decisions.⁴²⁰

Independent Journal and *The New York Packet* between October 1787 and August 1788. See *About the Federalist Papers*, LIBR. OF CONG., http://thomas.loc.gov/home/histdox/abt_fedpapers.html (last visited June 15, 2013); *Federalist Papers*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/203506/Federalist-papers> (last visited June 15, 2013).

⁴¹⁶ Hamilton became the first Secretary of the Treasury on September 11, 1789. Alexander DeConde, *supra* note 411.

⁴¹⁷ 1 ALEXANDER HAMILTON, *Report of the Subject of Manufactures* (Dec. 5, 1791), in WORKS OF ALEXANDER HAMILTON, *supra* note 217, at 157.

⁴¹⁸ 1 ALEXANDER HAMILTON, *Report on the Subject of a National Bank* (Dec. 13, 1790), in WORKS OF ALEXANDER HAMILTON, *supra* note 217, at 59.

⁴¹⁹ George Washington was forty-three years old when he assumed command of the Continental Army in July 1775. See Henry Graff, *George Washington*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/636381/George-Washington> (last visited June 15, 2013). While the average age of Washington's generals was forty, many were considerably older. *Who Served Here? Washington's Officers at Valley Forge*, HISTORIC VALLEY FORGE, <http://www.ushistory.org/valleyforge/served/ages.html> (last visited June 20, 2013).

⁴²⁰ Historically, the House of Lords was the United Kingdom's court of last resort.

But the decision of the House of Lords cannot control the House of Lords, and cannot control the House of Commons, if it does not want to be.⁴²¹ And last of all, does it control the Queen?

I cannot find any account of it in the history of any other nation. It seems to have come providentially into this instrument that there should be a judicial organization by usage, by principles, and by theory to set apart from the controversies of the present day, having in its organization no connection with political parties, but that should represent the people of the United States according to their will as expressed in this instrument. And when this court of last resort referred to speaks and delivers its judgment, that is the end of it. And one of the highest evidences of the innate respect of these American people for the law as regularly declared is the fact that up to this time, and we are now more than a hundred years old, there is not a single instance in which the people of this country have ever sought to arise in revolution or insurrection against that final deliverance of that court of last resort upon any question of law, whatever it might be.

Now, these judges, “both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”⁴²²

What do you mean by “during good behavior?”

Well, you can answer that question as well as I can. They left it undefined. What behavior for which a judge of the Supreme Court—or a judge of any other federal court—may be impeached, I say is left undefined by the Constitution. But if the Congress of the United States, in the mode prescribed by law, impeaches a judge of a federal court because he is not of good behavior, that is the end of it. I suppose that if it were true that a judge of a federal court was in the habit of coming upon the bench every

The Appellate Jurisdiction Act, 1876, 39 & 40 Vict., c. 59 (U.K.), delegated most of the appellate jurisdiction of the House of Lords to Lords of Appeal in Ordinary or “Law Lords,” with the exception of matters reserved to the Privy Council. The Constitutional Reform Act, 2005, c. 4 (U.K.), transferred the appellate jurisdiction of the House of Lords to the Supreme Court of the United Kingdom.

⁴²¹ In theory, the House of Lords could have overruled the Law Lords. Originally, the House of Lords could veto a bill passed by the House of Commons. *See The Parliament Acts*, UK PARLIAMENT, <http://www.parliament.uk/about/how/laws/parliamentacts/> (last visited June 16, 2013). During the Nineteenth Century, the House of Commons achieved predominance over the House of Lords. *See id.* Eventually, the House of Commons compelled the House of Lords to pass the Parliament Act of 1911, which enabled a majority of the House of Commons to overrule the House of Lords. Parliament Act, 1911, 1 & 2 Geo. 5, c. 13 (U.K.).

⁴²² U.S. CONST. art. III, § 1.

day in a state of intoxication, so that he could not properly discharge his duty, that would not be good behavior, and if he should be impeached upon that ground the impeachment would stand. But whatever was the ground, the judgment of the impeaching tribunals, the Senate and the House, would stand.

And then, we are to have a compensation, which shall not be diminished during our continuance in office.⁴²³ A most comfortable provision. A federal judge knows that however mad anybody may become, they cannot deprive him of the power of meeting his grocer's bill or paying his rent.

According to the rate fixed when he went into office. Is that wise, or is it not wise? I rather think it is a wise provision. It has some ups and downs. Do not know but I have explained it to you. I sometimes find it difficult to remember whether a thing I am about to tell you was told this term or last term, there is danger always of repeating, but perhaps this will bear repeating.

About fifteen or twenty years ago, some gentlemen in the House of Representatives came to the conclusion that they were not getting enough, and they got up a bill to increase the salaries of members of Congress in the lower House and Senate.⁴²⁴ That is all it contained when it was first presented, and the bill was so drawn as to take effect as from the beginning of the term, nearly two years back. A man elected, for instance, at the time when the salary was \$5,000, towards the close of his term he joined in passing a law saying he should have \$7,500 from the beginning of the term.

Well, there was some criticism of it, and General Butler—the late General Butler of Massachusetts—was credited with the thought that that might be strengthened if some amendments were made to the bill. And so in order to give it strength he had a provision that the salary of the President should be increased from \$25,000 to \$50,000 a year. And then the provision was added that the salaries of the judges of the Supreme Court of the United States should be increased from \$6,000 to \$10,000 a year. It was supposed that would give the measure more respectability. And it went through on that line, and as soon as it went through there was a howl from one end of this country to the other about a “back salary grant,”

⁴²³ *Id.* (“The Judges . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

⁴²⁴ On March 3, 1873, Congress voted to increase the salary of congressmen and other government officials. Act of Mar. 3, 1873, ch. 226, 17 Stat. 485. This act was colloquially referred to as the “salary grab.” See Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501, 540–41 (1994).

as it was called. The people of the United States said that was practically stealing.

If there is anything in the world that the average American voter hates it is a double-tongued fellow: a fellow that deceives, a fellow that wants to play a false part. And they did not object to increasing the salaries of Representatives and Senators, if you made it take effect for the future. But when a Representative had been before them and asked their votes at a time when his salary was to be \$5,000 a year, and then towards the close of his term he joined in for a law to give him \$7,500 from the beginning of the term, why the plain average man of the country said that was rascality. I don't like that, that is double-dealing.

And the politicians went tumbling over each other to get to the Treasury to pay back this extra money that they had received, so that they could go before the people and say that it is true that law was passed, but I did not take any of the money. And most of the fellows who did that were left at home; they did not come back. The fellow who went before his constituents with open countenance and brave words and said, "Yes, I voted for it, and I took it. I found that you had sent me to Washington to live upon \$5,000 and I could not do it. I could not do your work there properly, and I voted for that increase, and I have no apologies to make for it, but I would do it again." And many of those fellows were returned for their frankness.

Now, did you observe the wording of the clause here, that it should not be diminished during the term of office of the judge? So, when at the next session of Congress they repealed that law so far as Senators and Representatives were concerned, they could not repeal it as to the judges.

I will complete what I have to say about the judicial power of the Constitution next Saturday night, and probably be able to enter upon Article IV.

LECTURE 20: MARCH 12, 1898

When we were together last Saturday night, the subject was Article III of the Constitution, relating to the judicial power of the United States. I had said all upon the subject treated of in that first section which I need refer to. I called your attention to the fact that the judges of the courts of the United States under the Constitution were entitled to hold their offices during good behavior, and at stated times to receive for their services a compensation, which shall not be diminished during their continuance in office.⁴²⁵ Of course, you have occasion often to consider, what are the principles which underlie the federal system of judges appointed for life or during good behavior, and the system prevailing in many of the states under which the judges are elected for a short term, and then must stand for re-election, provided they are nominated by their political parties?⁴²⁶

Now in some of the states, curiously enough, no judge has been elected to office at any time within forty years that was not the nominee of a political party, with very few exceptions. I know of states in reference to which that is true. And if you were to attend the conventions of those parties—the one as well as the other—and look over that convention previously, if you had an opportunity to know them all, you would stand amazed in the presence of the fact that there were four or five hundred men here selecting a candidate for judge, and not one of them is a lawyer. Not one of them ever opened a book on the subject of the law, and yet they pick out a man to be the candidate of their party for judge. And they vote for him because he is the nominee of the party, and when he gets on the bench, why he forgets that fact, if he can. If he is an honest man he will forget that fact, and he will administer justice as he understands it.

But let me suppose that an election is near at hand: here is a case on trial that involves a man's property, or liberty, or life; that man has a large connection through the county, and that fact is known to the judge. He knows that if he rules the law against that man that whole tribe will be against him at the polls. That is what he believes. Well, if he is a thoroughly honest man and had rather starve than be dishonest, he will march right up to the line of duty and discharge it. If he is a weak man, or a little timid, he will trim his way, or he may put the case in a shape to save that man and please that large connection.

⁴²⁵ U.S. CONST. art. III, § 1.

⁴²⁶ For a historical analysis of partisan and nonpartisan judicial selection methods, see generally JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 14–84 (2012).

Now, that is the difficulty, and that is the temptation in the way of judges elected for a short time by popular vote, and who must get their nominations from a political party. Let me suppose that before an election there was a case before that judge, the decision of which was going to bear very materially upon the election just approaching. He knows very well that if he decides it against the will of the leading politicians of his party that he will fail of his nomination and of his election. That intimidates some men. Now, the judge who is on his bench for life, or during good behavior, with the assurance in the Constitution that his salary cannot be diminished during his term of office, is in a condition where he can say to the politicians, “do what you want to do, do as you will, you cannot hurt me, I am here to administer the law, and I am going to give the law whatever may be the consequences to my political associates or to my party.” Now, is that system better than the other?

Now let us go to the next section. “Section 2. The judicial Power shall extend to all Cases”⁴²⁷ Now, speaking of the judicial power of the United States, 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.⁴²⁸

You will meet with people who seem to labor under the impression that it is competent for the courts of the United States to meet every possible case that may arise in a court of justice, and particularly if you meet with one of our friends of the gentler sex who has just come to the conclusion that she ought to be a lawyer.⁴²⁹ She don’t understand why it is

⁴²⁷ U.S. CONST. art. III, § 2, cl. 1.

⁴²⁸ *Id.*

⁴²⁹ This is probably a veiled reference to *In re Lockwood*, 154 U.S. 116 (1894), which was decided while Justice Harlan was a member of the Court. In that case, Ms. Belva Lockwood—who had been admitted to the bar in Washington, D.C., the federal circuit, and “the bars of several states of the Union”—sought a writ of mandamus to compel the high court of Virginia to admit her to the practice of law. *Id.* In denying the writ, the Court cited

that the courts of the United States cannot dispose of every case and every question that involves the general welfare. It is hard to explain it, equally hard to explain it to a man who don't stop to think, and who don't read the words of this Constitution.

Here is a case between A and B. It is certain upon the statement of that case, let me assume, that to give a judgment in favor of B is to give a judgment that will advance the cause of dishonesty and rascality. Therefore, many a man will say, "Well, why don't the United States take hold of that?" They forget that the United States is a government of enumerated power, and that the courts of the United States cannot take hold of any question except one embraced by the judicial government of the United States, one embraced by the Constitution of the United States.

Therefore, when A sues B in a Circuit Court of the United States on a promissory note for \$10,000, let me assume, and the judge says, "hand me up that declaration here." And he looks at it and it says, in substance, that A complains of B that B owes him \$10,000 evidenced by his promissory note herein referred to and made a part of this complaint. He has not paid any part of it, the whole of it is due and unpaid. He seeks judgment. Of course, if B owes A and don't pay him, why he is doing wrong.

But the judge of the United States says, "What have I to do with that case, that is not a case to which the judicial power of the United States extends. Some man has drawn that declaration that does not know what he is about, has not read the Constitution of the United States, has not read the Judiciary Act." "But," says the lawyer for the plaintiff, "A is a citizen of New York, and B is a citizen of Virginia," in the latter state the suit was brought. "Very well," says the judge, "Why didn't you state that? Why didn't you show in your declaration that this is a suit between citizens of different states? If you had done that I could take jurisdiction."⁴³⁰ Now you must amend your declaration."

Suppose it has been amended. Now the Circuit Court has jurisdiction of that case. Why? It is answered when it is seen that it is given jurisdiction between citizens of different states.⁴³¹ Why was that done? Let me ask this, why was not a citizen of New York required to sue the citizen

a case from just before Justice Harlan's tenure: *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872). This case was cited to support the proposition that the right to practice law in a state court is not a privilege or immunity of citizens of the United States, and essentially that it should be left to states—not federal courts—to determine the requirements for the admission to the practice of law. *Lockwood*, 154 U.S. at 117–18.

⁴³⁰ U.S. CONST. art. III, § 2, cl. 1.

⁴³¹ *Id.*

of Virginia in one of the courts of Virginia? Why, it was upon the idea that if he did, the courts of the State of Virginia, or the jury there, would lean to its own people, would lean to its own fellow citizens. And no man has ever had any practice to any extent in the state that has not seen that that would be the case very often.⁴³²

I saw it when I was at the bar, and sometimes got judgment against a man upon no other ground really. I didn't say so, and I didn't argue so. If I had, the judge would have stopped me. If I had said to the jury, when I was arguing the case for the plaintiff against the defendant who lived in Indiana, "You should give my client a judgment because this fellow lives over in Indiana," he would have stopped me and rebuked me.

But if, in the course of my argument, very innocently the fact leaked out that my client was one of their own people, was living right among them, and the other fellow lived across the river, all things being equal, that jury would lean to the Kentuckian every time. And so it would occur in every state in this Union, one quite as naturally as in the other. Therefore, the Framers of the Constitution very wisely put in the provision that if this was a controversy between citizens of different states the judicial power of the United States should extend to that.

Now, there are cases—those enumerated here on their face—cases of which the United States courts ought to have cognizance. If it is a case arising under the Constitution or laws of the United States, or treaties of the United States, it is appropriate that those cases should be dealt with by the United States. If it is a case affecting ambassadors, ministers, and consuls, the jurisdiction ought to extend to that. Well why? Because the treatment which we will extend here toward ambassadors, ministers, and consuls of other countries will affect our foreign relations, and therefore it is appropriate that cases affecting those officers of foreign countries should be cases which could be brought in the courts of the United States. And then to controversies to which the United States shall be a party, and that is one of which the federal courts can take cognizance.

"Controversies between two or more states." The judicial power of the

⁴³² 3 STORY, *supra* note 43, at § 1632. Justice Frankfurter later summarized his understanding of the issue:

Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias. The Framers of the Constitution, according to Marshall, entertained apprehensions lest distant suitors be subjected to local bias in State courts, or, at least, viewed with indulgence the possible fears and apprehensions of such suitors.

Guaranty Trust Co. v. York, 326 U.S. 99, 111 (1945) (internal quotation marks omitted).

United States extends to controversies between what we call in popular language “sovereign states.” The State of New York and the State of Pennsylvania have a dispute about the boundary line between New York and Pennsylvania.⁴³³ It don’t amount to a great deal in point of value, but it does amount to a great deal in the estimation of either one in point of pride. How are you going to settle it? Can New York and Pennsylvania be permitted to go to war? Why, of course not. If they attempted to, the United States would take hold of both of them and stop them.⁴³⁴ No war between states. No states can go to war with each other. We will not permit it. We will put our soldiers between you, you shall not fight, and if your troops try to fight we will punish them.

Why, Pennsylvania would not wish to bring its suit in a court of New York. New York would not trust to Pennsylvania courts to determine that. Now, the only power which can determine it is a power which is represented in the United States. And where would that suit be brought? Why, it would be brought in the Supreme Court of the United States.⁴³⁵ There is a tribunal that represents those two states and all the country.

Half a dozen cases in our reports now about disputed boundaries between states: disputed boundary between Massachusetts and Rhode Island;⁴³⁶ between Virginia and Tennessee;⁴³⁷ between Kentucky and Tennessee;⁴³⁸ between Kentucky and Indiana;⁴³⁹ between Missouri and Iowa.⁴⁴⁰ All these cases have been determined in the Supreme Court of the United States. Now, is it not a spectacle that may well surprise, as it has surprised European statesmen, that there is a tribunal in this country that can settle finally and to the satisfaction of both parties controversies between two great empires, you might call them? The State of New York, with its seven or eight or nine million, and Pennsylvania with its six or

⁴³³ Harlan is most likely referring to a dispute over the “Erie Triangle” area, which is the area of land now embracing Erie, Pennsylvania. See *Settlement of the Erie Triangle*, ERIE YESTERDAY (July 1, 2011), <http://www.erieyesterday.org/feature-articles/settlement-of-the-erie-triangle/>. Disputed lands were ceded to the federal government and after congressional deliberation, the disputed Erie Triangle land was sold to Pennsylvania. *Id.* While New York was the primary disputant, Connecticut and Massachusetts also made failed claims upon the land. See *id.*

⁴³⁴ See U.S. CONST. art. I, § 8, cls. 11, 18.

⁴³⁵ See *id.* art. III, § 2, cl. 1. The Supreme Court would have original jurisdiction over this dispute. See *id.* art. III, § 2, cl. 2.

⁴³⁶ *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838).

⁴³⁷ *Virginia v. Tennessee*, 148 U.S. 503 (1893).

⁴³⁸ *Poole v. Fleeger’s Lessee*, 36 U.S. (11 Pet.) 185 (1837).

⁴³⁹ *Indiana v. Kentucky*, 136 U.S. 479 (1890).

⁴⁴⁰ *Missouri v. Iowa*, 48 U.S. (7 How.) 660 (1849).

seven million of people, that these two states could litigate a matter of difference between themselves about a boundary with as much unconcern as A and B would litigate about a \$500 note, and when the Supreme Court reached its conclusion on the subject that was the end of it.

Only a few years ago there was a dispute between the United States and the State of Texas about some land.⁴⁴¹ There is a lot of land in the southwestern part of the Indian Territory, embracing about a million and a half acres of land, once was a part of Spain, afterwards a part of Mexico, before Texas independence was achieved.

And then there was a question as to whether it was embraced in Texas. And the government of the United States and the State of Texas quarreled one way and another in a peaceable way about who owned it. If the United States owned it, it was a part of the Indian Territory; if Texas owned it, it was a part of Texas.

They never reached a conclusion. Finally, the United States passed a law directing the Attorney General to bring a suit against the State of Texas.⁴⁴² Texas said the United States had no jurisdiction of the suit. Why? it was asked. Why, Texas is a sovereign state, and a sovereign state of this Union cannot be brought to the bar of any court in this country to answer for anything. We said while that was true between Texas and individuals,⁴⁴³ it was not true between Texas and the United States. That if this was a dispute between the United States and Texas, the Constitution gave jurisdiction to that court of such a controversy, and we held the investigation did rest in the court to decide that question.⁴⁴⁴

And then proof was taken and the court considered the case upon its merits, and we said the law of the case was with the United States, and that that million and a half acres of land was no part of the State of Texas.⁴⁴⁵ Well, although they had been quarreling fifty years over that question,⁴⁴⁶ as

⁴⁴¹ *United States v. Texas*, 162 U.S. 1 (1896) (Harlan, J.) (holding that the territory east of the 100th meridian of longitude between the North Fork of the Red River and the south bank of the South Fork was subject to the exclusive jurisdiction of the United States and did not belong to Texas); *United States v. Texas*, 143 U.S. 621 (1892) (Harlan, J.) (holding that the Supreme Court has original jurisdiction over boundary disputes between a State and a territory of the United States).

⁴⁴² Act of May 2, 1890, ch. 182, § 25, 26 Stat. 81, 92.

⁴⁴³ *See Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that Eleventh Amendment sovereign immunity protects states against suits filed by their own citizens, as well as citizens of other states).

⁴⁴⁴ *United States v. Texas*, 143 U.S. at 639–41.

⁴⁴⁵ *United States v. Texas*, 162 U.S. at 22–23, 90–92.

⁴⁴⁶ *Id.* at 32–36.

soon as it was decided, that was the end of it. To the honor of the people of the State of Texas, there was not a murmur of dissent against the opinion. Now suppose we had not a Constitution that would enable some federal court to take hold of a question of that sort, there would have been a perpetual dispute.

Now, this article further says, “[t]he 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.”⁴⁴⁷

You should read in connection with that Article 6 of the Amendments to the Constitution, which says that

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 accusation⁴⁴⁸

Before this constitution was adopted, there were many instances in which the people in the Colonies were taken across the waters and tried in England for crimes committed, if committed at all, on this side of the water in the Colonies.⁴⁴⁹ Now, it was intended to put an end to that, and therefore it stated that the trial of crimes shall be in the state where the crime was committed.

Now, what do we mean by a trial by jury? There are some strange notions in these later days about the right to trial by jury. I have heard quite recently gentlemen of intelligence and of undoubted humanity say that it was entirely competent for a state, if it chose, to provide for the trial of a man for murder before a single judge without a jury. If they wanted to reduce the jury—the jury is to be interpreted here in the light of the common law:⁴⁵⁰ it means a jury of twelve men. So they said if a State wants to try by a jury of eight men it may do so, or by five men. If it wants to constitute a jury for the trial of murder by three persons, it may. Or if the state chooses, it may try a man for his life before the judge alone.⁴⁵¹

⁴⁴⁷ U.S. CONST. art. III, § 2, cl. 3.

⁴⁴⁸ *Id.* amend. VI.

⁴⁴⁹ The Declaration of Independence makes a direct reference to this practice in its Indictment of King George III: “For transporting us beyond seas to be tried for pretended offences.” THE DECLARATION OF INDEPENDENCE para. 21 (U.S. 1776).

⁴⁵⁰ See *Moore v. United States*, 91 U.S. 270, 274 (1875).

⁴⁵¹ See *Hurtado v. California*, 110 U.S. 516, 548 (1884) (Harlan, J., dissenting).

Well now, whether that be so or not, I will refer to it further when we come to consider the Amendments to the Constitution of the United States—particularly the Fourteenth Amendment, which says that no man shall be deprived of life, liberty, or property without due process of law. I will have occasion to consider whether a State can, since that amendment, try a man for any criminal offense in any other way than by a petit jury of twelve men. Suffice it here to say that this article regulates criminal proceedings in the courts of the United States, and an act of Congress which should provide for the trial of crimes in this District by a jury composed of less than twelve people would be void.⁴⁵²

The trial of all crimes—not simply felony, but all crimes—shall be by jury.⁴⁵³ There is only one exception to that broad statement: that language is to be interpreted in the light of the common law when the Constitution was established. There were petty offenses which might be tried without a jury. For instance, if there was a license to be paid of \$6.00 for driving a hack, and if the man who drove the hack didn't take out his license, he might be fined by the judge alone without a jury. But with the exception of that class of cases, I make the broad statement that whenever a man is tried in the court of the United States, or in this District, or in any Territory of the United States, he must be tried by jury.⁴⁵⁴ He must be tried by a jury of twelve men, and not less than twelve men.⁴⁵⁵

There are some who think that these proceedings are dilatory, that there is too much delay in justice when you have twelve men to sit upon a jury, and that it is a wrong rule to say that no man shall be returned guilty unless the whole twelve men agree that he is guilty, that it results in defeat of justice. That may be true in some cases because of the corruption of some juries, some jurors, but it is oftener the results of an inefficient officer or commissioners who select the jurors.

For my own part, I believe that there is no feature of our Anglo-Saxon civilization today that lies more nearly to the liberty of man than the right of a trial by the old-fashioned jury composed of twelve honest men, and I

⁴⁵² See U.S. CONST. art. I, § 8, cl. 17 (providing Congress with “exclusive Legislation” over the District of Columbia).

⁴⁵³ *Id.* amend. VI.

⁴⁵⁴ Modern application of this principle in the United States results in the right to a jury trial being implicated only if the offense is not “petty,” in that the potential length of imprisonment is greater than six months. *Baldwin v. New York*, 399 U.S. 66, 68–69 (1970). Individual states still have the ability to choose whether to grant a jury trial even for petty offenses.

⁴⁵⁵ The Supreme Court later rejected this twelve-person rule for *state* jury trials. *Williams v. Florida*, 399 U.S. 78, 86 (1970).

would not dispense with any essential feature of that system. I am not a convert to the idea that a single man, sitting upon the bench, who is a candidate for re-election, is a safe depository. Nor, whether candidate for re-election or not, that he is a safer depository of sound principle arising out of facts that are to be established than a jury properly composed of men of fair intelligence. The glory of our civilization is that we do have some regard for human life and human liberty when a man's life is put at stake, or when his liberty is put at stake. I have heard that three-fourths might be sufficient to agree to a verdict. I think that a unanimous verdict is required under this Constitution in the Courts of the United States.⁴⁵⁶

Let me state what is one of the largest questions before the courts of this country yet to determine. The Fourteenth Amendment of the Constitution of the United States says that no man shall be deprived of his life or liberty without due process of law. Now, that is an inhibition upon the states. The Fifth Amendment said the same thing, and that tied the hands of the United States. It said the United States should not, in the federal courts, take away any man's life or his liberty except in accordance with due process of law. The Fourteenth Amendment made that a national right beyond the power of any state to affect, and therefore a state today no more than the United States can deprive any man of life or liberty without due process of law.

What do we mean by "due process"? It is not defined in the Constitution. We are, therefore, to go back to the time when the words were first introduced in the Constitution to ascertain what it means. Now, the large question that I spoke about just now, not yet directly covered by any decision of the Supreme Court, is what rights are secured against state action by this clause of the Fourteenth Amendment. The old Constitution states, for instance, that cruel and unusual punishments shall not be inflicted. Let me give you the exact words: "Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishments inflicted."⁴⁵⁷

Now, undoubtedly, before the Fourteenth Amendment, that applied

⁴⁵⁶ This point has been reflected in the Court's later opinions. *Johnson v. Louisiana*, 406 U.S. 356, 359–62 (1972) (explaining the difference between state jury trials, where the "unanimity rule" does not have to be followed, and federal jury trials, where the unanimity rule is required); *see also Apodaca v. Oregon*, 406 U.S. 404 (1972) (holding that the Sixth Amendment did not require that a jury's vote be unanimous in state criminal trials). The United States Supreme Court recently denied certiorari in a case that would reconsider the fractured opinions in *Apodaca*. *State v. Herrera*, 234 Or. App. 785 (2010), *cert. denied*, 131 S. Ct. 904 (2011).

⁴⁵⁷ U.S. CONST. amend. VIII.

only to the United States' authority. That clause did not stand in the way of any state imposing a cruel and unusual punishment. But now the Fourteenth Amendment says no state shall deprive any man of life, liberty, or property without due process of law. Suppose a state today should pass a law introducing the punishments of torture, a law which would authorize some ministerial officer to put a man to torture in order to make him confess before he was tried. Or suppose it provided the punishment of burning a man at the stake if he was convicted of a particular crime. Is that due process of law? Is the state prohibited from resorting to any mode of punishment of that sort?

So, along in that line of cases is the large question, not yet concluded, that as to whether a state may dispense with a petit jury or modify the trial as it was at the time of the adoption of the Constitution? I answer unhesitatingly that no court of the United States can try a man for any crime by a jury less than twelve, or can sentence any man upon the return of a verdict of jury in which all the jury have not concurred.

Has not the State of California done away with an indictment by grand jury?

Yes. How does that bear on this question? Take a minute, if you please, of a case that I will give you that is worth your while to read: *Hurtado and the State of California*, 110 United States.⁴⁵⁸

California adopted a statute which authorized a man to be proceeded against for any criminal offense by information, not indictment. The state could take either.

Now you know the difference between an indictment and an information. The grand jury is an old system connected with the administration of criminal justice. It is a given number of men selected by ballot or some impartial mode who come from the whole county, different parts of the county, generally men of the first standing in their neighborhood. They come together to inquire whether any crime has been committed in that county since the last term of the court. The Commonwealth's Attorney,⁴⁵⁹ for instance, has heard of a crime and that is brought to the attention of the grand jury, and they summon witnesses and

⁴⁵⁸ *Hurtado v. California*, 110 U.S. 516 (1884).

⁴⁵⁹ "Commonwealth's Attorney" is probably a tip of the cap to Harlan's home state of Kentucky, which uses this term instead of "district attorney" to refer to its prosecutors of felony crimes. *Office of Criminal Law*, KENTUCKY.GOV, <http://ag.ky.gov/criminal/Pages/default.aspx> (last visited June 16, 2013). Virginia also uses the same designation. See *Commonwealth Attorney's Services Council*, VIRGINIA.GOV, <http://www.cas.state.va.us> (last visited June 16, 2013).

investigate the matter. And if they find that here is a serious case, we do not know whether the man is guilty or not, but it is serious enough to be looked into, therefore they return an indictment.

Well, that is an indictment by a grand jury. An information filed by the District Attorney is this: he steps into the court and files the information charging John Jones with the crime of murder. He does that on his own responsibility. Well, a man was tried under an information of that sort in California and convicted and sentenced to be hung. He brought the case to our court, and he made the point that whatever might have been done by the state before the Fourteenth Amendment, that now no state can deprive a man of his life except in accordance with due process of law.

Well, the Supreme Court of the United States didn't take that view of it, and held that it was competent for the state to adopt that measure of proceeding for the purpose of initiating the prosecution, and the gentleman who now addresses you is the only one who had the misfortune to differ with them.⁴⁶⁰ If you will read that case, you will read a very great opinion representing the majority by the late Justice Mathews, and the opinion which I wrote.

I can add nothing tonight to what I said in that opinion. That case has been reaffirmed a number of times since, so that it can be regarded as the settled rule of the present day that the grand jury is not indispensable. Now may a state take another step? May a state go so far as to abolish the petit jury for criminal cases and try a man before a judge or before less than twelve? There is an opinion in some localities, particularly with book men and learned professionals, that a petit jury is a nuisance and that the whole thing ought to be modified. Whether that can be done is yet to be determined.⁴⁶¹

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

⁴⁶⁰ *Hurtado*, 110 U.S. at 538–58 (Harlan, J., dissenting).

⁴⁶¹ When the Court later held that jury trial was not guaranteed to those in American colonies, Harlan dissented, arguing that grand and petit juries both were fundamental guarantees “for the benefit of all, of whatever race or nationality, in the states comprising the Union, or in any territory.” *Dorr v. United States*, 195 U.S. 138, 154 (1904); *see also* *Hawaii v. Mankichi*, 190 U.S. 197, 235–36 (1903) (Harlan, J., dissenting) (arguing that constitutional rights extended to Hawaii even before it became a state); *Downes v. Bidwell*, 182 U.S. 244, 356–57 (1901) (Fuller, C.J., dissenting) (arguing that the Constitution’s restrictions on federal power extend to U.S. territories).

or on Confession in open Court.⁴⁶²

We have had very few trials for treason in this country since the foundation of the Government. We have had one that was a historic trial, not only because of the positions of the men, but because of the high character of the great magistrate who presided over that trial.

I told you a few evenings ago of the disreputable conduct of Aaron Burr when he attempted to steal the Presidency from Mr. Jefferson. When his term was ended, he had lost the confidence of his party and of everybody else almost. And there was a movement in the western states on the Mississippi that looked to a severance of part of the country we then owned, along with Texas and probably taking a part of Mexico and making a new government there. The bad feeling there was from the fear that the government of the United States would make some sort of terms with the government of Spain by which the people on the upper Mississippi would be interfered with in the free navigation of the Mississippi River. Mr. Jefferson believed that there was a scheme on foot to dismember the Union, and he watched it, and he thought that Burr was in it.

Burr, while he was in the West, was in the city of Frankfort, Kentucky, the capital of the state. I well remember the old house, now demolished, in which it was said the Legislature of Kentucky assembled, nearby where Burr was at one time. While out there he was indicted in the federal courts for treason against the United States, or for some offense under the laws of the United States, a pretty serious one. He sent for Henry Clay to defend him. Mr. Clay was then in the very prime of his young manhood, and Mr. Clay had heard that Mr. Burr had some hostility against the United States, and he required from Burr his assurance that he was not guilty of any such offense. They could not find proof against him, but not a very great while afterwards he was arrested and carried to the city of Richmond and there tried. Chief Justice Marshall presided.⁴⁶³

Now, I refer to that case as an illustration of the value from the standpoint of human experience that clause of the Constitution of the United States that gives the judge a fixed compensation. He presided at that trial—if there was a man in all the United States that was hated at that time from one end of it to the other, it was Aaron Burr. He was prosecuted with all the power and all the money of the United States. He was not distrusted by any person any more than he was by John Marshall who presided at the trial. And the question arose whether or not the evidence

⁴⁶² U.S. CONST. art. III, § 3, cl. 1.

⁴⁶³ *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,639).

was sufficient to convict him of treason under the Constitution. In an opinion which you will see in Burr's trial, he ruled in such a way as resulted in the [acquittal]⁴⁶⁴ of Aaron Burr.

Now, I refer to this as an illustration of courage and high integrity of the part of that great magistrate. To his honor as a judge be it said, and may every judge who acts with the same spirit have the same honor accorded to him, that he never stopped for a moment to see whether or not his opinion would be in accord with the public feeling.

⁴⁶⁴ The manuscript reads "conviction," but Burr was acquitted. *See id.* at 181. Either Harlan misspoke or his students misheard him.

LECTURE 21: MARCH 19, 1898

At our last Saturday night meeting, I made some observations upon the last clause of Article III, relating to the judicial power of the United States. One additional observation to that clause, and one or two general observations to the whole article, and I will pass from that subject.

That clause is: “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.”⁴⁶⁵

Now, what is treason? That is defined by the previous clause. “Treason against the United States, shall consist only in levying War against them”⁴⁶⁶

But a man may be guilty of treason without levying war. He may adhere to the enemies of the United States, giving them aid and comfort.⁴⁶⁷ Let us suppose this country was in a war, and one of our own people adhered to the enemy and gave them aid and comfort. Why, the one who did so would be guilty of treason.

Well now, suppose he owned real estate. If he were tried for treason, and convicted, and sentenced to be hung, that judgment sentencing him to be hung on account of treason, of which he was convicted, would not work corruption of blood as it would in other countries.⁴⁶⁸ That is to say, the son of that man would have all the rights that you would have, precisely. He could not be called into account anywhere, or under any circumstances, on account of the treason of his father. If the attainder of treason worked corruption of blood, why the result would be that the son would be under the displeasure of the government, and would be in a position not to inherit its honors or to exercise rights.

⁴⁶⁵ U.S. CONST. art. III, § 3, cl. 2.

⁴⁶⁶ *Id.* art. III, § 3, cl. 1.

⁴⁶⁷ *Id.*

⁴⁶⁸ Corruption of blood is a result of attainder, which at English common law prohibited the attainted party from inheriting, possessing, or disposing of real property due to a conviction of treason or felony punishable by death. The attainted person’s property would be relinquished to the crown. See Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727, 729 (1992). Since corruption of blood is flatly prohibited in the Constitution, the doctrine is largely unknown in the United States. See U.S. CONST. art. III, § 3, cl. 2. However, many states have so-called “slayer statutes” which may prohibit or proscribe property rights that have or will become vested in a person as the result of the commission of a homicide. See Gregory C. Blackwell, Comment, *Property: Creating a Slayer Statute Oklahomans Can Live With*, 57 OKLA. L. REV. 143, 143 (2004).

Well, we rooted that out of our republican system, and said in substance that no man was to suffer because of the treason committed by his father or his ancestor. He would stand upon his own merits. The real estate of the father might be forfeited on account of treason, but that forfeiture could only be during the lifetime of the father.⁴⁶⁹ That is, the government might cause him to forfeit his life estate, and when he died, why that estate would descend according to the course of the law, or according to the course of his will, if he has made one.⁴⁷⁰

Now, the general observations that I wanted to make about the judicial power of the United States I made heretofore, I think, in one way or the other. But it is an important observation, and one that cannot be repeated too often because it gives you an idea of our system of government, which is important for you to always bear in mind. And that is that the judicial power of our government has a function which the judicial branch of no other government on the Earth possesses. I do not think there is an exception to this broad statement.

Let me repeat it: no government on the Earth, and no government that ever existed on the Earth, had a judicial department such as we have got in this country.

We have recently heard in the papers the account of a fantastic trial in the city of Paris of the novelist Zola for something that he had said about the conviction heretofore of a man of the name of Dreyfus.⁴⁷¹ Now, we were not there to look upon the trial, and it may be that we are misinformed about it. But if one-half of what appeared in the public prints about that trial is true, there never was a more complete farce on the earth than that.

As to its being called a trial in a court of justice, why there was no semblance to such a trial. A man called at the stand as a witness and asked a question, he declines to answer it, and then turns to the jury and makes a speech in the presence of the court. And according to the account that was

⁴⁶⁹ See U.S. CONST. art. III, § 3, cl. 2.

⁴⁷⁰ See *Wallach v. Van Riswick*, 92 U.S. 202, 212–14 (1875).

⁴⁷¹ Émile Zola was a French novelist who risked his career by becoming involved in “the Dreyfus affair.” See LESLIE DERFLER, *THE DREYFUS AFFAIR* (2002). Captain Alfred Dreyfus was a Jewish officer in the French army, who was court-martialed and convicted of treason. *Id.* at 76–78. On January 13, 1898, Zola published a letter in the newspaper *L’Aurore*, claiming that Dreyfus was innocent and accusing the government of anti-semitism. *Id.* at 113. The letter was intended to provoke a libel charge, which would enable Zola to disclose exculpatory evidence about Dreyfus. *Id.* Zola was charged and convicted of criminal libel, but fled to England. *Id.* at 113–14. The government offered Dreyfus a pardon, which he accepted. *Id.* In 1906, Dreyfus was exonerated by the French Supreme Court. *Id.*

given, the court was in consultation half the time with the officers of the government in the so-called Republic of France, and it was said—and I suppose it to be true—that the government of France intimated to the court that it would not do to allow this or that or the other thing. The result was the conviction of Zola and his being sentenced to imprisonment.

Could that occur in this country? Why, nowhere, in no court of this country, federal or state, could that occur. Let me illustrate what is in my mind.

Let me suppose that President McKinley was in one of the states, visiting at a summer resort for his health that was near the capital of some county in the state, and a Circuit Court or Common Pleas Court was being held there, a court of general jurisdiction. And President McKinley should conclude that he would go into that courthouse to see how that trial was being conducted. Well, that he would have a right to do, and he would walk in like any of the rest of us would walk in if we were there. The sheriff, if he recognized him, would pay respect to high office, of course, and provide a seat for him. It might be that the judge of the court—and he could do so with great propriety—would, recognizing the President of the United States, send the sheriff to him and invite the President to come and take a seat beside the judge.

Well, the President might accept the invitation and he would walk up and take the seat beside the judge. There probably would not be—if the court was a well-conducted one there would not be—any applause. It would be done very quietly, but there you would have the spectacle of the President of seventy millions of people sitting by the side of a judge of a subordinate state court, and that President would have no authority to interfere in that trial, no authority to make a suggestion.⁴⁷² If he dared to make a suggestion to that judge about it, that judge—if he understood what were his functions and had any sense of the dignity of his office—would resent the insult of it. The President would sit there with no more authority than any one of you would have if you were in that courthouse.

But to bring the case closer, let us suppose that the government of the United States, through the Department of Justice, had ordered the prosecution of a particular man for an alleged offense against the laws of the United States, and the man was on trial in the federal court. It might be

⁴⁷² Justice Harlan's estimate is fairly accurate: according to the U.S. Census Bureau, the aggregate population in 1890 was approximately 63.06 million people, and in 1900 it was approximately 76.30 million people. U.S. CENSUS BUREAU, STATISTICAL ABSTRACTS OF THE UNITED STATES: 1900, at 10 (1901), *available at* <http://www2.census.gov/prod2/statcomp/documents/1900-02.pdf>.

that the President of the United States thought that the public interest demanded that that man, if guilty, should be punished. But does anyone suppose that the President of the United States would write a letter to the judge of that court and express the hope that the man would be convicted or that another man on trial might be acquitted? Would the President of the United States do that?

Why, of course, he would not. The judge of that federal court would resent such an insult to the administration of justice. And when that judge sits in the courthouse trying a case according to law and under the Constitution of the country, he knows nobody, neither the President of the United States nor the whole Congress of the United States. He is there representing the majesty of the law, and that law is above everybody. It is above presidents; it is above congresses; it is above all the seventy millions of people.

That judge under our system is under an oath of office to do justice in that case. And when the court disposes of these questions, and when they get, if they can, to the Supreme Court of the United States, there they are decided. That is the end of the matter in that case, and no power exists anywhere to review that. And that decision is as binding upon the President of the United States and the Congress of the United States as it is upon the individuals in that case.

And why is that so? It is because this Constitution says that that document, and the laws of the United States passed in pursuance of it, are the supreme law of the land, and the judicial power of the United States, extending as it does to cases arising under the Constitution and laws of the United States, is supreme.⁴⁷³

Now, I repeat that that cannot be said of any country on the face of the Earth except this.

It cannot be said of our kingdom across the ocean in the British government. Although their judiciary stands as high as any upon the Earth for integrity and learning, that judiciary cannot upset a law passed by the legislative branch of the British government. If Parliament passes a statute, no matter what it is—if Parliament passed a statute today confiscating all the estate of Lord Salisbury, the Premier of the British Government, and directs that the proceeds of that sale shall be put into the Treasury of Great

⁴⁷³ U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .”); U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . .”).

Britain without one cent compensation being made, no court could gainsay it. Parliament makes the law, and when they have said this, that, or the other, it is the law.⁴⁷⁴ The courts simply execute that.

Now, in this country, no legislature is paramount, no executive is paramount. The judicial branch of the government is authorized by this instrument to give effect to this Constitution. And therefore, when anything done by the President of the United States, or anything done by the Congress of the United States, violates any right secured by this instrument, and that question comes up in a court of justice anywhere in the United States, federal or state, that court can say that that act is a nullity because it is in opposition to this fundamental law.

And that power under our system belongs even to a justice of the peace. A justice of the peace in this District, if he is called upon to give a judgment in a case, and that judgment depends upon what purports to be an act of Congress, that justice of the peace having taken an oath to support the Constitution of the United States has a right to say, and it is his duty to say so if he believes such to be the fact, that “I won’t respect that act of Congress because it is in violation of the Constitution of the United States.”

That is his sworn duty. I would not advise an ordinary justice of the peace to take that course, but he might do it.

Now, can an Englishman take advantage of his fundamental rights when they are violated by legislation? Way back in the thirteenth century—you are familiar, no doubt, with the history of England, and remember the history of the Magna Charta, and that Magna Charta is one of the statutes of England.⁴⁷⁵ And then, further along in the history, there was a further struggle with the royal power, and they wrung from that power certain concessions embodied in statutes: the Bill of Rights, the statute which gave the right of the Writ of Habeas Corpus, and others

⁴⁷⁴ This parliamentary sovereignty is still in place today; however, judicial review is available for parliamentary laws that violate the laws of the European Union. See *The Legal Framework*, EUROFOUND (Nov. 21, 2011), <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/dictionary2.htm>.

Judicial review is therefore primarily used only for alleged improper application of the law by government actors. For Parliament’s own explanation of parliamentary sovereignty, see *Parliamentary Sovereignty*, PARLIAMENT.U.K., <http://www.parliament.uk/about/how/sovereignty> (last visited June 16, 2013).

⁴⁷⁵ It is technically a charter and not a statute, hence its full title: “The Great Charter.” For a detailed contemporary commentary on the history, meaning, and contents of the Magna Carta, see WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* (2d ed. 1914).

which make up what we call Anglo-Saxon liberty.⁴⁷⁶ Now, all that had been done before our government was established. And hence you will find, in all of the legislation passed preceding the Revolution of 1776, that our Fathers of that day said that we are entitled to the fundamental rights that all Englishmen have, and when those rights were accorded, they had full liberty.

Now, you ask, how is an Englishman to take advantage of his rights? If a question arises in an English court as to whether this man is entitled to a writ of habeas corpus, the court will enforce the statute. If Parliament passes a statute repealing that writ of habeas corpus, taking it away, then the English court could not grant it. We have, by the privileges of Magna Charta, that no man shall be deprived of his life, liberty, or property without due process of law. Now, suppose Parliament should repeal that? That is what I meant, competent for Parliament to wipe out a statute. Of course, one Parliament cannot bind another Parliament, and any subsequent Parliament can wipe out the statutes of a previous Parliament.

But why cannot that occur in this country? In England they have got no written constitution. They have got no unalterable constitution. We have got a Constitution which may be amended, but until it is amended it is the supreme law of the land for everybody. And when a man says that this proceeding here against me deprives me of my property without due process of law, that this act is in violation of the Constitution of the United States, and he appeals to the Fourteenth Amendment, a federal court or state court is to consider the question, "Is this consistent with the Constitution?"

An English court is bound by the existing statutes, whatever they are. It is literally true that nowhere on the Earth up to this time and at this day is more respect paid to the liberty of man, to the rights of property, than in England. But any day that Parliament is so minded they could by a statute ten lines long wipe out all these guarantees of life, liberty, and property. They cannot do it in this country.

Cannot the court of England so construe an act of Parliament as to make it a dead letter?

Well, I answer that yes and no. Yes, if the court chooses to so construe it; but no, if the thing is plain enough. If there is no room to doubt about its construction, the court must march up to that result. Sometime an

⁴⁷⁶ The Bill of Rights of 1688 and the Habeas Corpus Act of 1679 join the Magna Carta to form the basis for Britain's unwritten constitution. See Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L.J. 329, 336-37 (2002).

act of Parliament may be passed that is very obscure, and the court has said in some cases, “Well, we don’t understand this act. This act is inconsistent. The first and second sections do not stand together. Our duty is to make them all stand together if we can so as to give some intention to the act of Parliament, but we cannot make them stand together.” The court did not announce that they intended to make the statute *De Donis* a dead letter by construction.⁴⁷⁷ They may have construed it so as to make it a dead letter, but they did not say that they did that.

Parliament could not, perhaps by any vague statute, get around the effect of a judgment. But Parliament could no doubt, if the court said that this piece of property belonged to A—if that was the judgment of the court of last resort—I take it that Parliament could by a statute declare that it belongs to B and ought to be delivered to B, and no court could upset it. When Mr. Blackstone says that an act of Parliament is void because it is impossible of enforcement, he means to say that the court is powerless to enforce it.⁴⁷⁸ If it is impossible of enforcement, why is it to be called an act? The court simply says that, “We do not understand it; we cannot enforce it,” and therefore it is so much waste paper. Well, of course, one Parliament cannot undertake to bind subsequent Parliaments. Would Parliament be omnipotent if Parliament could bind subsequent Parliaments?

⁴⁷⁷ *De Donis Conditionalibus*, 1285, 13 Edw. 1, c. 1 (Eng.). This statute introduced perpetuities to England and had several unintended and undesired consequences, including broken leases, defrauded creditors, and a general lack of fear regarding repercussions for such acts. See JOSHUA WILLIAMS, *PRINCIPLES OF THE LAW OF REAL PROPERTY* 35 (London, C. Roworth & Sons 1845).

⁴⁷⁸ It seems Justice Harlan misspoke here. In *Thomas Bonham v. College of Physicians* (more commonly known as *Dr. Bonham’s Case*), it was Sir Edward Coke rather than Blackstone who declared that “in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or *impossible to be performed*, the common law will control it, and adjudge such an Act to be *void*.” *Dr. Bonham’s Case*, (1610) 77 Eng. Rep. 646 (K.B.) 652; 8 Co. Rep. 113b, 118a (emphasis added). In his famous work, Sir William Blackstone stated that

if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government.

1 WILLIAM BLACKSTONE, *COMMENTARIES*, *supra* note 194, at *91. While Blackstone’s view of parliamentary sovereignty won out in the United Kingdom, the United States evolved more in line with Coke’s view.

Now I pass from that subject to Article 4. The first section of that Article was the subject of consideration at our last meeting when we talked about personal property. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."⁴⁷⁹ I do not care to add anything to what I said on that subject.

The second section is one of vastly more consequence. It has been the subject of much consideration, and it will be the subject of much more consideration. It is only two lines and a half, and they are very weighty words: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."⁴⁸⁰ It is a little awkwardly worded, but the object of it cannot be misunderstood: "The Citizens of each State." Read in connection with that and consider the first clause of the Fourteenth Amendment: "All persons."⁴⁸¹

We sometimes talk, when we think of the Civil War, about this, that, and the other battle being the turning point in that war; that if this particular battle had gone that way rather than the way it did, the results would have been far different. We say very often, for instance, that the turning point in the war was the battle of Gettysburg.

Well when we take our minds off of military matters to consider the political matters of the country. I think we may say that, but for this clause that I am about to read, the Constitution of this country might have been very different.

The first clause of the Fourteenth Amendment: "All persons." Not some persons, but all persons. Mark you, not all citizens, but "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."⁴⁸²

That, I believe, is the first time in the Constitution that you find the phrase "citizens of the United States."⁴⁸³ You find in the judiciary article a statement to the effect that the judicial power of the United States extends,

⁴⁷⁹ U.S. CONST. art. IV, § 1.

⁴⁸⁰ *Id.* art. IV, § 2, cl. 1.

⁴⁸¹ *Id.* amend. XIV, § 1.

⁴⁸² *Id.*

⁴⁸³ Actually, the first reference to a "Citizen of the United States" appears in Article I, Section 2 regarding the requirements for representatives. Justice Harlan is technically correct in that the phrase "citizens of the United States" does not appear until the Fourteenth Amendment. For further discussions on the meaning of "Citizen of the United States" in Article I of the Constitution, see Josh Blackman, Essay, *Original Citizenship*, 159 U. PA. L. REV. PENUMBRA 95 (2010).

among other things, to controversies between a state and citizens of another state, and between citizens of different states, but the phrase “citizens of the United States” appears for the first time in the Fourteenth Amendment.

What does that mean? What is the history of it? Along in the early fifties a case got to the Supreme Court of the United States. It is the case of Dred Scott against Sandford.⁴⁸⁴ It is in 18 or 19 Howard. Unless you read that case you will not understand many things that have occurred since that time. That was the case of a colored man bringing a suit in a circuit court of the United States, at the City of Saint Louis, I believe. It involved the question of his freedom, and it got to the Supreme Court of the United States.⁴⁸⁵

Now, you will remember I have just read to you that the judicial power of the United States extended to controversies between citizens of different states. One of the questions raised in the case was whether or not this colored man of African descent was a citizen, or could be a citizen, of the State of Missouri, so as to authorize him to sue in that capacity. And that induced the court to consider the question of citizenship generally: what was meant by citizenship of a state, what was meant by citizenship of the United States.

We sometimes are in the habit in our ordinary conversation of speaking of particular things which have occurred as providences: “That was a special providence.” We say that George Washington was a special providence, that he was raised up for the work he did, and that no other man could have done the work—so far as we can tell—that he did. We say that Jefferson was a special providence, and that no other man could have performed the work that he did. We talk in the same way about Abraham Lincoln, and about Ulysses S. Grant in the same sense.

I think I may say that that case was a sort of special providence to this country, in that it laid the foundation of a civil war which, terrible as it was, awful as it was in its consequences in the loss of life and money, was in the end a blessing to this country, in that it rid us of the institution of African slavery. That case was the beginning of that struggle.

⁴⁸⁴ Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

⁴⁸⁵ Dred Scott, a slave owned by Dr. John Emerson, was moved from a slave state, Missouri, through two different free states, Illinois and the Wisconsin territory. *See id.* at 397–98. Scott remained in this free territory for two and a half years, during which time his slave master hired out Scott’s services, thereby bringing slavery into a free state. *Id.* After Emerson’s death, Scott brought suit against John Sanford, who was the executor of Emerson’s estate, seeking Scott’s freedom. *Id.* Scott alleged several grounds for his freedom, with the main ground being his extended residence in free states. *See id.*

The majority of the Supreme Court of the United States as then constituted said that a colored man of African descent was not one of the people of the United States by whom and for whom this Constitution was ordained. It laid down the doctrine that citizenship of a state was different from the citizenship of the United States; that a man might be a citizen of the United States but he could not be a citizen of a state, except with the consent of that state.⁴⁸⁶

Now, in the light of that historical statement about which there can be no controversy, laid down in that opinion which stirred this country from one end of it to the other, which brought this country face to face with the problem that this government must die or slavery must die, it was consequences following from that which brought on the Civil War largely, which resulted in this Amendment, which says, beyond the power of any state to alter it—I am not now discussing the policy of these things, but telling you historical facts—which says by the fiat of the people of the United States that all persons born in the United States and subject to the jurisdiction of the United States, or all persons naturalized in the United States, are not only citizens of the United States but they are citizens of the state in which they reside.

Now, to state it in a way that you will understand it, here is a colored man in the state of Tennessee of African descent. He was born in the state of Tennessee, as his father was before him, freed by the Thirteenth Amendment, made a freeman.⁴⁸⁷ Now, that man, whatever Tennessee may think about him, however much she may grumble about it—if she does, I do not say that she does, but whatever she may think of it—that man is not only a citizen of the United States, but he is a citizen of the state of Tennessee, because he was born in the United States, and born subject to the jurisdiction of the United States. And the mandate of this instrument is those two facts concurring. He is a citizen of the United States, as well as a citizen of the state in which he resides.

Judge, does that include Indians?

No. The case of Elk against Wilkins—I wish I knew the volume—they were considered an exception.⁴⁸⁸ You will find a very learned opinion there by the majority of the Court. It was the case of an Indian who had

⁴⁸⁶ *Id.* at 453–54.

⁴⁸⁷ The Thirteenth Amendment provides, “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.” U.S. CONST. amend. XIII, § 1.

⁴⁸⁸ *Elk v. Wilkins*, 112 U.S. 94, 99 (1884).

left his tribe and came into the state of Nebraska, intending to become a part of that people, and the majority of the Court thought that he could not become a citizen of the United States. That case was apart from this Amendment. They were wards of the nation, and they thought he could not become a citizen of the United States. I had the misfortune to differ from the Court upon that question, and of course I was wrong.⁴⁸⁹

Would a Chinaman born in this country be a citizen?

We have now before us under consideration this case, and when I tell you the case you will probably understand why I cannot answer your question, as it has not been decided.⁴⁹⁰ It will be decided some of these days. It is the case of a man whose parents both were Chinese. They came to San Francisco at a time when it was easier for a Chinaman to get into this country than it is now, and the father engaged in business there. And shortly after he did engage in business there—still, however, a subject of the Emperor of China—a male child was born to him, twenty-odd years ago. A few years ago, that young man went back to China, and then attempted to return to this country, and was refused admission.

He claims that he was entitled to be admitted. He claims that he was a citizen of the United States, although his parents when he was born and still are today the subjects of the Emperor of China. For, says he, “I was born in the United States, and by the very terms of this Fourteenth Amendment I am a citizen of the United States.” That is the question in the case.

Now, that question involves other considerations. You will remember in the Constitution there is power given to Congress to establish a uniform rule of naturalization.⁴⁹¹ Did this Fourteenth Amendment curtail that power? What is naturalization? Why, it is turning a foreign-born man, or turning somebody who was not born of American parents, into a citizen.⁴⁹²

Now, does that Fourteenth Amendment curtail the power of the United States over the subject of naturalization? We have for many years had the policy—I am now giving you the argument on one side—we have had the policy of excluding the Chinese from this country absolutely, except certain classes, and the power of the government to do that no one disputes now or

⁴⁸⁹ *Elk v. Wilkins* was abrogated by the Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253.

⁴⁹⁰ *United States v. Wong Kim Ark*, 169 U.S. 649, 649 (1898) (argued Mar. 5 & 8, 1897 and decided Mar. 28, 1898).

⁴⁹¹ U.S. CONST. art. I, § 8, cl. 4.

⁴⁹² Black’s Law Dictionary defines naturalization as, “The granting of citizenship to a foreign-born person under statutory authority.” BLACK’S LAW DICTIONARY 1055 (8th ed. 2004).

can dispute.⁴⁹³

It has been asserted time and time again, and we have done that upon the idea that this is a race utterly foreign to us, and never will assimilate with us. They are pagans in religion, so different from us that they do not intermarry with us, and we don't want to intermarry with them. And when they die, no matter how long they have been here, they make arrangements to be sent back to their fatherland. That there is a wide gulf between our civilization and their civilization, and we don't want to mix.⁴⁹⁴

The consequences of a different policy perhaps may be apprehended in my asking you one question, which I don't expect you to answer: What would have been the condition today of the states of California, Oregon, Washington, Nevada, and Utah, and that western Pacific slope, if we had no restriction whatever against the admission of Chinese in this country?

If out of two or three hundred million that are in China, if out of that number fifty million had been here by this time, as there would have been if there had been no restrictions, that whole Pacific slope today would have been dominated by that race. They would have rooted out the American population that is there, would have compelled all the laboring part of that country to have left and come to other parts of the country to seek subsistence.

Now, that is said on one side, and the question was put to the Court, "Can it be possible that the Fourteenth Amendment had the effect of tying the hands of the Congress of the United States in the matter of naturalization, so that children born in this country of people who are Chinese subjects, and who always remain such, should become citizens of the United States? If so, what would follow?" we were asked.

⁴⁹³ Following the influx of Chinese workers during the California Gold Rush, the United States severely restricted entry of Chinese people through the Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), (repealed 1943). See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 855–56 (1987). The Chinese Exclusion Act was repealed in 1943 by the Magnuson Act, allowing Chinese nationals to be naturalized by the United States. Chinese Exclusion Repeal (Magnuson) Act of 1943, Pub. L. No. 78-199, 57 Stat. 600, 600–01. The Magnuson Act itself was repealed in 1965, paving the way for increased Chinese immigration. Immigration and Nationality (Hart-Cellar) Act of 1965, Pub. L. No. 89-236, 79 Stat. 911.

⁴⁹⁴ Harlan stated this opinion in his lone dissent to *Plessy v. Ferguson*: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race." *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

Why, they said, "It would follow that, although that man's mother or father, no matter what they could do, could never become naturalized citizens of the United States because we had never permitted naturalization of the Chinese, if that father and mother and that race were excluded from this country, that this son by the accident of his birth in this country became a citizen of the United States, and therefore eligible to the Presidency of the United States, eligible to the Senate of the United States, and eligible to any position in this country."

And according to the same principle, it was argued that if some of our own people, American-born and their ancestors American-born, but they should be traveling in foreign lands and stay there a year or so and a child boy should happen be born to them while there, that son would not be a citizen of the United States because he was neither born in the United States or naturalized in the United States.

Now, those questions are involved I say in that case, and I do not think I can answer it yet. When the case is decided, I will try and bring it to the attention of the class. How it may be decided, I do not know. If I did, I would not say. Of course, the argument on the other side is that the very words of the Constitution embrace just such a cause.

Now go back to that second section of Article IV. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."⁴⁹⁵ What does that mean?

Here is a man in the state of Virginia who was entitled by the law of that state to make a will and to devise his estate. Suppose the state of Virginia by a statute should say that no man living in any state outside Virginia should inherit real estate in the state of Virginia? Would that statute stand? Not for a moment. And why? Here is a Virginian entitled to inherit real estate, but that law would deny the right of the New Yorker to inherit that real estate in Virginia.

Now, this section means that a citizen of New York is entitled in the state of Virginia to the same rights that are accorded to a man of the same sort in the state of Virginia, a citizen of the United States.

Now, I ought not to stop right here without making one observation. Not that there are not certain things that may be required. For instance, a citizen of Virginia may bring a suit in one of the courts of that state without giving a bond for costs. Now, the state of Virginia might rightfully require that a citizen of another state bringing a suit in the courts of that state give a bond for costs, because he lives out of state, and the state of Virginia

⁴⁹⁵ U.S. CONST. art. IV, § 2, cl. 1.

cannot touch his property. So, she says you must give a bond for costs or deposit the amount of money that may be necessary for the costs.

LECTURE 22: MARCH 26, 1898

We were considering at our last meeting Section 2 of Article IV of the Constitution: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”⁴⁹⁶

Before the Fourteenth Amendment was adopted, there were cases in the federal and state courts which involved a construction of that section of the Constitution. A citizen of New York, for instance, bringing a suit in a state court of Pennsylvania would be required by the laws of Pennsylvania to give a bond for costs, whereas a citizen of Pennsylvania suing in one of the courts of Pennsylvania would not be required to give a bond for costs in order that he might maintain an prosecute his action to a conclusion. And it was stated in some of the cases—it was contended that that was a violation of this section of the Constitution that I have just read. It was said, plausibly, “You are imposing upon the citizen of New York a burden you don’t impose upon your own people when suing in the courts of your state.”

But it was held, I think without any contrary opinion anywhere, that that was a reasonable regulation that was entirely consistent with this clause of the Constitution. And for the reason that, when a court gives a judgment for costs, that judgment would be ineffectual for any purpose unless it could reach the man against whom the costs were charged. But if he lived in another state, the process of the court of Pennsylvania for costs could not reach him. Therefore, as the citizen of New York was beyond the process of the courts of Pennsylvania, it was but fair and right that if he sought justice at the hands of a Pennsylvania court, he should give security to pay the costs if he should lost the suit. And it was held not to be a violation of that clause of the Constitution.⁴⁹⁷

⁴⁹⁶ *Id.*

⁴⁹⁷ See *Kilmer v. Groome*, 6 Pa. D. 540, 540 (1897) (citing *Haney v. Marshall*, 9 Md. 194, 209 (1856)) (“[T]he rule referred to does not interfere with the privileges and immunities of non-residents, but it merely places them on a basis in relation to the payment of costs similar to that on which our own citizens stand.”). Later that year, in *Blake v. McClung*, Harlan used this holding as an example of the limits of the Privileges and Immunities Clause. *Blake v. McClung*, 172 U.S. 239, 256 (1898) (“For instance, a State cannot forbid citizens of other States from suing in its courts, that right being enjoyed by its own people; but it may require a non-resident, although a citizen of another State, to give bond for costs, although such bond be not required of a resident. Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states.”).

In an early case, reported in one of Washington's circuit court reports, there was a decision by Mr. Justice Washington under that clause of the Constitution, in which he said that the privileges and immunities that are there referred to were those fundamental privileges relating to life, liberty, and property that inhered in Anglo-Saxon liberty, and that it did not apply to the ordinary regulation as to business, as to proceedings in courts.⁴⁹⁸

Now, that section was very much enlarged by the war. I say by the war, because there are certain amendments to the Constitution of the United States which everybody knows were the result of the war—which would never have been incorporated into the fundamental law but for that Civil War—and the amendment resulting from that war which relates to this subject of citizenship in this country is the first clause of the 14th Amendment. I have read it to you before—perhaps not in this connection, let me read it again.

“All persons”—not some persons, not a few persons, not any privileged character, but, “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.”⁴⁹⁹

What was the occasion of that clause? What does it mean? Before the war, there came that case to which I called your attention at the close of my remarks at the last meeting, *Dred Scott* against Sandford, at which the question arose whether the colored man in that case, *Dred Scott*, was a citizen of the United States.⁵⁰⁰ The question was pertinent because the jurisdiction of the federal court depended upon the inquiry whether or not he was a citizen of the United States.

The majority of the court, speaking by Chief Justice Taney, said that that class of people, descendants of Africans, were not a part of the “people of the United States” referred to in the Preamble of the Constitution, for

⁴⁹⁸ *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (“The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. . . . But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens . . .”).

⁴⁹⁹ U.S. CONST. amend. XIV, § 1.

⁵⁰⁰ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

whom the government of the United States was ordained. And in that opinion, there is a great discussion upon the question of citizenship. And it was held by the majority of the court that a man might be a citizen of the United States, and yet not a citizen of the state in which he resided. That citizenship of a state and citizenship of the United States were two different things. That it was for each state to say who should be citizens of that state. And that the United States might legislate as long as it chose in making citizens of the United States, but that did not make them citizens of the state unless that state assented to it.

Well, that was ended. But it did not end before the people of the United States abolished the institution of slavery, and took out of slavery several millions of people who had been chattels—who had been property under the laws of the several states—and made them free.⁵⁰¹ You might make them freemen, but the question still remained, were they citizens? Were they citizens of the United States? Were they citizens of the states in which they were?

That question it was intended to place beyond all peradventure or dispute by this Fourteenth Amendment. And therefore it is incontrovertible under that amendment—whatever we may think about it, as to the policy of it—it is incontrovertible since the adoption of that amendment that every colored man, woman, and child in the United States is not only a citizen of the United States, but is a citizen of the state in which he resides. The state might declare at every session of the legislature for a half a century that the colored man was not a citizen of a state, and could not be accorded the rights of citizenship of that state, but such a declaration would fall to the ground as an utter nullity under this amendment.

Mark you, it is not all white persons, it is not all Anglo-Saxons, but it is all persons that were born or naturalized in the United States, and subject to the jurisdiction of the United States. They are citizens not only of the United States, but citizens of the state in which they reside.

⁵⁰¹ There were about 4 million slaves in the United States at the time of the Civil War. See *Emancipation Proclamation, MR. LINCOLN AND FREEDOM*, <http://www.mrlincolnandfreedom.org/inside.asp?ID=39> (last visited June 16, 2013). About 3.1 million were freed by the Emancipation Proclamation, on January 1, 1863. *Emancipation Proclamation, HISTORY.COM*, <http://www.history.com/topics/emancipation-proclamation> (last visited June 16, 2013). The remainder were freed by the Thirteenth Amendment, which was ratified on December 6, 1865. U.S. CONST. amend. XIII; see also *Primary Documents of American History: Thirteenth Amendment to the Constitution, LIBR. OF CONG.*, <http://www.loc.gov/rr/program/bib/ourdocs/13thamendment.html> (last visited June 15, 2013).

Therefore, a colored man living in the state of Tennessee, if he had a cause of action against somebody in the state of New York, could bring his action in the federal court sitting in the state of New York, and in his declaration allege that the plaintiff, John Jones, a citizen of the state of Tennessee, complains of John Thompson, a citizen of the state of New York. And if the defendant in that case made a plea in abatement to the effect that the plaintiff, John Jones, was not a citizen of the state of Tennessee, he could not sustain that plea by proving that the plaintiff was a black man. He would have to go beyond that. And in the case that I am putting, the plea in abatement would be perfectly idle, because the black man was born in the United States, subject to the jurisdiction of the United States, and a citizen therefore, by virtue of this amendment, not only of the United States but of the state in which he resided, whether the state wanted it or not.

Therefore, no state can justify any legislation which is grounded upon discrimination on account of color.⁵⁰² It cannot make one law—no matter what the law is, whether it relates to voting, whether it relates to holding of office, whether it relates to the acquisition and disposition of property—it cannot make one law applicable to the white man and another applicable to the black man, because the white man and the black man in that state are equally citizens of that state, and you cannot distinguish against them in respect to their immunities on account of their race or color. If a state, for instance, passed a statute by which it attempted to prevent a black man from inheriting estate devised to him by will, why that law would fall before this Fourteenth Amendment of the Constitution, and this clause that I am reading, because it is not competent for the state to deny that right to that race, while according it to the white race.

In other words, these two amendments—or rather this one amendment, the Fourteenth, in connection with the original Constitution—establishes once for all, until you change that Constitution, that every citizen of the United States, whether a native or naturalized, is the equal before the law of every other citizen, and that no power in this country, federal or state, can discriminate against a citizen on account of his color. Equality before the law, therefore, is the fundamental underlying principle upon which our Constitution rests, and it rests there securely. It never will be changed, as I think.

Now go to the next clause.

⁵⁰² *But see* Plessy v. Ferguson, 163 U.S. 537; *contra id.* at 563 (1896) (Harlan, J. dissenting) (arguing that forced segregation violates the 14th Amendment).

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.⁵⁰³

Only five and half lines there, and unless you had read up on the subject, you would probably read it—unless you were watching very closely—as a thing of no very great consequence in itself. And yet, it is one of the links which bind this country together, and which preserve the peace of this country. What would happen if that provision was not in the federal Constitution today? What would happen? Everybody agrees that except to the extent that the states have parted with their power, and organized a general government, and given it control of matters specified in the Constitution, in all other matters, the state has reserved its full power, and is absolute—that is, beyond the control of the national government.

Now, strike that provision out. What might occur? A man could commit murder in the state of Virginia tomorrow, and he had only to step across the line into the state of Pennsylvania, and that is the end of that prosecution.⁵⁰⁴ No sheriff from the state of Virginia could go into the state of Pennsylvania and arrest that man, and bring him out and into Virginia. Pennsylvania would make trouble about that, if any officer of the state of Virginia assumed to come upon the soil of Pennsylvania and to lay his hands upon a man in that state and take him into another state. Pennsylvania would have some inquiry to make on that subject. She would not allow that to be done.

But now, under the clause that I have read, no man can commit crime in this country and escape justice, unless the Governor of some state is unfaithful to the obligations which he has taken an oath to support that Constitution, or unless the man flees the United States and gets into some country with which we have no treaty of extradition, and where he cannot be reached.

There are cases of that sort. Until recently—perhaps I am speaking too fast when I indicate that it is now otherwise, perhaps it is not, but I think it is—but I know that fifteen or twenty years ago, if a man robbed a savings bank, if the president or cashier of some national bank robbed it, defrauded

⁵⁰³ U.S. CONST. art. IV, § 2, cl. 2.

⁵⁰⁴ Virginia and Pennsylvania do not share a common border, and have not shared one since the creation of West Virginia on June 20, 1863. See *Today in History: June 20*, LIBR. OF CONG., <http://memory.loc.gov/ammem/today/jun20.html> (last updated Dec. 10, 2010).

the stockholders, he had only to get upon a train come night in the city of New York, before the exposure came, and find himself the next morning in Montreal or Quebec, perfectly safe. We could not reach him.

Fifteen or twenty years ago, a gentleman—so-called—son of a very rich man in New York, was guilty of great frauds in connection with a national bank in the city of New York. And he left his home, and he could not be reached. He had taken up his abode in Canada. He had rented a home, carried his family there, was having a good time, and we could not reach him. We had no treaty with England that would cover cases of that sort, and our process could not reach him.

It was convenient for him to keep out of the United States for ten or twelve years. And finally he came back not long ago. But in the meantime, he had been indicted in the state courts for his alleged rascality in reference to that bank. He supposed that it had been forgotten perhaps, or somebody advised him that those indictments were not valid, that those were federal offenses and not state, and that the indictments in the state were void.

So, having made due arrangements with some of the bosses in the state of New York, he came back and surrendered himself to the state authorities, and then sued out a writ of habeas corpus from a federal court, asking that he be discharged, upon the ground that the state courts had nothing to do with the offense against him, had no jurisdiction. And the case was brought to our court, and we said—I had the honor of delivering the opinion of the court in that case—“This may or may not be true, but let it be tried, Mr. Ex-Canadian. Go back to the state of New York and stand your trial in the state court. It may be that the state court will acquit you. It may be that the state court will hold your view about it. But if they do not and you are convicted in the state court, why then you have a writ of error to the Supreme Court of the United States upon the federal question, and when the case gets to us in due form we will then consider this question.”⁵⁰⁵

Well, as soon as that decision was announced he returned to Canada. Now, a man may escape to Canada and escape the justice of the United States, if we have no treaty of extradition. And there are some countries with which we have none; I believe we have none with Belgium. But he cannot in this country.

If a man commits a crime in the state of New York, and chooses to go to the farthest ends of the country, way over in California—and it does not

⁵⁰⁵ See *New York v. Eno*, 155 U.S. 89, 98 (1894) (Harlan, J.).

matter what crime it is, it is treason, felony, or other crimes, it will include a misdemeanor—and the authorities in the state of New York find out that this man is now in California under an assumed name. He has been indicted in the state of New York, and he has fled from the justice of the state of New York, and is hid in California.

Now, how do you get him to New York? A New York sheriff cannot go there and by virtue of his office bring him to the state of New York. It is pointed out here how it shall be done. If a man flees from justice in one state to another state, he “shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed.”⁵⁰⁶

In other words, the Governor of the state of New York could make a demand upon the state of California for the arrest of this man. And he would in that written demand inform the Governor of California, “That man stands indicted in the state of New York for a given crime. He has fled from the justice of New York, as evidence whereof I transmit herewith a copy of the indictment. And I therefore ask that you shall issue your warrant for the arrest of this man and deliver him to the agent of the state of New York.”

And it is the duty of the Governor of California to do that. And it is the duty of the sheriffs, and constables, and marshals of that state, to whom that warrant may be addressed, when they find where that man is to lay their hands upon him. And then he is taken into a court of the United States and identified.

Now, the California court, or the California Governor, will not stop to inquire whether he is innocent or guilty. That belongs to the state in which he has committed the crime. But if the proceedings are all regular on their face, and he is indicted in New York and charged with a crime there, and if he fled from the justice of that state, then the duty of the Governor of California is to have that man arrested and deliver him over to the state of New York, when he is taken to New York and tried.

That cannot be enforced, can it, Judge?

No. In the case of—it is worth your while to read the case, it is the case of Commonwealth of Kentucky vs. Dennison, 24 Howard 66.⁵⁰⁷ It is a very suggestive case on many accounts. I know something about the history of that case.⁵⁰⁸

⁵⁰⁶ U.S. CONST. art. IV, § 2, cl. 2.

⁵⁰⁷ *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860).

⁵⁰⁸ *Kentucky v. Dennison* concerned the 1859 indictment of Willis Lago, a free black man, for assisting in the escape of Charlotte, a slave who belonged to C.W. Nuckols. *Id.* at

I remember when quite a young man—and I am a young man yet I hope—of sitting in the courthouse at the capital of Kentucky and hearing an Ohio lawyer—now dead, a man of rare ability—making a plea on behalf of a colored man, which colored man had been taken out of the state of Ohio and brought back there to Kentucky, and was alleged to be the slave—property—of an old lady who lived right opposite from where I lived—knew her very well.⁵⁰⁹ Evidence showed that the colored man had been out of Kentucky for nearly twenty years. He had run away, as was not unnatural, and he had been in Ohio, but they managed to get him back there some way. And this was a proceeding advocated by this Ohio lawyer for the purpose of getting that colored man back to the state of Ohio.

Well, he failed, as might have been expected. And Governor Dennison of Ohio in that, or one of the kindred cases, refused to honor a warrant made upon him by the Governor of the state of Kentucky, who wanted to get some man into Kentucky who had been harboring that slave. They wanted to put him in the Kentucky penitentiary. Well, Governor Dennison declined to honor that requisition, as he could under certain circumstances. Then a proceeding was instituted to compel him to issue his warrant.

Well, the Supreme Court of the United States held that it was out of the question to talk about judicial process being served upon the Governor of a state to compel him to do anything.⁵¹⁰ The court looked beyond the mere form of the proceeding to the consequences. What might happen? You will read that between the lines of the opinion.

67. Governor Dennison of Ohio refused Governor Magoffin of Kentucky's request to extradite Lago. *Id.*; see also Stephen R. McAllister, *A Marbury v. Madison Moment on the Eve of the Civil War: Chief Justice Roger Taney and the Kentucky v. Dennison Case*, 14 GREEN BAG 2D 405, 406 (2011). Harlan appears to recall a different case that presented some similar issues.

⁵⁰⁹ In 1860, Harlan was twenty-six years old and practicing law in his father's Frankfort, Kentucky law office. See Harlan, *John Marshall*, AM. NAT'L BIOGRAPHY ONLINE, <http://www.anb.org/articles/11/11-00385.html> (last visited June 16, 2013).

⁵¹⁰ *Dennison*, 65 U.S. at 109–10 (“And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, ‘it shall be his duty.’ But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him.”).

What might happen in this country if any court assumed by its process of contempt to lay its hands upon a Governor of one of the states of this union and put him in jail? A pretty serious matter. The Constitution had not provided for it. And the court worked out that result, that it may be true that the duty of the Governor of Ohio under the Constitution was to issue that warrant, but you cannot compel him to do it by judicial process. And there is no case in the books that more clearly illustrates the nature of our form of government than that.

You will now and then come across a lunatic who is going abroad through the land indoctrinating the people with the idea—or trying to do it—that here is a great consolidated government at the city of Washington, backed by the Supreme Court of the United States, which is absorbing all power in this country, and which is destroying the liberties of the people. Well, I have sometimes seen men who looked as if they actually felt the chains were on their limbs, and that they were just about to go to jail because of some fearful order that had issued from the city of Washington that was going to destroy us all.

Well, I congratulate you that you live in an era of knowledge and information which enables you to regard all such stuff as that at its real value. The fact is so far from the national government absorbing all the power of this country and destroying the states. The national government has been compelled to fight from the very start, from the origination of the government, for the right to live, for the right to have any power at all.

The natural tendency of every American—perfectly natural to us all—is to think a great deal of home rule. A man is not half a man that don't think more of his family than of every other family, that don't like his state above every other state. A man is not half a man that does not take pride in his state. But the longer we live, and the oftener we have difficulties—the more nearly we reach the point in this country when we are to come in conflict with other people and other countries—the greater the necessity every true American feels that there shall be a government right here at Washington which, while it protects the states and all their rights, is yet strong enough to protect every state and every citizen of the United States when his rights may be invaded by any power.

This clause says such a man shall be delivered up. Can you give us an outline, Judge, of the decision which says that the Governor of a state cannot be compelled to deliver him up?

The decision is that you cannot compel by judicial process the Governor to answer that demand. The obligation of the Constitution is that he shall be delivered up, that the Governor of the state upon which the demand is made shall issue his warrant, and that he shall be delivered up.

Now, the decision in that case of Kentucky and Dennison is that whenever you come square up to the proposition that a Governor of a state will not issue his warrant, he is not bound to give any reason. He may simply say that I won't honor that demand. It may be that he has got good legal reasons for it, but the courts cannot inquire into the reason, and cannot compel him, because he is the representative of one of the states of this Union, the head of the executive department. And that it is inconsistent with the framework of the government of the state to put a governor in jail, because whenever you admit the proposition that a court may lay its hands upon the governor of a state and order him to do a thing, if he has got jurisdiction to do that and he refuses, the next thing is to send process of contempt and arrest that governor, and finally put him in jail for contempt of court.

Now, that you may not misapprehend the scope of that, let me remind you that the demand that may be made by one state upon another is not always conclusive, not absolutely conclusive. It has occurred often in these fugitive of justice cases that a smart merchant in the city of New York thinks himself to have been swindled by a man out west that has bought goods from him. The man never had been in the city of New York at all. He has ordered goods by mail. He had made representations, perhaps, that were not exactly accurate, and the New York merchant sent his goods out to the man in the west. And in the course of a short while, the man in the west failed in business, made an assignment.

The New York merchant says, "Well, I have been caught. I thought this fellow was good. He made me believe he was, and I sent my goods out. And here he is a bankrupt, and that is a swindle on me." He finds an obsequious district attorney that is a candidate for re-election at the next election, or wants to curry favor with a particular part of the population. And that man will go before the grand jury with the aid of that district attorney, and have that western merchant indicted for obtaining goods under false pretenses. And then go up to the Governor of New York at Albany with a copy of this indictment and get a requisition upon the Governor of Kansas, for instance, for this man.

Well, that is presented to the Governor of Kansas, and what may the Governor of Kansas do without violating the law? Why, he may ask this agent of the state of New York, "Was this man in New York at all? Did he go there in person, and buy these goods?" "I don't know," says the agent of New York, "All I know is here is this indictment against him. Here is a warrant of the Governor of New York." By that time, the retail merchant gets wind of what is going on, and he comes before the Governor, and he says, "Why, I wasn't in New York. I didn't go there at all. I, therefore,

have never fled from the justice of the state of New York.”

The language of the Constitution is, “A person charged in any state with treason, felony, or other crime, who shall flee from justice.” Well, if the man never was in New York, he didn’t flee from the justice of New York, and upon that fact being known in some satisfactory way to the Governor of the state of Kansas, why he will say to the agent of the state of New York, “You don’t bring me a case under the Constitution. This man didn’t go to New York, and he simply corresponded by mail.”

Now, in such a state of case, the Governor of Kansas might well say that this not a case embraced by the Constitution, and I shall not deliver up this man to the agent of the state of New York, to be carried to New York and tried.

Do the proceedings which you have described apply to the case of a man where he flees to a territory from a state?

No. The question is a very appropriate one, and I am glad you asked it. It gives me a chance to call your attention to the very words. It is “a person charged in any state” with crime “who shall flee from Justice, and be found in another State.”⁵¹¹ He must commit the crime in one state and flee to another state.

Well, you would ask at once, can it be that man is safe when he flees from a state and goes to a territory? No, because there are statutes of the United States passed by Congress that govern that case. The territories of the United States are subject to the jurisdiction and authority of Congress. Congress may make legislation for the territories. And you will find in the statutes of the United States provisions that will enable the governor of one of the states to reach a man who has secreted himself in a territory. And they are substantially the same as those of criminals fleeing from one state to another.

Why was not that decision of the court in the Kentucky case practically equivalent to declaring that provision null and could not be enforced?

Well, the effect of the decision was not that that clause was nullified, but that it was not intended by the framers of the Constitution to embrace that case. That it never was the intention of the framers of the Constitution to allow any man to lay his hands upon the governor of a state. Would there be any action of impeachment by the governor’s own state for violation of duty? It might be, and I would have to look at the constitution of the particular state to speak with accuracy. But I would say just off-hand that if the constitution of the state authorized the impeachment of the

⁵¹¹ U.S. CONST. art. IV, § 2, cl. 2.

governor for high crimes or misdemeanors, that if the governor with his eyes open and in disregard of the provision of the Constitution should refuse to issue his warrant, why I think that he might be committing a crime that might be reached.

Now the next clause.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, But shall be delivered up on Claim of the Party to whom such Service or Labour may be due.⁵¹²

There lurked under that clause a principle that had a great deal to do with the recent Civil War. It would not occur to the casual reader that there was such power in a section couched in such simple and apparently innocent language as that. It is a curious fact that you do not find the word “slave” anywhere in the Constitution of the United States. They did not mention it, and yet there were slaves when the Constitution was adopted. And that clause that I have just read had reference primarily to slaves.

“No person held to service or labor in any state under the laws thereof.” What did the statesmen of the South say in convention when that matter was being considered? Within a very short while before the Constitution was adopted, there was a very tolerant view of the institution of slavery in some of the extreme northern states. If any of you are over in Boston or the Congressional Library here, and will turn to the newspapers published in Boston about the time of the Declaration of Independence, and even after that, you will find there advertisements in those papers for runaway slaves.

There were a good many people in the South that felt, here was a great trouble in their midst. The best-educated men of the South of that day were by no means partial to the institution of slavery. You cannot find—I don’t think you can find, I have never been able to find in the writings or letters or speeches of any statesmen of the South during the Revolutionary period, and before the Constitution was adopted, any defense of the institution of slavery upon moral or economic grounds.

Mr. Jefferson didn’t like the institution of slavery. You know that Washington didn’t. The most terrific arraignment that ever was made in the country against it was that by George Mason of Virginia.⁵¹³ But the statesmen said, “We are not responsible for these people being here. Here

⁵¹² U.S. CONST. art. IV, § 2, cl. 3, *amended by* U.S. CONST. amend. XIII.

⁵¹³ *See supra* note 243.

they are. Our laws recognize them as property. We cannot get rid of them. Anything in the Constitution here that would uproot that institution all at once would disturb all of our local affairs, produce infinite confusion.”

And that clause was a part of the compromises of the institution. The northern and the southern men met upon that ground and said

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.⁵¹⁴

In other words—that is, the English of it—if a slave, one such by the laws of Virginia, escaped and went into Pennsylvania, he could not by reason of the laws of Pennsylvania be discharged from such service or labor. And that clause is the basis of what we popularly know to be the fugitive slave laws you will find discussed in the case of *Prigg* and the Commonwealth, about *16 Peters*, and its validity sustained.⁵¹⁵

But in about 1860, when we were approaching the war, when the institution of slavery had been extended and the number of slaves increased, when—to speak plainly—the institution of slavery had got its hand upon the throat of this country, when the institution, understanding what was necessary to maintain it, adopted the motto, “Death or Tribute”—you have got to sustain this institution, else we are ready for anything that may come.

That was the feeling on the one side. On the other side, the desire for liberty and freedom throughout the whole land had increased, abolitionists springing up everywhere to place their opposition to slavery upon high moral grounds. Same sort of feeling that induced John Brown, with a handful of men, to cross into the state of Virginia and attempt to raise a revolt among the negroes, and which induced him to risk his own life.

In 1850 it became necessary to have another fugitive slave law, more rigid, more severe in its terms.⁵¹⁶ And when it was passed, then commenced a political contest which never ended until Sumter was fired upon, and until the close of the war at Appomattox. Under that law, men of the colored race that had been in the North for years were arrested, after having been there for a great many years, and brought back by the orders of courts of justice to states of slavery.

⁵¹⁴ U.S. CONST. art. IV, § 2, cl. 3, *amended by* U.S. CONST. amend. XIII.

⁵¹⁵ *See Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

⁵¹⁶ Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

Now, that clause is of no further consequences today, except as it may embrace apprentices. A boy or girl apprenticed under the laws of a state to somebody to learn a trade, if they escape from one state to another, may be reached and delivered up to the party entitled to their service. But it is of no other consequence.

Now, the next section is one of very large consequence. “New States may be admitted by the Congress into this Union”⁵¹⁷ In those few words you find the authority for the admission of a very large number of states which now constitute the Union. There may be, in time, other states. When they shall be admitted into the Union as states belongs to the Government of the United States to determine. What countries, and what parts of countries, shall come into this Union under the protection of our Constitution and flag depends upon the United States. But that is so large a subject that I will not attempt to detain you after having heard the sound of that bell, and will continue on next Saturday night.

⁵¹⁷ U.S. Const. art. IV, § 3, cl. 1.

LECTURE 23: APRIL 2, 1898

We have reached in our examination of the Constitution the third section of Article IV. I was barely able at the last meeting to open the subject of that section. It is one of very considerable importance.

The first clause of that section is, “New States may be admitted by the Congress into this Union”⁵¹⁸ Those of you who are at all familiar with the history of the country will recall the fact that when this Constitution was adopted there was no state west of Pennsylvania, Virginia, North Carolina, South Carolina, and Georgia. All the states west of those states have been admitted into the Union since the adoption of the Constitution.

It is quite an interesting fact in the history of the country that the man who above all others seemed to anticipate the probable future of this country—of its extension westward from the original thirteen states—better than anybody else of his day, was George Washington. Not a lawyer, not trained in the politics, or what we commonly call statesmanship. Yet, the more his life is studied, the more that we read of his letters, the better satisfied we will be with the conclusion that there was no man of his day that was wiser than he was. You will hardly find in any letter that he ever wrote a sentence that you would alter today. You might improve it perhaps in its rhetoric, but you could not improve its sense.

There is to be said of him what cannot be said of all the public men of his day, that no man has ever seen any letter that came from him that could not be read in any crowd, or in any audience. Nothing in it of an unworthy character, nothing in it that was indecent or unchaste, that was not consistent with the highest dignity of human character.

He looked ahead and saw what was the future of this country in the West. Now, Virginia at that time laid claim to a large extended territory in the West, which includes today Illinois, Indiana, Ohio, and other parts of the country there. She surrendered to the government of the United States all of that territory, and all further debate about it ceased.⁵¹⁹ And out of it great states have been made, so that it is easy to be seen today—and everybody recognizes the fact—that the seat of empire in this country has gone West. And that more and more, every year our country exists, will we recognize that the seat of empire and of power is in the valley of the Mississippi and of the Ohio rather than on the Atlantic coast.

⁵¹⁸ *Id.*

⁵¹⁹ Benjamin F. Shearer, *E Pluribus Unum*, in 1 THE UNITING STATES: THE STORY OF STATEHOOD FOR THE FIFTY UNITED STATES 1, 6 (Benjamin F. Shearer ed., 2004).

We have had formed out of that territory, since this Constitution was formed, all of these western states, and under the authority of this clause that I have read to you, “New States may be admitted by the Congress into this Union.”⁵²⁰ Not, be it observed, new territories or new tracts of land, but new *states* may be admitted into the Union.

Now, it would occur at first blush that in the admission of new states into the Union—which, of course, as is prescribed by this article, must be by Congress, cannot be otherwise done—that states might be admitted into the Union subject to condition. In other words, a man—unless he thought about it or was familiar with the history of the question or had read the decision of the courts on the subject—might suppose as it was a matter of discretion with Congress whether it would admit states or not. Might also prescribe conditions. And therefore might proscribe that it should prohibit polygamy, for instance. Or that it might pass such and such a law, or should pass another law. Or that a state should be admitted on condition that a certain principle should always remain in the constitution of that state.

Now, nothing is further from the fact. Congress cannot impose any such condition upon the admission of a state into the Union.⁵²¹ Every state admitted into the Union must be admitted in the eye of the Constitution—or of the law—absolutely, unconditionally as a state, the equal of any other state when admitted.

Therefore, when the state of Nebraska, for instance, was admitted into the Union, as soon as it was admitted it took its position side by side with all of the other states of the Union, with all the power that any other state had. Congress could not impose any conditions upon its admission. And if the state came into the Union under an act of Congress which said, we admit this state to the Union upon this, that, or the other condition, those conditions would be nullities. They would not bind the state at all.

That is why some people were very solicitous and anxious when the state of Utah was admitted to the Union. They knew, as every lawyer knows, that when Utah was admitted to the Union as a state, it became the equal of every other state. And it had the same power precisely as the state of New York would have, or the state of Mississippi would have, over the question of marriage and divorce. And that Utah—if it was admitted into

⁵²⁰ U.S. CONST. art. IV, § 3, cl. 1.

⁵²¹ Over a decade after this lecture was given, the Supreme Court put this issue to rest and held that conditions may not be imposed upon admittance into the Union. *See Coyle v. Oklahoma*, 221 U.S. 559, 559 (1911).

the Union—could, if it sat proper, change its Constitution, the one it had when admitted, and authorize polygamy. And if it did, there was nothing in the Constitution of the United States to prohibit it.⁵²² It could not be reached, except by an amendment of the Constitution which would place the subject of marriage and divorce under federal control, federal jurisdiction.

Now, this applies not only to the territory which is within the political jurisdiction of the United States, but any territory that we may acquire. Some people once had the opinion that the United States had no authority under the Constitution to acquire new territory. Mr. Jefferson, when he was President, made a treaty with France, when Napoleon was First Consul and absolute in his power, by which we acquired what was called the Louisiana Territory, which includes Louisiana, Arkansas, and Missouri, and stretched way out to the Northwest.⁵²³ Napoleon needed money. He knew perfectly well that France could never hold that territory long. He was wise enough to look forward in the future and anticipate the destiny of this Anglo-Saxon people in this continent, and that he could never hold that territory. And as he wanted money, as he had those views, he sold it.⁵²⁴

Mr. Jefferson made a treaty. As an illustration of a public man doing an act which he deemed for the good of his country, and essential to the best interests of his country, with the conviction at the time that he was violating the Constitution of his country, as soon as he has concluded that treaty, and as soon as it was ratified, Mr. Jefferson sought at the hands of Congress an amendment to the Constitution of the United States that would

⁵²² Although Utah became a territory of the United States in 1848 following the Treaty of Guadalupe Hidalgo, legislators did not admit Utah as a state until 1896. JACK ERICSON EBLE, *THE FIRST AND SECOND UNITED STATES EMPIRES: GOVERNORS AND TERRITORIAL GOVERNMENT, 1784–1912*, at 5–7 (1968). In debating whether to admit Utah as a state, the congressional record is rife with references to polygamy and discussion of the Mormon lifestyle. See, e.g., *HEARINGS BEFORE THE COMMITTEE ON TERRITORIES IN REGARD TO THE ADMISSION OF UTAH AS A STATE* (Washington, Gov't Printing Office, 1889) (argument of F.S. Richards).

⁵²³ This is, of course, a reference to the Louisiana Purchase, which Thomas Jefferson negotiated with France. *Treaty Between the United States of America and the French Republic, U.S.-Fr., Apr. 30, 1803*, 8 Stat. 200.

⁵²⁴ Napoleon planned to make Florida, Louisiana, and the Caribbean a French stronghold in North America, but was frustrated by Spain's refusal to relinquish Florida, which left the Louisiana Territory indefensible. See GEORGE C. HERRING, *FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776*, at 101–14 (2008). Desperately in need of money to fund his war with England, Napoleon eventually abandoned his plan and sold the Louisiana Territory to the United States, exclaiming, "Damn sugar, damn coffee, damn colonies." *Id.* at 106.

validate that purchase.⁵²⁵ He didn't believe that there was authority in the United States under the Constitution to acquire new territory, and his conscience was troubled that he had made that treaty and that we acquired that territory in violation of the Constitution of the United States.⁵²⁶

But his political friends laughed at him, in substance, and they said, of course the United States could acquire territory.⁵²⁷ The Constitution didn't forbid it. No amendment to the Constitution was necessary, and the subject was dropped. And out of that territory acquired by treaty with foreign power all those states were formed.⁵²⁸

Then we had the war with Mexico, 1846, the result of which was that we acquired a large part, or a good part of the territory of Mexico. And that we formed into states, under which the state of Utah, I believe, Nevada, California. And we acquired New Mexico by treaty, that will perhaps in time come into the Union as a state.

So, if it should be before us in the future that Hawaii should become a part of the United States by treaty, we could annex Hawaii as a state. That is, we could convert it into a state, or we could hold it as a part of the territory of the United States, to be governed as a territory until the time when it was competent and ready for admission into the Union.⁵²⁹ So, if it should result also in the near future that an island down southwest should become a part of the United States, no matter how, it could be organized as a territory. And after a while, if we saw proper, it could be admitted into the United States as one of the states of the Union.⁵³⁰

There is no limitation in this clause of the Constitution as to the locality of the territory which may be converted into states and become a part of the American Union, and the American Union is going to be larger than it is today. I don't know when, nor do I know how. We may extend it

⁵²⁵ *Id.*

⁵²⁶ *Id.* at 106–07.

⁵²⁷ Jefferson's proposed treaty has been described as "generally popular" in Congress. *Id.* at 106.

⁵²⁸ One prominent scholar frames the debate in a slightly different manner:

Having acquired far more than he had sought, Jefferson quickly cleared away obstacles to possession of his empire for liberty. Troubled that the Constitution did not explicitly authorize acquisition of new lands, he considered an amendment remedying the omission. But when told that Napoleon might be having second thoughts about the transaction, he waved aside his scruples and presented the treaty to Congress without reference to the constitutional issue.

Id. at 106.

⁵²⁹ See U.S. CONST. art. IV, § 3, cl. 2.

⁵³⁰ See *id.* art. IV, § 3, cls. 1–2.

South and North. North, if the time ever should come—I hope it will never come—when there is trouble of a serious character between this and our so-called mother country. If that should come, and these two branches of the Anglo-Saxon race should be arrayed against each other in war, it is absolutely certain that if it ever came, the northern boundary of the United States would be most probably extended up to the North Pole.

“[B]ut no new State shall be formed or erected within the Jurisdiction of any other State”⁵³¹

It will not be competent for the United States, for instance, to divide the state of New York into two states. Nor will it be competent for the United States to divide the state of Texas into two or more states. We are pledged by this Constitution, “[N]o new State shall be formed or erected within the Jurisdiction of any other State.”⁵³²

Now, there never has been any question arising out of that clause of the Constitution until the last Civil War. Those of you who have read the history of that war will probably ask yourselves the question, “How does it happen, therefore, under that clause that the state of West Virginia is one of the states of this Union, and that it was formed entirely within the territory of the old state of Virginia. How does that happen?”⁵³³

Well, that is a very difficult question. It is not so easily answered. It has been answered by time, and by judicial decision.⁵³⁴ No man today disputes the lawful existence of the state of West Virginia. Nobody even in Virginia disputes it. The final judgments of the Supreme Court of Appeals of West Virginia are brought to the Supreme Court of the United States and revised just as regularly as are the final judgments of the Supreme Court of Appeals of the State of Virginia. The State of West Virginia has senators and representatives, part of the political department of the government.

You will ask how that occurred, how can that be under this clause of the Constitution, “[B]ut no new State shall be formed or erected within the Jurisdiction of any other State.”⁵³⁵ I won’t go into that question at large or

⁵³¹ *Id.* art. IV, § 3, cl. 1.

⁵³² *Id.*

⁵³³ During the Civil War, the western portion of Virginia voted to separate from Virginia proper to form the state of Kanawha, which later became known simply as West Virginia. See *A State of Convenience: The Creation of West Virginia*, W. VA. ARCHIVES & HIST., <http://www.wvculture.org/history/statehood/statehood.html> (last visited June 16, 2013).

⁵³⁴ *Virginia v. West Virginia*, 78 U.S. (11 Wall.) 39 (1870) (upholding the constitutionality of the new state of West Virginia).

⁵³⁵ U.S. CONST. art. IV, § 3, cl. 1.

discuss it upon principle. But I remind you of that fact that in 1861 all the constituted authority of the State of Virginia allied themselves with the Southern Confederacy. And when that state was thus allied with the Southern Confederacy, was it a state of the union? Did the old state for the time being die?⁵³⁶

Now, these are questions never dreamed of by the men that framed this Constitution. And in time, the people of this country will come to recognize the fact that the most difficult problems of statesmanship ever presented to this country were presented during the Civil War and after the Civil War. For a time after that war opened, there were no authorities in the State of Virginia that recognized the authority of the United States. And people within the old State of Virginia met who did adhere to the United States, and organized the State of West Virginia upon the theory that the old state had cut loose from the union. And the new state was admitted.⁵³⁷ There the matter ended. There has been no special discussion about it; it is just one of the things that resulted from that war, which the less said about the better for the country.

How could that portion of the state be recognized as a new state while the United States still adhered to the fact that the entire state of Virginia never actually went out of the union, Judge?

Where was the old state of Virginia during the war? Who constituted the state of Virginia during the war—I mean the state as a component part of the Union? Its government, its legislators, its senators, and every public officer in that state took an oath to support the Southern Confederacy. And where was the state, who represented it? Who could represent it, in that condition of things? It was in that condition of things—upon the theory that the old state for the time being had committed suicide, and that there was no state of Virginia left as a part of the United States—that the new state was organized.

Now, if you tell me that you don't quite understand that, I am quite ready to agree with you that it is not very easy to understand.

*Judge, the history of West Virginia recites that when the state was organized it was entitled "The Reorganized Government of Virginia."*⁵³⁸

⁵³⁶ The Supreme Court had at this time already held that Texas's secession from the Union was a "nullity" and that the Confederate states had in fact never ceased to be under the jurisdiction of the Union. *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869), *overruled on other grounds* by *Morgan v. United States*, 113 U.S. 476 (1885).

⁵³⁷ For a more detailed account of West Virginia's separation from Virginia, see JOHN ALEXANDER WILLIAMS, *WEST VIRGINIA: A HISTORY* (1984).

⁵³⁸ It was also known as the "Restored Government of Virginia." For a contemporary

Let me, in Yankee fashion, answer that question by putting another. Let me suppose that in the case of a Civil War in this country—which involved the question of the existence or non-existence of the United States in its form under the Constitution—let me suppose that the legislature of Kentucky, in both branches, the governor backing them, repudiate all connection with the government of the United States.⁵³⁹

Now, that is putting it more strongly than it was in Virginia and West Virginia. Where was the state of Kentucky after that, the state of Kentucky as one of the states of the United States? Let me add to that supposition that a majority of the people of the state of Kentucky by vote at the polls declare their opposition to the government of the United States, and try to set up an independent government outside of the government of the United States. Well, was the state of Kentucky counted as one of the United States?

Suppose the minority in that state had met in convention and declared their adherence to the government of the United States, and declared that they represented the state of Kentucky as one of the states of the United States. They elected a governor and legislature, and sent senators and representatives to Congress. And they were admitted to the Congress of the United States. Which would be the true state of Kentucky, this last one, or the one that said they were out of the United States?

Now, the question would have been rid of all difficulty if these gentlemen who formed the state of West Virginia had said that we are the state of Virginia, we represent the people in that state, we adhere to the government of the United States. And that they were the state of Virginia, and they had been so recognized by the admission of their senators and representatives in the Congress. There would have been less trouble in the question than is presented.

Well now, in the case that I put, let us suppose that a majority of the people of the states of this union rebel against the government of the United States; say that, “We are going out of the union, and we are going to take this state out of the union.” Well, they don’t get out by saying they are going out. The territory is there; the state in its corporate capacity is there.

recapitulation of events, see Letter to the Editor, *The Restored Government of Virginia—History of the New State of Things*, N.Y. TIMES, June 26, 1864, at 3.

⁵³⁹ This line of questioning appears to be a reference to Kentucky’s brief stint under a Confederate government. See Lowell H. Harrison, *The Government of Confederate Kentucky*, in *THE CIVIL WAR IN KENTUCKY: BATTLE FOR THE BLUEGRASS STATE* 79, 84 (Kent Masterson Brown ed., 2000).

Now, suppose the minority organized a state government as the government of that state, and it is recognized by the government of the United States as the local government of that state within the meaning of this Constitution. Why, it would be the minority thus organized, for the government of the United States could never recognize the legality of any movement which proposed to take a state bodaciously, if I may coin a word, out of the union.

I do not know whether I have made myself clear. I am not sure that I understand myself on that question.

After the states were readmitted to the union, upon what theory was that? Do you find the word "readmitted" in the Acts of Congress?

Well, I doubt whether you will find the word "readmitted" in the Acts of Congress, but I expect you will find substantially this, that after the war when the people came together in some of the usual forms and announced themselves to be the government of the state of Alabama, for instance, Congress by an act recognized that as the government of the state of Alabama.⁵⁴⁰ But I don't think you will find any act of Congress that recognized that Alabama got out of the Union and was readmitted as state. I reckon not.

"[N]or 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."⁵⁴¹

You cannot join Alabama and Georgia against their will into one state. You cannot join Delaware and Maryland, upon the idea that Delaware is a little bit of a thing, against the will of that state. The states that form the Union, without regard to their size or population, are equal and independent. The state legislatures may consent, and then Congress may unite them. And some think that the Constitution ought to be amended so as to put these little states out of existence.⁵⁴² And you occasionally hear a man say that it is an outrage that the little state of Delaware—which is so far advanced in civilization that it has got the whipping post⁵⁴³—that it is

⁵⁴⁰ The process of readmitting Confederate states began in 1867 with the first part of the so-called Reconstruction Acts. See Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

⁵⁴¹ U.S. CONST. art. IV, § 3, cl. 1.

⁵⁴² The nine eastern counties of Maryland have had three rounds of debate since the nineteenth century regarding joining the area where Maryland, Delaware, and Virginia intersect—the Delmarva Peninsula—and seceding to create what would now be the fifty-first state. See *Passions Still Run High for State of Delmarva*, FREE LANCE-STAR, Mar. 18, 1994, at C12.

⁵⁴³ Delaware did not abolish the whipping post until 1972, three years after man stepped foot on the moon. See *Enforcing the Law*, STATE OF DELAWARE,

an outrage that the little state of Delaware should have the same power in the Senate of the United States that the imperial state of New York has; that the two Senators from Delaware can neutralize the votes of the two Senators from the state of New York. That is an outrage they say.

Well, I don't think it is. And it would be an unhappy day for this country if that principle was ever altered. I am not one of those who believe that the greatest safety in this country lies in the notions, or the legislatures, or the policies of the great states of the Union. The safety does not lie in what may be determined by the states that have got millions of people. A great deal depends upon who the people are. What are their policies? What are their plans?

I am one of those old-fashioned people who believe that some of the greatest dangers that are ahead for this country come from the great centers of business and of population, where the great mass of people come to think that everything must be made to bend to what they call their "business interests." One of the dangers that this country has always got to confront, particularly if it has got a question of honor to settle with a foreign nation, is that what are popularly called the more moneyed and commercial interests of this country will subordinate national honor to dollars and cents.

I want to see these little states preserved. I want to see these small states presented with all their power in the Senate of the United States. And therefore this country will consult its own safety, if they will stand resolutely by those compromises of the Constitution, one of which was that the states of this Union were to be equal with each other, particularly in one branch of the national government.

Now the next clause. "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"⁵⁴⁴

Under that clause we organize the territories and we govern them. We govern them as we please, speaking in a large sense, but we must govern them subject to this Constitution. We cannot prescribe for the people of one of the territories of the United States a rule forbidden by the principles of this Constitution. Congress could not prescribe for one of the territories of the United States, for instance, a rule to the effect that a man in a criminal case shall be compelled to testify against himself, a rule that

http://archives.delaware.gov/100/other_stories/Enforcing%20the%20Law.shtml (last updated June 11, 2010, 4:17 PM).

⁵⁴⁴ U.S. CONST. art. IV, § 3, cl. 2.

would subject a man to trial for a criminal offense by a jury composed of less persons than twelve. The Congress of the United States is bound to respect the fundamental guarantee of the Constitution relating to life, liberty, and property when applied to the people in the territories of the United States.

Now, Section 4 is a section of the Constitution that has never been interpreted.⁵⁴⁵ I doubt whether we will ever have occasion to interpret it, although some people think that this country is going to the dogs, that it is not many years hence before our institutions will be overturned and we will be either under a king or under a mob.⁵⁴⁶ That is the view of some.

I got only today a letter from a gentleman, a resident of this city, whose friendship I enjoy, and whom I know to be one of the best men in the world. He says, in substance, that the days of the American Republic are very few, and that the government is going to be overthrown, he thinks, by those whom he styles, “wild people in reference to politics.”

Well, I know what it is in his mind. He is a true American. He is a friend of the government of the United States. But he is a man of large means, and he is thinking of preserving those means. He is unnecessarily alarmed, for fear that what he calls the masses in this country are going to upturn everything, and play the mischief generally. And that is the view of some.

But I take leave to believe that, so far from any possibility of that sort being shortly ahead of us, true republicanism—the love of the fundamental principles that constitute what is popularly styled Anglo-Saxon freedom—is stronger today in this country than it ever was. And that there is absolute certainty—although we have got seventy million of people—there is absolute certainty that the sense of law and order in this country is strong enough to protect and preserve all of those rights.

Now, this clause here is that “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”⁵⁴⁷

What does that clause mean, that the United States shall guarantee to every state a republican form of government? What is a republican form of

⁵⁴⁵ Harlan is referring to the Guaranty Clause, U.S. CONST. art. IV, § 4.

⁵⁴⁶ This provision later came to be an oft-cited passage in cases involving voting rights. See *Baker v. Carr*, 369 U.S. 186, 242 (1962).

⁵⁴⁷ U.S. CONST. art. IV, § 4.

government? You will not find that defined in any decision of the Supreme Court of the United States. It is left at large.⁵⁴⁸

It is easy to say what is not a republican form of government. Let me suppose that one of the states of this union should, under the lead of a particular religious denomination, establish a state religion and compel every citizen, whatever might be his religious tendency, to pay a tax to support that particular religion. Would that be a republican form of government? I should say no.⁵⁴⁹

Suppose one of the states of this union should establish a form of state government under which the right to fill the office of governor of that state should reside in a particular family. And say that when AB—the then-governor of the state—died, that the right to fill the office of governor should descend to his eldest male heir. And when that fellow petered out that it should descend to his eldest male heir. And they should also have titles and ape some of the monarchical governments of Europe in that way. Would that be a republican form of government? Well, I should say no.

Very well. If any state did that, how would the United States government reach it? Here is the broad duty assigned to it, by guaranteeing to every state in the union a republican form of government.

Well, I should say in the cases I have put before you, Congress could by an act wipe out such a state government, and if necessary send our army down there to kick that fellow out of office, drive him out of power. I say, we will never have that issue. There is no danger that this American people will ever lean in any state to a form of government that is not republican. The only danger is that they may lead to forms of government that are rather loose, that do not sufficiently guard the rights of life, liberty, and property.

Now, 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

⁵⁴⁸ More specifically, that determination is not within the grasp of the judiciary. Instead, it is up to the legislature to determine the meaning of “republican form of government” and to promulgate rules supporting that notion of government. *Luther v. Borden*, 48 U.S. (7 How.) 1, 42–44 (1849).

⁵⁴⁹ See U.S. CONST. amend. I.

of the several States, or by Conventions in three fourths thereof⁵⁵⁰

We talk about particular battles in the last Civil War determining the result. We sometimes say, those of us who sympathize with the cause of the Union, that Gettysburg was the battle which turned the scale and saved the Union. I have no trouble referring to these things, for I have come to the conclusion that all of our American brethren that were on the Southern side have come to the conclusion that the best thing that could have happened to them was the defeat of the South. So I can say that this amendment section was the turning point in the great struggle for the acceptance or rejection of this Constitution.

Patrick Henry, George Mason, and James Monroe, men whose patriotism was not to be doubted, said that the Constitution as originally proposed would not do. “There is nothing in that Constitution that guarantees the rights of life, liberty, and property against invasion. There is no national bill of rights in it.”⁵⁵¹

Well, Washington said, “It was not deemed necessary to put those things in it, because as the government of the United States was government of enumerated powers it could not endanger life, liberty, or property, because it has no power to do so. But suppose I am wrong. Here is a provision made in the fifth article of the Constitution to amend that instrument. I appeal to you patriots of America, that in view of the fact that if this Constitution is rejected we have got anarchy. We will never get another convention together again. I appeal to you to take this Constitution, because here is a provision made for its amendment, and if anything is wanting in it we can put it in by amendment.”⁵⁵²

⁵⁵⁰ U.S. CONST. art. V.

⁵⁵¹ See, e.g., Patrick Henry, Speech at the Convention of Virginia (June 14, 1788), in 2 THE DEBATES, *supra* note 26, at 329–32.

⁵⁵² In a letter to Patrick Henry, Benjamin Harrison, and Thomas Nelson, Jr. dated Sept. 24, 1787, George Washington wrote:

In the first moment after my return I take the liberty of sending you a copy of the Constitution which the [federal] Convention has submitted to the People of these States. I accompany it with no observations; your own Judgment will at once discover the good, and the exceptionable parts of it. [A]nd your experience of the difficulties, which have ever arisen when attempts have been made to reconcile such variety of interests, and local prejudices as pervade the several States will render explanation unnecessary. I wish the Constitution which is offered had been made more perfect, but I sincerely believe it is the best that could be obtained at this time; and, as a Constitutional door is opened for amendment hereafter, the adoption of it under the present circumstances of the Union is in my opinion desirable.

And that view carried the day. That caused the acceptance of this Constitution. And at the first session of Congress after its acceptance, the first ten amendments were adopted, which constitute the national Bill of Rights. But there is another aspect of that article that is in my judgment of considerable moment, and that is that it is not easy to amend the Constitution of the United States.

The first ten amendments were adopted because everybody wanted them.⁵⁵³ There was no trouble. The Eleventh Amendment was adopted because everybody wanted that. The Twelfth Amendment was adopted because of the difficulty arising out of the election of Thomas Jefferson and Aaron Burr as President and Vice-President of the United States.⁵⁵⁴ And from 1801 down to the Thirteenth Amendment, there was no amendment to this Constitution. The Thirteenth, Fourteenth, and Fifteenth Amendments arose out of the Civil War.

We are now thirty-three years after the close of that Civil War, as evidenced by the surrender of Appomattox, and yet no further amendment has been made to the Constitution.⁵⁵⁵ Our country is full of all sorts of

From a variety of concurring accounts it appears to me that the political concerns of this Country are, in a manner, suspended by a thread. That the Convention has been looked up to by the reflecting part of the community with a solicitude [sic] which is hardly to be conceived, and that, if nothing had been agreed on by that body, anarchy would soon have ensued, the seeds being richly sown in every soil.

Letter from George Washington to Patrick Henry, Benjamin Harrison, and Thomas Nelson, Jr. (Sept. 24, 1787), available at <http://memory.loc.gov/cgi-bin/ampage?collId=mgw2&fileName=gwpage014.db&recNum=155>.

⁵⁵³ The Bill of Rights was adopted and ratified all at once, but there were twelve amendments on the table, therefore leaving two amendments unratified: the Congressional Apportionment Amendment and the Congressional Salary Amendment. RUSSELL FREEDMAN, *IN DEFENSE OF LIBERTY: THE STORY OF AMERICA'S BILL OF RIGHTS 17-18* (2003). The first, dealing with how the number of representatives to Congress from each state would be determined, has never been ratified and is technically still pending before the states; the latter, limiting the ability of Congress to increase Congressional salaries, was ratified in 1992 as the Twenty-Seventh Amendment. *Id.* at 18; U.S. CONST. amend. XXVII.

⁵⁵⁴ Under the system in place prior to the Twelfth Amendment, Jefferson and Burr had both received a majority of electoral votes, but the number was tied at 73. See TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804*, at 99 (1994). Despite the fact that Jefferson was clearly the party's choice for President, each electoral vote for Burr had the effect of counting as a vote for President. See *id.* The House of Representatives therefore had to resolve the uncertainty according to constitutional contingent election procedures. See *id.*

⁵⁵⁵ The Battle of Appomattox Court House, fought on the morning of April 9, 1865, was the final engagement between the Confederate Army of Northern Virginia and the Union Army of the Potomac. See P.H. Sheridan, *The Last Days of the Rebellion*, 147 N. AM. REV. 270, 270 (1888). Confederate General Robert E. Lee recognized that he had lost,

notions. It is full of brain, and energy in every part of it. There are educated men, and thoughtful men, and reading men, and scheming men, too, that think we must amend this instrument this way—it ought to be amended in that way, it must be amended in that and another way. And at every session of the Congress of the United States, somebody who thinks he knows more than all the country beside, proposes an amendment to the Constitution of the United States. But it dies with that session, because it takes two-thirds of each house to put it before the public, and then it takes three-fourths of the states to have it adopted.

Now, these gentlemen across the waters affect to look upon this country of ours as a wild democracy, as going headlong and tumbling over head and heels, and don't know what they are doing. But they forget that while it is in the power of the armies of European countries, or with the heads of European countries, to overturn their governments in one night or in one day, it is not in the power of any bare majority in this democratic government to change this fundamental law. We recognize the right of every man to say what he wants, and we recognize the rights of the people to vote as they please. But we have imposed upon ourselves this check, that this fundamental law of the land—the law for the states, the law for individuals, the law for every department of the government, federal or state—we have said by this Constitution it shan't be easily changed. You shan't lay your hands upon that instrument unless you are preceded by a vote of two-thirds of each branch of the national Congress, and that must be supplemented by the vote of three-fourths of the states of this union before you can depart from this instrument at all.

Therein lies the safety of this country. Therein lies the security of our people against temporary excitement, sudden violence of temper as the result of bad legislation. The whole thing is so checked and balanced that there can be no hasty action, but before anything is done of a serious or material character, all these provisions must be complied with.

Now one clause more and I conclude what I have to say about the original Constitution and will commence at our next meeting considering the amendments to the Constitution.

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

State to the Contrary notwithstanding.⁵⁵⁶

I love to read these clauses. Let me read one more before we close.

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 [of] any Office or public Trust under the United States.⁵⁵⁷

Is there any country on the Earth that has in its statutes or laws a provision like that? Not one. This is the only people which have adopted a written Constitution, which by its very terms is above everybody, all governments, federal and state, all judges, all Congresses.

And the people of the United States have said to everybody, “You shall not assume to exert any authority in the name of the people of the United States, unless you can find warrant for that in this instrument.” So that whatever a President may do, whatever the head of a department may do, whatever may be said in an Act of Congress, all of it must be brought to the test of this instrument.

And if there is not authority in that instrument for it, what is done is void, so that whatever in our future history—whatever anybody may assume to do—every human being in this country, whether citizen or not, can rest secure in the conviction that that which may be done in the name of the law, under authority of any department of the government, must be brought to the test of that supreme law of the land.

⁵⁵⁶ U.S. CONST. art. VI, cl. 2.

⁵⁵⁷ *Id.* art. VI, cl. 3.

LECTURE 24: APRIL 16, 1898

We have reached in our consideration of the Constitution the amendments of that instrument, not the least important part of it I beg to assure you. These amendments are popularly called the national Bill of Rights. I assume that you have read, or will soon read if you have not already, a history of England besides a history of your own country.

Way back a thousand years ago, the people of England had very little idea of what constituted true liberty. But that people developed from year to year, and from century to century, so that by the time this country adopted the Constitution of the United States, that people, the English people, after several hundred years of trial and suffering and expenditure of blood, had imbedded into what is called the Constitution of England certain great fundamental principles which are called the guarantees of life, liberty, and property among free people. And when that country had reached the period just before the adoption of the present Constitution of the United States, those principles were well understood and embodied in statutes in England.⁵⁵⁸

One of them was the Magna Charta, wrung from King John in the 13th Century, and then habeas corpus, and various other statutes well-known in English history.⁵⁵⁹ These all together constitute what is popularly called Anglo-Saxon freedom.⁵⁶⁰ And when our fathers rebelled against the English government and determined to have a government of our own here—whenever the people appeared in convention preparatory to the Revolution out of which our Constitution came—they declared that these rights belonged to them here as English subjects as much as they belonged to the people who lived in England. And they were recognized in this country everywhere before the adoption of the Constitution.⁵⁶¹

Well, when this Constitution was adopted, no one of those fundamental guarantees of life, liberty, and property was found in the instrument. And the Constitution was submitted to conventions in the

⁵⁵⁸ The notions of guaranteed protection of “life, liberty, or estate” are traced back to English philosopher John Locke, whose various theories were very influential in England during the Glorious Revolution. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 119 (Thomas I. Cook ed., 1947) (1690).

⁵⁵⁹ See *supra* notes 475–476 and accompanying text; see also 3 STORY, *supra* note 43, at § 1858.

⁵⁶⁰ For a contemporary analysis of the notion of so-called “Anglo-Saxon freedom,” see JAMES K. HOSMER, A SHORT HISTORY OF ANGLO-SAXON FREEDOM (New York, Charles Scribner’s Sons 1890).

⁵⁶¹ 3 STORY, *supra* note 43, at §§ 1851–62.

several states without any declaration upon that subject. What was the result? Why, in Virginia, Patrick Henry, whose great speech was said to have set the ball of the Revolution in motion, said, "I am opposed to accepting this Constitution because these guarantees are not embodied in it."⁵⁶² And George Mason, a great friend of the liberties of the country, took the same ground. And James Monroe took the same ground. And other men, whose patriotism no one doubted, whose love of liberty no one doubted, whom everybody knew to be in favor of an independent republic here, independent of the English government in every way, these and others opposed the adoption of this Constitution for that reason, for the absence of this Bill of Rights.⁵⁶³ It was very difficult to meet.

On the other side it was said, "Why put this into the Constitution of the United States? The Constitution of the United States guarantees a general government, but it has got no powers except what are granted to it." And they said, "You cannot find in the Constitution as we submit it to you any authority in the Congress of the United States, expressly or by implication, to go against what are these fundamental rights, and, therefore, it was not necessary to put them in the Constitution. We have got them in all of our state constitutions, and we do not need them in the national Constitution."⁵⁶⁴

But that argument did not quite allay the apprehension of a good many men whose patriotism I say no one doubted, and the influence of Washington finally turned the scale. He said in various forms, and in letters to those who were afraid of the Constitution of the United States, "If you reject this Constitution we are in anarchy. We cannot get another convention together. Here are these states all separate, with no common government to present to the world, and if this Constitution is rejected there is no telling when we will get another."⁵⁶⁵

⁵⁶² Patrick Henry opposed the federal Constitution primarily because he believed it reduced states' rights and that the price of a strong national government was the loss of individual liberties. See Patrick Henry, Speech at the Convention of Virginia (June 5, 1788), in 2 THE DEBATES, *supra* note 26, at 61.

⁵⁶³ Much of this anti-federalist sentiment was captured in writings and speeches of the time in what are known as the "Anti-Federalist Papers." See generally THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES (Ralph Ketcham ed., 1986).

⁵⁶⁴ This idea sprung from the Federalists, who believed a bill of rights was not necessary to protect personal liberties. See THE FEDERALIST NO. 84 (Alexander Hamilton).

⁵⁶⁵ It was reported that Washington said, "Should the States reject this excellent Constitution, the probability is that an opportunity will never again offer to cancel another in peace—the next will be drawn in blood." See CHARLES WARREN, THE MAKING OF THE CONSTITUTION 717 (1928).

“Luckily,” he said, “this Constitution provides for its own amendment. And therefore let us accept this Constitution, and then amend it in order to embody those principles about which there can be no controversies.”⁵⁶⁶ And that view finally prevailed. And—by small majorities in many of the states—the Constitution was accepted.⁵⁶⁷

Now, in accordance with the understanding at that time, as soon as the first Congress met, on the twenty-fifth of September, 1789, these first ten amendments were adopted.⁵⁶⁸ They were supposed to have been prepared by Mr. Madison.⁵⁶⁹ And the experience of this country, since the foundation of the government, tells us that those who wanted these provisions in the Constitution were right, and that it was a mistake to have omitted them. But that mistake amounted practically to nothing because they were immediately put into the Constitution.⁵⁷⁰ The last state which accepted these amendments to the Constitution did so in December 1791.⁵⁷¹

Curiously enough, there is no evidence on the journals of Congress that three great states, Connecticut, Georgia, and Massachusetts, ever ratified them.⁵⁷² What may be the fact about that as to whether they in fact ratified them, I do not know. Perhaps Massachusetts thought we have got it in our present Constitution here and we do not need it. Connecticut may have acted for the same reason, and Georgia also.

⁵⁶⁶ See *supra* note 552.

⁵⁶⁷ While some states voted unanimously to ratify the Constitution, some states ratified with much closer margins, including Pennsylvania (46–23), Massachusetts (187–168), New Hampshire (57–47), Virginia (89–79), New York (30–27), and Rhode Island (34–32). Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 467–68.

⁵⁶⁸ 1 ANNALS OF CONG., *supra* note 288, at 90–91. For a general overview of the adoption of the Bill of Rights, including archival materials and background information, see *Bill of Rights*, NAT'L ARCHIVES, http://www.archives.gov/exhibits/charters/bill_of_rights.html (last visited June 16, 2013).

⁵⁶⁹ James Madison, who later became known as the “Father of the Bill of Rights,” proposed the amendments that would become the Bill of Rights. ROBERT A. GOLDWIN, *FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION* 82–85 (1997).

⁵⁷⁰ Madison introduced the amendments to the House of Representatives through a series of legislative bills. See H.R. JOURNAL, 1st Cong., 1st Sess. 85–87 (1789).

⁵⁷¹ On December 15, 1791, Virginia ratified the Bill of Rights and it went into effect. THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES xxi (Patrick T. Conley & John P. Kaminski eds., 1992).

⁵⁷² Massachusetts, Georgia, and Connecticut did ratify the amendments as part of sesquicentennial celebrations on March 2, March 24, and April 19, 1939, respectively. *Id.* at xxii.

But here they are, and they constitute what we ordinarily call, and call with pride, the national Bill of Rights. What do we mean by Bill of Rights? Why, it is that part of the constitution of a government which lays down certain fundamental principles which are not under any circumstances to be invaded by the legislature, which the legislature has no power to violate. Now, what are these? Let us see how important they are.

The first article of amendment is: "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."⁵⁷³

Right in the front of these guarantees was the one relating to the establishment of religion. Why was that put there? Observe, it says: "Congress shall make no law respecting the establishment of religion." When Virginia was admitted into the union it had an established religion, that is, a religion that was recognized by the state, a particular form of religion, the Church of England. And every citizen of Virginia, whether a member of the Church of England or not, was compelled to pay taxes to support that established religion.⁵⁷⁴ James Madison was a member of that church, but he encouraged the amendment. Jefferson was with him in favor of abolishing that religion, in the sense that the state should have no connection with it. No man should be compelled to pay any tax to support any religion; that all religions were to be alike under the Constitution.

Now, these words, it seems to me, are a little awkwardly put together: "Congress shall make no law respecting the establishment of religion." What is the meaning of that? Now, there is one thing we know it does mean. It means that Congress cannot establish a religion. Congress cannot by any act recognize a religion, one religion above another in the District of Columbia, or in any territory of the United States. If Congress were to pass a statute recognizing a particular form of religion as a state religion here, it would not be worth the paper on which it was written. "Or prohibit the free exercise thereof." You cannot put any burden upon any man's conscience

⁵⁷³ U.S. CONST. amend. I.

⁵⁷⁴ Tithes to the Church of England were suspended in 1776 and were never reenacted. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1436 (1990). The compulsory relationship with the Church of England ceased permanently in 1786 when the Virginia Statute for Religious Freedom was enacted. See Act for Establishing Religious Freedom, 1785 Va. Acts 26, available at http://www.virginiamemory.com/online_classroom/shaping_the_constitution/doc/religious_freedom.

in respect to his religion. It cannot favor one religion at the expense of another before the words “respecting an establishment of religion.”

I saw not a great while ago in the papers—I know nothing beyond that—that someone raised the question of the validity of an act of Congress which made an appropriation for the maintenance and support of one of the charitable hospitals of this city, Providence Hospital, which is managed by a religious entity, that is part and parcel of the Roman Catholic Church. And the question was made that that appropriation was unconstitutional under this provision of the Constitution of the United States. In opposition to that view it was said that law did not relate to the establishment of a religion. Congress founds here a hospital for taking care of poor people who are not able to take care of themselves, and it was said that is not a law respecting an establishment of religion. The Congress of the United States is simply accepting the aid of an organization of that sort in order to care for these sick and indigent people. And that view was sustained in the Supreme Court of this District, and in the Court of Appeals of this District it was reversed, and it is said the case will be attempted to be taken to the Supreme Court of the United States.⁵⁷⁵

I mean neither to intimate nor express any opinion upon the point. The important thing is that the Congress of the United States shall not, in any place where it has jurisdiction, favor any religion at the expense of another, or put any burden upon any person in this country because of his religion; that Congress shall not by any law prohibit the free exercise of religion. A man may say—and I may say here if I choose—that I have no religion, and I do not believe in any religion. I may say if I choose—of course I would not say it, but if I did say it, no one has a right to call me to account under the law of Congress—that I do not believe in the inspiration of the scriptures, or that I believe it was a myth, or that I do not believe in the divinity of the Savior.⁵⁷⁶

I may say, if I choose, that there is no future life; that when I die, and my bones go into the ground, that is the last of it. I have a right to say that, so far as the law is concerned. I may have no moral right, I may be

⁵⁷⁵ Harlan refers to *Roberts v. Bradfield*, 12 App. D.C. 453 (D.C. Cir. 1898). The Supreme Court granted the appeal and affirmed the Court of Appeals in *Bradfield v. Roberts*, 175 U.S. 291 (1899).

⁵⁷⁶ Justice Harlan was an observant Presbyterian and occasionally taught Sunday school in Washington, DC. For a detailed exploration of the influence of religion on Justice Harlan's jurisprudence, see James W. Gordon, *Religion and the First Justice Harlan: A Case Study in Late Nineteenth Century Presbyterian Constitutionalism*, 85 MARQ. L. REV. 317 (2001).

responsible to a higher power than any on this Earth for notions of this sort, but I am not responsible to any human power. I have the right to have what religion I please, or I have the right to have no religion. That is the meaning of this Constitution.

And curiously enough, that struggle resulting in that amendment arose largely out of contests between people that did believe in some form of religion, but neither believed in the other. The Established Church of England persecuted the Dissenters, and they persecuted the Established Church.⁵⁷⁷ And the experience of the world showed that the worst thing that could possibly happen for freedom for the human race would be to put it in the power of any religious denomination to dominate the conscience of the mind of the people of the country where that religion was maintained. And this amendment says to the Congress of the United States, which is invested with all the power of this Constitution, “keep your hands off of the conscience of every man in matters of religion, and let every man be free to have what religion he chooses, and to exercise without let or hindrance from any human power.” And that is the glory of this country today.

There are not many countries in the world of which that can be said. It can be said of this country. It can be said of England. It can be said of no other country beside those in the largest sense, although there are other so-called republics. Yet they are republics and governments that have a religious attachment to them which interferes with the free exercise of religion.⁵⁷⁸

Nor shall Congress abridge “the freedom of speech, or of the press.”⁵⁷⁹

What is freedom of speech? Well, I need not say what that is in America. We certainly have a good deal of free speech here, and we know

⁵⁷⁷ Harlan seems to refer to early conflicts between Anglicans and Congregationalists. Later, these became established religions that persecuted new “dissenters,” including Baptists, Methodists, Quakers, and Unitarians. See David Bebbington, *Nonconformists*, LIBERAL DEMOCRAT HIST. GROUP (July 27, 2006), http://www.liberalhistory.org.uk/item_single.php?item_id=40&item=history.

⁵⁷⁸ Harlan is likely referring to France. “*Laïcité*,” or “French secularism,” had taken root in France in the 1880s and was later codified in the 1905 Law on the Separation of Churches and State. See T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 420–21 n.2. For further discussion on international regimes of religious freedom, see Ben Vermeulen, Speech at the International Coalition for Religious Freedom Conference on Religious Freedom and the New Millennium: The Historical Development of Religious Freedom (Apr. 17–19, 1998), available [at http://www.religiousfreedom.com/index.php?option=com_content&view=article&id=378&Itemid=18](http://www.religiousfreedom.com/index.php?option=com_content&view=article&id=378&Itemid=18).

⁵⁷⁹ U.S. CONST. amend. I.

what freedom of the press is. We have not only got freedom of the press, but you might call it the “licentiousness of the press.” If there is anything that a newspaper wants to say, it says it. And it says a great many things that are not so, but it says them, and you cannot suppress it. You can hold the manager of that paper responsible for any libel, but that is practically all.

The newspapers of this country are great searchlights that are looking into everything, not only that which concerns the public, but that which does not concern the public. And the privilege is abused. But we had better stand it abused than to have the press subjected—as it is on the continent of Europe—to a sort of censorship, under which somebody sitting near a telegraph office in a room adjoining, says by the authority of government that no telegrams shall go from this office to a foreign country unless submitted to this censor. And he strikes this out and that out and the other out, so that if in such a government they do not want the truth known, it keeps it back.

Well, we have no trouble of that sort in this country. We have not only got the truth, but we have got more than the truth, constantly traveling in the telegrams and newspapers. I say better that—a thousand times better—than any condition of things that would subject the press or speech of this country to a governmental censorship.

Nor shall Congress abridge “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁵⁸⁰

Anywhere in all this broad land the people have the right to assemble—not riotously, but peaceably—and petition their government, whether federal or state, to remedy the grievance. It is a great privilege; it is one we do not appreciate because nobody ever proposes to abridge it, in a time of peace, at least. Masses of people are often stirred into excitement. They would call a public meeting and express their views. Well, they have a right to meet. They have a right to express their views. Deny them that right and they will think they have been wronged, and out of that feeling would come revolution in the end. But as long as the republic, the people, have a right to meet peaceably and speak out their minds, and ask the government to redress what they deem grievances, they are content. Their right to assemble is acknowledged. Their right to ask that these grievances, or that grievance, or that which they deem a grievance, be remedied is not disputed, and then they quietly submit.

⁵⁸⁰ *Id.*

In some parts of the world you cannot have a public meeting unless you get the consent of the chief of police, or secretary of war, or some department of the law. We have got no law of that sort. Those fellows across the waters think we are a wild sort of people because we have not laws of that sort. In fact, those people that have got those privileges have got more patience, more good sense than any people anywhere on the Earth. And if you don't attempt to repress them, they are quite apt in the end to reach solid ground, and to reach a conclusion that is commended by the sound judgment of men everywhere.

Now, 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."⁵⁸¹

What do you mean by "militia" here? Why, it means the men that are not in the regular forces. Back in the Constitution, you will remember, it is stated that Congress shall have power "[t]o provide and maintain a Navy," "[t]o raise and support Armies," and Congress shall have power "to make Rules for the Government and Regulation of the land and naval Forces," and the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."⁵⁸²

The militia is composed of the people outside of the regular forces, and every man is of the militia, according to the law of the state in which he lives. He may be called into service. That is necessary to the security of a free people, and it is because it is necessary for the security of a free people that this country has never had a large standing army. We have got a very small one, not as large as it ought to be, but always a small one. And nobody ever proposes to make it an overwhelming force.

It was the apprehension that if we had a large regular army, officered by men who gave their whole lives to the military service, and composed of soldiers who were there as a business for many years to come, that it might be that in some emergency that force might be turned against the government to overturn it. It says in the Constitution, "Congress shall have power . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrection, and repel Invasions."⁵⁸³

Does that allow the militia to be sent out of the country into foreign countries, Judge?

Well, I would not answer that too hastily. But to enforce the laws of

⁵⁸¹ U.S. CONST. amend. II.

⁵⁸² *Id.* art. I, § 8.

⁵⁸³ *Id.* art. I, § 8, cl. 1, 15.

the United States they may call it. And to repel invasion. And to execute the laws of the Union. Sometimes, the best way to repel an invasion of this country is to go outside of it and meet the fellow where he may be found. And I suppose—I do not go into details—I suppose that there may be a power to employ them for the purposes indicated.

Now, how [the militia is] called out is another question. In the last Civil War, the army of the United States was composed mostly of volunteers, militia from the states. The President of the United States, for instance, would call upon the state of New York for 30,000 soldiers. They would be raised under the laws of New York, through the Governor of New York, by that state organized into regiments, officered by the Governor of that state, or in accordance with its laws; and then turned over to the United States. They would be mustered then in the service of the United States.⁵⁸⁴ Being thus mustered in the service of the United States, they are under the control of the United States from thenceforward. The particular object of this provision, however, was to make it certain that the Congress of the United States should never have it in its power to say to any state, “You shall have no regular trained militia with arms in their hands.”

This militia, as contradistinguished from regular troops, are the boys at home around their local government, attached as they ought to be to their home and to their local government, and therefore ready if emergency requires to defend that home government against a government outside.⁵⁸⁵ Therefore, the fathers said that is necessary to the freedom of the people, to the security of the people. And therefore an act of Congress which should say that no state should have any militia, should have no troops with guns in their hands, is a nullity. It is a declaration, to put it in plain English, to the Congress of the United States, “Now keep within the limits of your power. Execute the laws of the union. Carry out the Constitution of the

⁵⁸⁴ See BRUCE CATTON, *THE CIVIL WAR* 24–26 (1960) (detailing the assembly of state militiamen for service of the federal government).

⁵⁸⁵ It may be that the militia was only competent for such limited purposes of defending their own “home” and “local government.” George Washington, as Adjutant General of the Virginia militia, experienced the limitations of state and local militias:

[H]e experienced all the evils of insubordination among the troops, perverseness in the militia, inactivity in the officers, disregard of orders, and reluctance in the civil authorities to render a proper support. And what added to his mortification was, that the laws gave him no power to correct these evils, either by enforcing discipline, or compelling the indolent and refractory to do their duty The militia system was suited only to times of peace. It provided for calling out men to repel invasion; but the powers granted for effecting it were so limited, as to be almost inoperative.

JARED SPARKS, *THE LIFE OF GEORGE WASHINGTON* 70 (Boston, Little, Brown & Co. 1857).

United States. Don't you come down here to our states to overturn our local government, to interfere with our domestic affairs. If you do, we have a right under this Constitution to have a militia to meet you, and defend, if need be." That was the provision of the Bill of Rights, and "the right of the people to keep and bear Arms, shall not be infringed."⁵⁸⁶

Well, there was a statute in the state of Kentucky which punished a man for carrying concealed deadly weapons. A man carried a pistol, and he was tried and fined under the statute for carrying concealed deadly weapons. And he said, "Under the Constitution of the United States, as well as the Constitution of Kentucky, I have a right to bear arms." "No," says the court. "It is the militia that may bear arms, and you, going around here among your peaceful neighbors, pretending to be as unprotected as they are, but carrying a concealed deadly weapon, that is doing something that the state may prevent."⁵⁸⁷

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."⁵⁸⁸

The President of the United States, the General of the Army, Admiral of the Navy, and Secretary of War, all combined, have no power to quarter a company of soldiers on my lot, or in my house, in time of peace. And that was put in there because those men who framed the Constitution knew what that amounted to when the military, passing through a country, quartered a company of soldiers upon a man's premises.⁵⁸⁹ Any man who saw anything of the last Civil War knows what that means. It was a very

⁵⁸⁶ U.S. CONST. amend. II.

⁵⁸⁷ Harlan seems to refer to *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822), but misstates the facts of the case and its outcome. Bliss was charged with carrying a concealed weapon, in violation of Kentucky law. *Id.* at 90. The weapon he carried was a sword-cane. The Kentucky Court of Appeals held that the statute prohibiting concealed weapons violated the Kentucky Constitution, *id.* at 93, which provided "that the right of the citizens to bear arms in defense of themselves and the state, shall not be questioned," KY. CONST. art. X, § 23.

⁵⁸⁸ U.S. CONST. amend. III.

⁵⁸⁹ The English Bill of Rights of 1689 prohibited quartering soldiers on private land. See An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crowne, 1688, 1 W. & M. 2, c. 2 (Eng.) ("Whereas the late King James the Second, by the assistance of diverse evil Counsellors Judges and Ministers employed by him did endeavour to subvert and extirpate the Protestant Religion and the Lawes and Liberties of this Kingdom . . . [b]y raising and keeping a Standing Army within this Kingdome in time of Peace without Consent of Parlyament and Quartering Soldiers contrary to Law."). The Declaration of Independence explicitly objected to the English practice of quartering soldiers in private homes: "[King George III] quarter[ed] large bodies of armed troops among us." THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

common thing to quarter a regiment upon the farm of a man that was known to be on the other side. And when that regiment left the next day, there were no fences to be seen for miles around. There were no chickens, no ducks. They were quartering on this man's farm. And this guard was thrown in in order to protect the home, to protect the man in civil life, to protect it against the outrages that may be committed by an armed military force under a man who did not know anything about discipline, and who allowed soldiers to roam over private premises as they deemed proper. When war was upon the country, then it might be done, but in the manner to be prescribed by law.

Now the fourth article:

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.⁵⁹⁰

Well, you will ask yourselves, if you have not read up on that subject, "Why was that necessary to be put in the Constitution?" None of us ever heard in this country—in a time of peace at any rate—of any seizure of a man's house, and papers, and effects, for the purpose of finding out what he had. The President of the United States might have good grounds today to suspect that a particular man in this District was really an enemy to the country, that if he could in some way get a soldier in that man's house and break open his drawers or presses he would find something there that would be beneficial to the country, and would show that that man was an enemy to the country.

Well, the President would have no right for that reason to send a soldier there to go into that man's house against his will and open his presses for the purpose of searching for those papers. Two or three hundred years ago it was a common practice in England for the Secretary of State, when he wanted to get evidence against a particular man, to issue a search warrant. And that search warrant would be broad enough in its terms to authorize the officer to whom it was given to go through every house in a given part of London, and through every house in a whole square, without the consent of the owner, break open drawers, break open doors, break open trunks, and search for papers.⁵⁹¹ Papers about what?

⁵⁹⁰ U.S. CONST. amend. IV.

⁵⁹¹ This practice was put to an end in England by the King's Bench, which determined

The warrant did not say. Papers owned by whom? The warrant did not say.

Now, this says that “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.”⁵⁹² There must be something specific and definite upon the face of it, else you cannot make these searches. Not that you may not make a search or seizure at all, but that they shall not be unreasonable searches.

Judge, do these apply to the state governments as well as to the federal government?

Well, you may have stated a larger question than you apprehend, unless you have been reading fully upon the subject. I stated to you that these ten amendments were adopted as the National Bill of Rights; then came the Eleventh and Twelfth, which are not involved in the question that you put, but the ten are. Now, it was early decided, particularly in the case of Barron against the City of Baltimore, 7 Peters, that these amendments were restrictions only upon the federal power, upon the agencies of the federal government, and had nothing to do with the states.⁵⁹³

Now comes the Fourteenth Amendment. I will not comment on it fully now. That amendment says: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”⁵⁹⁴ And the question arises whether or not these privileges in the first ten amendments are not privileges pertaining to citizenship of the United States, and is it now, since the adoption of the Fourteenth Amendment, in the power of any state to take away from anyone the privileges conferred by those amendments.

Now, I will not express any opinion just now upon that subject, but only give you one thought which may aid you in considering the question. One of these amendments, the Fifth, is “No *person* shall be held to answer for a capital, or otherwise infamous crime.”⁵⁹⁵ An infamous crime is one which is punishable by confinement in a penitentiary.

Amendment V: “No person shall be held to answer for a capital, or

that the executive power did not extend to these putative investigatory raids disguised as “general warrants.” *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.) 818; 2 Wils. 275, 292.

⁵⁹² U.S. CONST. amend. IV.

⁵⁹³ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (holding that the Bill of Rights limits the United States, but not the individual states).

⁵⁹⁴ U.S. CONST. amend. XIV, § 1.

⁵⁹⁵ *Id.* amend. V (emphasis added).

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.”⁵⁹⁶

Now, it has been held since the adoption of the Fourteenth Amendment that it is competent for a state to provide for a criminal prosecution of a man for murder otherwise than by an indictment or presentment of a grand jury, that he may be proceeded against by an information alone, filed by a district attorney. The Supreme Court has so held in the case of *Hurtado* against the State of California.⁵⁹⁷ I could not agree with that opinion, and I filed a dissenting opinion, but no one stood with me. My own view was that it was not competent for a state, since the adoption of the Fourteenth Amendment, to proceed against any man for his life except by indictment of a grand jury.⁵⁹⁸

Now, presumably I am wrong, because I stood alone, and the law must be held otherwise. But now let us proceed a little further with that amendment. What would occur if the principle should be applied still further? “[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb”⁵⁹⁹ That is the Fifth Amendment. Can a state by a statute authorize a man to be put twice in jeopardy for his life or limb? “[N]or shall be compelled in any criminal case to be a witness against himself”⁶⁰⁰ Suppose a state passes a law that authorizes the state in prosecuting a man for a criminal offense to call upon the criminal himself and compel him to testify in the case. Would that be an abridgment of the privileges that belonged to one as a citizen of the United States? Would that be due process of law? I do not assume to answer that question tonight, because it is likely to arise most any time, but that brings us to a clause of that Fifth Amendment that is one of the largest possible consequence.

“[N]or be deprived of life, liberty, or property, without due process of law”⁶⁰¹ I will consider, when I come to the Fourteenth Amendment, what that means as applied to the states. Now, consider it only in its application to the United States. Can the Congress of the United States by any statute deprive a man of his life, liberty, or property without due process of law? Why, all say at once, no, it cannot. But the question is

⁵⁹⁶ *Id.*

⁵⁹⁷ *Hurtado v. California*, 110 U.S. 516, 538 (1884).

⁵⁹⁸ *Id.* at 539 (Harlan, J., dissenting).

⁵⁹⁹ U.S. CONST. amend. V.

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.*

what is due process of law, what is meant by it?

Now, those words—"due process of law"—were well understood in the English law and in this country at the time of the adoption of the Constitution. "Due process of law" in England today, as I have had occasion to say to you before, and I repeat it because I cannot think of any better illustration. A great statesman of that country, the greatest they have had probably, now nearly ninety years of age, known wherever the English language or any other language is spoken, Mr. Gladstone. Let us suppose that the Parliament of England tomorrow—it is now in session—should pass an act declaring or ordering the sheriff on the country in which Mr. Gladstone lives to advertise his estate for sale and accept the highest bid for cash, and pay the proceeds into the treasury of England without the compensation of a dollar to Mr. Gladstone for it.

Now, we could not imagine an act of legislation more arbitrary and cruel than that, and yet there is no judge in England today, there is not court in England today, that could stay the operation of that statute.⁶⁰² They would have to obey it. No writ of injunction, no other form of process could stay the execution of that statute. It could be executed and Mr. Gladstone could be turned out of house and home, and every dollar that he had on Earth in that estate would be put in the English treasury without the power of any judge of England to stop it, and that is because Parliament is omnipotent. Whatever Parliament says is the law, is the law.

But that is not the situation here. Every judge in America, federal and state, down to and including every justice of the peace in every state of this union, is under the obligation of an oath to support the Constitution of the United States. And when a man says to a court of justice, a statute of Congress being pleaded against him as authority for what is being done that involves either his life, or his liberty, or his property, if he says that that act of Congress is in violation of that clause of the Constitution of the United States, it is the duty of that court, if that be its opinion, so to declare and to give effect to this Constitution, for it is the supreme law of the land. And the great glory of this country of ours today is that it is the only country on the Earth in which life, liberty, and property cannot be taken except in accordance with due process of law. And there is a mode provided in the organization of the courts of this country by which effect can be given to that provision.

⁶⁰² This is due to England's recognition of parliamentary sovereignty. See *supra* notes 474–478 and accompanying text.

LECTURE 25: APRIL 23, 1898

We are still engaged in considering the amendments to the Constitution of the United States. The first amendment to which your attention was called contains the words, "Congress shall make no law respecting an establishment of religion."⁶⁰³ I recall that to your attention in view of a question I find upon the table addressed to me, to this effect: would the states have the power to make laws regarding the establishment of religion, or is that a question arising from the decision in the California case also?

What California case is referred to in the question I do not know, unless it be the case of *Hurtado* and the State of California, to which I called your attention, in which it was held that it was competent for the states to proceed against a man for his life by information instead of by an indictment by a grand jury.⁶⁰⁴ I do not see that that case has any bearing upon this subject.

At any rate, I am able to say without reference to that case that this First Amendment of the Constitution relates only to the powers of the United States, and there is nothing in that clause of the Constitution which would prevent a state from establishing a religion. But there is another clause of the Constitution of the United States that would have more direct bearing on that, and that is the clause in the original Constitution to the effect that the United States shall guarantee to every state in the Union a republican form of government.⁶⁰⁵

It may very well be doubted whether a state which had an established religion would have a republican form of government. I do not express any decided opinion upon that, because the question has never arisen in any state. And the question is practically of very little importance now, because it is very certain that in this age, at this hour in the history of this country, no state in this union could ever succeed in establishing a religion without creating a revolution in that state. The people of no state in this union would ever submit to a law or provision of the state constitution

⁶⁰³ U.S. CONST. amend. I.

⁶⁰⁴ *Hurtado v. California*, 110 U.S. 516 (1884); *see also supra* Lecture 20.

⁶⁰⁵ U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."). *See generally* Jonathan Toren, *Protecting Republican Government from Itself: The Guarantee Clause of Article IV, Section 4*, 2 NYU J.L. & LIBERTY 371 (2007).

which would establish any particular religion in preference to any other. Or that would require any man to pay respect to one religion more than to another. Or that would tax the people to maintain any religion which their consciences did not approve.

It is fair, however, to say that after the adoption of the Constitution of the United States there existed what might fairly be called an established religion. There was a religion in the State of Virginia which was recognized by the laws of that state, and for the support of which the statutes of the state made a provision by a tax upon all the people. But as soon as the Constitution was adopted, Mr. Madison encouraged an amendment in that state in favor of abolishing that provision in the constitution of that state. He met with no very great success at the outset, but he persisted. He was sustained in that fight by Mr. Jefferson and other leading statesmen of Virginia, and he finally succeeded in eradicating from the state any such statute. In no state of this union is there now an established religion.⁶⁰⁶

⁶⁰⁶ Jefferson and Madison long opposed the establishment of religion. *See Religion and the Federal Government*, LIBR. OF CONG., <http://www.loc.gov/exhibits/religion/rel06-2.html> (last visited June 16, 2013). In 1774, Madison condemned the “diabolical, hell-conceived principle of persecution” that led the state’s Anglican establishment to arrest and imprison Baptist dissenters. Letter from James Madison to William Bradford (Jan. 24, 1774), in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 10, 12 (Philadelphia, J. B. Lippincott & Co. 1865). When Virginia adopted its first constitution in 1776, it established Anglicanism as the state religion, but exempted dissenters from taxes to support the Anglican clergy. *See* McConnell, *supra* note 574, at 1436. Jefferson introduced a statute to end the establishment of religion in the Virginia General Assembly in 1779, but it was tabled in the face of opposition from the Anglican church. John Ragosta, *Virginia Statute for Establishing Religious Freedom (1786)*, ENCYCLOPEDIA VA., http://encyclopediavirginia.org/Virginia_Statute_for_Establishing_Religious_Freedom_1786 (last visited June 16, 2013). When Patrick Henry proposed a tax to support Christianity in 1784, Madison used the opportunity to build support for Jefferson’s bill. *See* Jon Kukla, *Patrick Henry (1736–1799)*, ENCYCLOPEDIA VA., http://encyclopediavirginia.org/Henry_Patrick_1736-1799#start_entry (last visited June 16, 2013). Madison’s Memorial and Remonstrance Against Religious Assessments, anonymously published in 1785, argued that government should not regulate religion and helped to defeat Henry’s tax proposal. Ragosta, *supra*; *see also* JAMES MADISON, A MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), available at http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html. On January 16, 1786, the Virginia Legislature enacted the statute Jefferson proposed in 1779, ending established religion in Virginia. Ragosta, *supra*; *see also* Act for Establishing Religious Freedom, 1785 Va. Acts 26, available at http://www.virginiamemory.com/online_classroom/shaping_the_constitution/doc/religious_freedom.

Connecticut had an established church until it replaced its colonial charter with the Connecticut Constitution of 1818. *See* Wesley W. Horton, *Connecticut Constitutional*

Coming to Article V, the last thing I talked about was that no man “shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”⁶⁰⁷ Only one additional thought I care to express upon that amendment—that is the meaning of an “infamous crime.” It is now settled that any crime is to be deemed an infamous crime in the meaning of the Constitution of the United States which is punishable—not which is in terms punished by confinement in the penitentiary, but which may be punished by confinement in the penitentiary.⁶⁰⁸

In other words, when you look at the statute and find that the judge has discretion whether, when a man is found guilty, he shall sentence him to a jail or to the penitentiary. Whenever the law exists in that condition it is said to be infamous, because it may be punished by imprisonment in a penitentiary. It is true that the meaning of that word may be said to have been enlarged by the circumstances of the country since the adoption of the Constitution. No man disputes it that a man is infamous whenever he passes the wall of a penitentiary, and striped clothes are put upon him, and his head shaved. Or whether that is done or not, when a man goes into a penitentiary, no matter what the cause is, he never gets rid of the odium that attends that punishment, and his children never get rid of it.

Whenever he comes out, wherever he goes, anywhere in this country, he may think that he is unknown, and that his history is unknown. But finally somebody appears there who does know him, and starts the rumor that the man was once in a penitentiary. That is sufficient to put a stain upon that man which he cannot eradicate. No man would invite such a man to his house. Ordinarily, no man would want him to sit at his table. They do not stop to think whether he has reformed or not. He was once in the penitentiary. Therefore, the courts rightly hold that any crime is infamous in the meaning of the Constitution where the punishment may be confinement in a penitentiary.

History 1776–1988, CONN. ST. LIBR. (Aug. 1988), <http://www.cslib.org/cts4ch.htm>; *see also* CONN. CONST. of 1818, art. VII, § 1, *in* 1 FRANKLIN B. HOUGH, *AMERICAN CONSTITUTIONS 167–68* (Albany, Weed, Parsons & Co. 1871). Massachusetts established religion in general until 1833, and until 2010 the Massachusetts Constitution provided that “the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality, in all cases where such provision shall not be made voluntarily.” MASS. CONST. art. III (amended 2010).

⁶⁰⁷ U.S. CONST. amend. V.

⁶⁰⁸ *Ex parte Wilson*, 114 U.S. 417, 426 (1885).

“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”⁶⁰⁹ Mark you, “for the same offense.” A man may be punished one day for one offense, a year afterwards for another, a year afterwards for another. And they may keep him constantly in hot water for a variety of offenses. And when he is prosecuted today for a felony, he cannot say that he was put in the penitentiary five years ago for another offense.

The difficulty always arises in interpreting “put in jeopardy of life or limb.” What is it to put a man in jeopardy? A man may be prosecuted. It may be an offense for which he may be put in a penitentiary, or only a misdemeanor for which a fine may be imposed, and he may be put in the county jail. Now, when is a man put in jeopardy for his life or limb?

Now, let me give you one or two cases that will illustrate. Here is a man on indictment for his life in a court of justice. The case is called. Both sides are ready. The court says, “Call a jury, Mr. Sheriff,” and the jury is called. And the jury is selected after being examined as to their qualifications. Then they are sworn. The true verdict they render according to the law and the evidence. And the indictment is read to him. And he pleads not guilty.

Now, that man is thus put on trial. Well, in the progress of the trial, let me suppose that the Commonwealth’s attorney is disappointed by some ruling of the court. He has offered evidence which he thought would be competent and would establish the guilt. But the court rules that out. He knew that he had another witness to a point that could be supplied in place of that, but he thought he had sufficient, and he went to trial.

This evidence being ruled out, he sees that he cannot get along; that if he goes along with this trial, this man will be acquitted. He don’t think he ought to be. Well, he asks leave to dismiss the case, thinking that he can go to another trial at the next term. The court allows the Commonwealth’s attorney to dismiss him.

Now, that man has been put in jeopardy, and he cannot be tried again for that offense under the circumstances which I have detailed. Suppose the court comes to the conclusion that this trial is going all wrong. He thinks this fellow is guilty, and that he ought to be convicted, and he is not going to allow the public interest to suffer. And the judge says, “Gentlemen of the jury, I discharge you from any further service in this case. Mr. Sheriff, take the prisoner back to jail.”

⁶⁰⁹ U.S. CONST. amend. V.

Well now, there would be no sort of difficulty in that prisoner—after you get him into jail—suing out a writ of habeas corpus and getting his discharge. He has been put in jeopardy of his life or limb: his life, if a capital crime; his limb, if a felony. He gets out on habeas corpus, and he is called at the next term, and he pleads that he has been put in jeopardy. Hence, that plea would be sustained.

Now, there is a class of cases that very commonly occur, where all the authorities agree that the man is not put twice in jeopardy in the meaning of the Constitution. Suppose a juror, after the man is arraigned, dies. It is in a court of the United States. Can that trial go on? No, because you cannot try a man in federal court for a felony by a jury of less than twelve, and you cannot summon a new man in who has not heard the former evidence, and you cannot proceed.

Now, in that state of case the court could discharge the jury. Or suppose a juror should get sick so that he could not stay in court. The court in that case could discharge the jury.

Or suppose the jury disagree. Now, at common law, and under the Constitution, it takes the unanimous verdict of twelve men to convict a man of a crime. Well, one man holds out. He says, “Here are eleven contrary jurors that won’t think right about this case. I don’t think this man is guilty. On my conscience, I don’t think he is guilty. I don’t think the facts of this case show a state of case which under the law compels me to find him guilty, and I won’t find him guilty.”

Well, they will come into court and say that they find it impossible to agree. Well, the court says, “I will not discharge you now. I will send you back to discuss this thing with each other still further, and probably you will agree.” But it turns out that they cannot agree, no possibility of their agreeing.

Well, the court cannot hold them together after their term is over, and as they disagree, the jury is discharged. Now, that man may be tried a second time. Under those circumstances, it is held that he has not been put in jeopardy.⁶¹⁰

Now, that is an old principle of the common law, for which the patriotic men of England fought for years, and finally got imbedded into the fundamental law of England.

⁶¹⁰ See *Simmons v. United States*, 142 U.S. 148, 155 (1891) (holding that a defendant is not twice put in jeopardy when put on trial by a second jury where the first jury was discharged for being unable to render an impartial verdict).

“[N]or shall [any person] be compelled in any criminal case to be a witness against himself”⁶¹¹

That is fundamental in the criminal law of this country. Sometimes there is an attempt to evade that. They put a man a question way off yonder that does not seem to be connected with the real charge. But the prosecution has got possession of other facts, and knows that if I can get just this other fact, the link in the chain of testimony will be complete. And I can convict this man, if I can get him to testify. But this Constitution says, no man charged with crime in a federal court can be compelled to take the stand as a witness. And if he is called upon, he can say that “I will not testify.” And if the court understood its business, it would protect him.

Now, in these later days, there has been quite a change in the law of criminal procedure, in respect to the defendant testifying. In most of the states, now a defendant can testify for himself. When this Constitution was adopted, he could not do so. He could not do so in England.⁶¹²

Sometimes there was lacking a fact or circumstance that would explain something in the case that looked very bad for the prisoner, but he was the only human being that could explain that unproved fact.⁶¹³ He was the only one that could explain this circumstance, but at common law his mouth was closed, and he could not speak.

But now in most of the courts of the states, a defendant is admitted to testify in his own behalf.⁶¹⁴ When he takes the stand as a witness, he is allowed to be cross-examined like any other witness. And I believe the experience of the world, and of this last quarter or half a century, is that was a wise change in the criminal law.

A man innocent need not fear to take the stand and tell the truth. And many a case that looked mysterious and inexcusable came out clearly, distinctly, when the accused himself took the stand to testify.⁶¹⁵ And when

⁶¹¹ U.S. CONST. amend. V.

⁶¹² See *Ferguson v. Georgia*, 365 U.S. 570, 574 (1960) (“Disqualification for interest was thus extensive in the common law when this Nation was formed. Here, as in England, criminal defendants were deemed incompetent as witnesses.”) (citation omitted).

⁶¹³ See *id.* at 580–81 (“[T]he shutting out of his sworn evidence could be positively hurtful to the accused, and . . . innocence was in fact aided, not prejudiced, by the opportunity of the accused to testify under oath.”).

⁶¹⁴ *Id.* at 577 (“The first statute was apparently that enacted by Maine in 1859 making defendants competent witnesses in prosecutions for a few crimes. . . . Before the end of the century every State except Georgia had abolished the disqualification.”).

⁶¹⁵ See *id.* at 582 (“A poor and ill-advised man . . . is always liable to misapprehend the true nature of his defence, and might in many cases be saved from the consequences of his own ignorance or misfortune by being questioned as a witness.”) (quoting Sir James

he took the stand to testify for the purpose of bringing about his acquittal, he was quite sure to be harmed if he was guilty.

He is a man of rare nerve and cunning who can put himself into the witness box, and undergo cross-examination by a skillful attorney, and keep up a well planned lie from beginning to end. Something will betray him. Something will indicate the truth. There will be something in his eye, or his appearance to the jurors that will indicate whether he is suppressing something, or telling something that is untrue. We all feel by instinct, no matter what our capacity, as we look into some men's faces, that that man is telling the truth. And there is a look in other faces, and we have an instinct that the man is telling a lie. And therefore it is that the accused is admitted to testify, and that he can be cross-examined as to all the facts and circumstances.

Nor shall any person "be deprived of life, liberty, or property, without due process of law."⁶¹⁶ There are no words in our Constitution more important than those. That is the law in England, but it is not the law in any other countries on the face of the Earth, except England and America.⁶¹⁷ And that is the glory of Anglo-Saxon civilization, that that principle is imbedded in the fundamental law. Without it, no people can be free, no people are free.

There is a republic across the water, the French Republic—it is called a republic, but it is a country in which a man can be put on the stand, charged with a crime, and question after question propounded to him by the judge, or by some prosecutor. It is a country in which, according to their forms of law, it is pretty nearly equal to the conviction of a man that he should be charged with crime and believed to be guilty by the police force.⁶¹⁸

Now, I say, in our country, no man's life can be touched, no man's property can be taken from him, except in accordance with due process of law. I call your attention to the fact that these three words—life, liberty,

Stephen).

⁶¹⁶ U.S. CONST. amend. V.

⁶¹⁷ See 28 Edw. 3, c. 3 (1354) (Eng.) ("No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law.").

⁶¹⁸ In 1898, the French criminal justice system was based on the Code of Criminal Instruction of 1808 and the Penal Code of 1810. The Code of Criminal Instruction created a system of criminal procedure that blended accusatory and inquisitorial procedural systems, and the Penal Code defined a list of criminal offenses. James W. Garner, *Criminal Procedure in France*, 25 YALE L.J. 255, 255 (1916). Under the Code of Criminal Instruction, judges could question suspects. *Id.*

and property—run together all through the history of the Anglo-Saxon race.⁶¹⁹ And it proceeds upon the ground that unless your liberty and your property is protected, it does not matter so much that your life is protected, if your liberty and property are not. Nor does it matter, so far as free institutions are concerned, that your life and liberty are protected, if your property is not.

Now, you cannot under this Constitution, by any agency of the federal government, through courts, the Congress, the municipal governments, army and navy all combined. This Constitution says to all that you cannot deprive the humblest man in this country of life, liberty, or property without due process of law.

What is due process of law? There comes the difficulty. There are some things that we know are not due process of law. There are some things that we know are due process of law. But there is a middle ground between these two, and you are not able to decide whether this, that, or the other proceeding is due process of law.

Now, suppose the Congress of the United States should pass a statute declaring—making it the duty of the Marshal of the District of Columbia to take the life of John Jones as soon as he got a copy of that act of Congress, take him down here to the wharf on the Potomac River, and put his head on a block, and cut it off. That would not be due process of law, because you cannot take a man's life without an indictment or presentment in a federal court; without a trial, with an opportunity for him to be heard and to have counsel and present his case.

Or suppose an act of Congress should be passed in a time of peace that would authorize the President of the United States to imprison any citizen of the United States whom he believed dangerous to the peace of the country. Suppose that was done. If the President was a good man, a pure man, a clean man, an honest man, a humane man, he would never exercise that authority, except in proper cases. But suppose the President was not that sort of man. Suppose he was an ambitious man, a cruel man, or a bad man, and he could use that power then to the oppression of everybody in the country he did not like? Now, such a state as that would be contrary to this Constitution. That is not due process of law.

Suppose an act of Congress should authorize the President of the United States to seize my house and take possession of it for a

⁶¹⁹ See 3 STORY, *supra* note 43, at § 1895 (“This provision seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property. It is little more than the affirmance of a great constitutional doctrine of the common law.”).

quartermaster's office of the army, or to make a hospital of it for wounded soldiers, or old soldiers, and make no provision in the act of Congress for paying me, a case of arbitrary power. No judge anywhere in this country would hesitate to say that that act was void. And if any man who attempted to turn me out of my house, and I shot him down, no court in the world would interfere with me. No court would hesitate to say that the act was void and unconstitutional.

Now, there were certain forms and modes of procedure in the light of the common law. Those modes were well understood. If a criminal case, it must be by indictment or presentment. The man was entitled to be defended by counsel. You could not take a man's property for public use without compensation.

Now, since the adoption of the Fourteenth Amendment, there have been a great many decisions in the country as to what constitutes due process of law. And you will never hear the last of that phrase, as long as this is a free country, because there are varying circumstances arising, and the judges are put to their wits' end to know whether this, that, or the other act transcends the provision of the Constitution.

Article VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." ⁶²⁰ Why did they say "to a speedy and public trial?" Why, the word "speedy" was introduced there because of the oppressions and cruelties that were introduced there—because of the oppressions and cruelties that were to be seen and known of, all along the track of English history, where they would seize a man that was obnoxious and imprison him, sometimes for years, without trying him.

Then, the trial must be public. There is no secret criminal trial in this country in the federal or state courts, as far as I know. But if the federal court is in session and a man is being tried for crime, and the federal judge says to the marshal, "Close that door. Admit nobody into this room except the jury and the prisoner and the lawyers," the judge who would do that ought to be impeached. That is not a public trial in the true meaning of the Constitution. The prisoner is entitled to have his friends there. He is entitled to have the public there.

There is a great deal of value in publicity in affairs that concern the life, liberty, and property of the people, as well as in public affairs. Many things might be done in the course of a criminal trial if the trial was in secret that would not be done if the public eye was upon that trial, if the public saw all that was going on there. And then, it educates those who are

⁶²⁰ U.S. CONST. amend. VI.

there in the criminal law. It educates them in the principles that are involved. Therefore it is a right of the person to have a public trial and not any Star Chamber closed-door proceeding.⁶²¹

Judge, cannot witnesses be excluded?

Yes, but that is for a very obvious reason. If witnesses were all there in the courtroom, particularly if there is a case of considerable interest, a smart witness hearing another witness testify on the same side he was—and seeing that the witness had left a gap in the facts or circumstances—a smart, unscrupulous witness could make up his mind to fill that gap when he came upon the stand to testify. There is such a thing as witnesses conspiring, and any man who has ever witnessed a criminal trial of great interest cannot have failed to observe that there were reasons often to suspect that a witness—from friendship for one side or hatred to the other, from corrupt methods, or other reasons—that he suppressed something, he enlarged something beyond what was the actual fact, or he actually misstated something.

Well now, all possibility of collusion is prevented when the witnesses are separated, and do not hear each other testify, and when a man is brought into a courtroom to testify, he does not know what they have stated. They may have stated something about him. They may have been asked the question, “Did you not say at a certain time and place to a certain man this, that, and the other thing?” “No, I did not,” or “Yes, I did.” That man is on the outside. Finally he comes in. He does not know what the other witness has stated, and questions are put to him. Well, as he does not know what the others have said, he will see that his only safe course is to tell the truth, and no more than he knows. That is the object of the exclusion of witnesses.

Professor, what is meant by the term “public” there?

Well, of course, you will understand that this article here primarily applies to proceedings in a federal court. But your question is entirely pertinent, because I presume you will find the same thing in the state constitutions. Well, I can understand that you find certain limitations. The

⁶²¹ The Star Chamber was an English court of law that developed out of the Privy Council. See Daniel L. Vande Zande, *Coercive Power and the Demise of the Star Chamber*, 50 AM. J. LEGAL HIST. 326, 337–340 (2008–2010). It consisted of privy councilors and common law judges and heard common law and equitable actions. *Id.* It met in secret, with no indictments, no right of appeal, no juries, and no witnesses. *Id.* Under the Stuarts, it became a tool of oppression, and it was abolished by the Habeas Corpus Act of 1640, 16 Car. 1, c. 10 (Eng.). The abuse of the Star Chamber inspired elements of the Fifth and Sixth Amendments to the Constitution of the United States.

legislature might exclude this, that, or the other people from the courtroom while the case was being tried.

Let me suppose that there was a divorce suit pending. In some of the states they try a divorce suit by jury. Well, very often evidence in divorce suits is not very agreeable to hear, and does not do anybody any good to hear. And in some of the states, provision is made that the trial in divorce suits, or the hearing of divorce suits where they are in equity, may be in the judge's chambers, or private, only the lawyers and the parties. And that is done, in part, so as not to wound the sense of decency of the public.⁶²²

Now, I should think the state may make certain reasonable regulations of that sort in regard to particular cases. "Public" here is to be contrasted with those trials which used to occur in England, called Star Chamber proceedings, where all the public, in every case, was absolutely excluded.⁶²³ The man not even allowed to have counsel or to see his friends.

Then it must be "by an impartial jury of the State and district wherein the crime shall have been committed."⁶²⁴ "An impartial jury of the State"—well, what do we mean by "impartial jury"? It is a jury that does not know anything about the case, that has formed no opinion in advance about the case. That is substantially the rule in all the states under their constitutions. Sometimes a little difficult to tell what is an impartial jury in a true sense. The aim of those cases is to have a jury of twelve men whose minds are as it were a blank about this case and they will only know about the case as it is declared in the testimony.⁶²⁵

Now, in these modern days, it has become very difficult in cases that excite much interest to get a juror that has not some impression about the case. I was struck with the fact yesterday when riding along on one of the streetcars, as I looked along the line of the two cars, about fifty or sixty men in the two cars. It seemed to me every man in the cars had a newspaper in his hands. If there was some man killed down the street, they were reading about it. And each would say that if that account is true, that

⁶²² Currently, eleven states allow juries to participate in some aspect of divorce litigation: Colorado, Georgia, Illinois, Louisiana, Maine, Nevada, New York, North Carolina, Tennessee, Texas, and Wisconsin. See Jeffrey F. Ghent, Annotation, *Right to Jury Trial in State Court Divorce Proceedings*, 56 A.L.R.4th 955 (1987).

⁶²³ This statement is not entirely correct. See Vande Zande, *supra* note 621, at 337–40.

⁶²⁴ U.S. CONST. amend. VI.

⁶²⁵ Harlan's interpretation of this clause of the Sixth Amendment was rather aggressive. At that time, the Court held that trial courts had discretion to seat jurors who had formed an opinion of a case, so long as they expressed an ability to set aside their opinion. See, e.g., *Spies v. Illinois*, 123 U.S. 131, 179–80 (1887).

fellow ought to be hung. Or if another account is true, that was a case of self-defense. And he carries home with him an impression about that case. And the next day in the papers there are more articles about it. Whether it is true or not, he does not know, but he assumes the body of it to be true, and he unsuspectingly comes to a conclusion.

And the trial goes on. And one of those men who has been reading all these accounts is brought into the courtroom and examined. And he is asked, "Do you know anything about this case?" "No." Or, "Did you ever hear of it? Where did you hear? In what way?" "I read all the accounts in the papers as they came out." "Did you get any impression about the guilt or innocence of this man?" "Yes, I got a pretty strong impression." "Well, have you got that impression now?" "More or less. I have not heard anything about it for some time. If the facts were as stated in the papers I have got an impression now."

Well now, if every man is to be disqualified to sit in a criminal case because he reads in the newspapers of these days about it, and gets that sort of impression, why it becomes next to an impossibility to get a jury of men that know anything. It is the intelligent, wide awake man that reads. There is no reputable merchant, or businessman, or well-to-do farmer that does not read the papers, and keep up with all that is going on. And if the reading is to incapacitate him from sitting on a jury, why the result will be that the jurors will be those who do not read the papers, who do not know what is going on. And one of the results of juries of that sort is that men are acquitted who ought to be convicted.

A great many people think our organization is all a failure. What is the use of having juries? Let us abolish juries and have the case tried by a single judge. That is the extreme some go to. "You say you have got an impression from what you read in the papers. Have you got any such impression upon your mind from the results of that reading as that you will not be able, when you hear the evidence of witnesses as to the truth, to try this case according to what the witnesses tell you, uninfluenced by what you have read in the newspapers?"

Well, a self-respecting, conscientious man would say, unless he was trying to dodge service on the jury, "Yes, I can do justice to the Commonwealth and this man." Well, another man will say, and may say so honestly, "I have read all about that case in the papers, and I am bound to say that I got very strong impressions upon it. And I have got them now, and I will keep hold of those impressions, unless they are removed by evidence." In other words, he would start in the trial of that case with an opinion already made up. And he would hold to that opinion, and find the man guilty or innocent according to that opinion, unless the impression

thus made upon him by reading in the papers was removed.

Well now, that man is not an impartial juror. That man goes into that jury with a biased opinion, against one side or the other. Whereas, to be an impartial juror, he ought to feel that he can decide the case according to the evidence, uninfluenced by anything that he had read or heard. Well, the court would be very apt to discharge that man.

LECTURE 26: APRIL 30, 1898

I was commenting at our last meeting on the sixth article of the amendments of the Constitution of the United States, and was about to reach that clause which says that “the accused shall . . . be informed of the nature and cause of the accusation,” which is plain enough of itself.⁶²⁶ He is informed ordinarily by the indictment or presentment that is made by the grand jury. That indictment states what offense he had committed. And if the indictment does not indicate to him the nature and cause of the accusation, then he is entitled to demur to it. And if the demurrer is well taken—that is to say, if the indictment does not sufficiently inform the accused of the nature of the cause or accusation—the court will quash the indictment and defer the case again to the grand jury.

He is entitled also “to be confronted with the witnesses against him.”⁶²⁷ There is no such thing in the courts of law of the United States as a deposition being taken and read in a criminal cause. In one of the states, that perhaps may be done. That is, in a criminal prosecution pending in that state, you can take the deposition of a man in New York, upon notice to the accused, and have it read as evidence in that cause.⁶²⁸

That cannot be done in the United States courts, no matter what is the matter with the witness. If he is not at court and cannot attend the trial, that may constitute a reason why the prosecution will be entitled to continue the case until the next term until he can be present, but that does not entitle the prosecution to take his deposition and read it in court. It means that the witness who testifies in a criminal prosecution against a man in the federal court must be in the courthouse. He must stand in front of the witness—that is, the accused is entitled to be confronted with the witnesses against him.⁶²⁹

⁶²⁶ U.S. CONST. amend. VI.

⁶²⁷ *Id.*

⁶²⁸ See *United States v. Zucker*, 161 U.S. 475 (1896) (Harlan, J.). The Supreme Court later incorporated the Confrontation Clause against the states. See *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

⁶²⁹ See *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (“The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”)

Well now, it will naturally occur to you to ask what takes place if that witness dies after he has once given his testimony. It has sometimes occurred, as the books in the case show, that a man has been tried and the jury were not able to agree. They were discharged. The case continued until the next term to be tried again.

Now, at the first trial a man has testified against the accused under oath. The accused was confronted with him and had an opportunity to cross-examine him. Now at the second trial he is dead. Is the prosecution to lose his testimony? No, it is well settled by a current of decisions in this country and in England that that requirement is met where somebody who heard the man testify under oath at the former trial, being himself put under oath, is able to tell the jury what he swore to on that trial.⁶³⁰

Of course, the difficulty in the way of that lessens very much if the statements of the witness on the former trial have been taken down by a shorthand writer and preserved as a part of the record. Or if that shorthand writer was alive, he could be sworn as a witness and state that he was a shorthand writer, that he took down the testimony in that case. "What did the witness state," he would be asked. "Well, here it is, just as I took it down. I took it down accurately. I intended to, and I think I did take it down accurately." That could then be read to the jury. That is considered a compliance with the provision of the Constitution.

Then he is entitled "to have compulsory process for obtaining witnesses in his favor."⁶³¹ Let us suppose a case came up in the federal courts where a man is tried for his life, and that the court below refused to give him process to compel Mr. AB, a witness, to appear and testify. Well, the judgment would be reversed if that record showed that state of fact, because of the constitutional right of the accused to have this compulsory process.

What about dying declarations in murder cases, Judge?

If the witness has never testified in court, they cannot be taken. Dying declarations of a man as to what he saw at a particular time in reference to an act of that time is not competent testimony in a criminal case.⁶³²

Suppose, Judge, it is the man who testifies just before his death, if it is his dying statement?

Well, it is part of the *res gestae*.

⁶³⁰ See *id.* at 244.

⁶³¹ U.S. CONST. amend. VI.

⁶³² See *Mattox*, 156 U.S. at 244 (holding that a dying declaration is admissible in a criminal trial only if the witness to the declaration testifies at the trial).

“[A]nd to have the Assistance of Counsel for his defence.”⁶³³

That is a constitutional right of the man. He is too poor to employ counsel, let me suppose, and the court will not assign him counsel. Or he is able to employ counsel, but the court says, “You shall not have counsel.” There was a time not a great many years ago when a man was not entitled to counsel as a matter of right.⁶³⁴ That fact was known to the men who framed the Constitution and they intended to guard against it and to make it the fundamental law that the accused should have the benefit of counsel.⁶³⁵

One of the students asked you about the amendments, “Why could they not have been just as well accomplished by statute?”

Of course it could, but not just as well. Congress could have passed a statute about all these things I have been referring to, but the next Congress might repeal it. These are put in here in order that they may not be wiped out by a bare majority. Two-thirds of each house must concur in an amendment of the Constitution, and then it must be submitted to the states, and must be ratified by three-fourths of the several states—not three-fourths of the popular representation of the several states, but three-fourths of the states. And upon the question of an amendment to the Constitution of the United States, the voice of little Delaware is as potent as the State of New York.

In a population of this size—70 millions of people—there are all sorts of people. There are a great many cranks. You will hear the wildest notions on all sides as to what ought to be the fundamental law. And you will hear it on the floor of both branches of Congress that this, that, or the

⁶³³ U.S. CONST. amend. VI.

⁶³⁴ English common law denied counsel to defendants charged with felonies, but allowed defendants charged with misdemeanors to retain counsel. WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 8 (1955). However, the law allowed felony defendants to retain counsel to argue points of law, of which courts adopted a broad definition. *Id.* at 9. The practice in the American colonies and states under the Articles of Confederation ranged from adopting the English rule to guaranteeing counsel to indigent defendants. *Id.* at 18–21.

⁶³⁵ While the original meaning of the Assistance of Counsel Clause is unclear, an early federal statute suggests that Congress understood it to guarantee only the right to retain counsel, as it provided for the appointment of counsel only in case of treason and other capital crimes. *See* Act of April 30, 1790, ch. 9, § 29, 1 Stat. 118 (providing that every person who is indicted for treason or other capital crime “shall also be allowed and admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required immediately upon his request to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access to him at all reasonable hours”). However, courts often appointed counsel to represent indigent defendants accused of non-capital crimes. *See* BEANEY, *supra* note 634, at 29–30.

other amendment to the Constitution ought to be made. But the mode of amendment stands in the way of this speedy alteration of the fundamental law of the land. It cannot be done so easily.

One of the students asked me just before I came in as to whether some people were not in favor of the abolition of the Supreme Court of the United States, and as to whether Congress could do that or not? Well no, this Constitution says that we are to have one Supreme Court, and such others as Congress may establish. Congress cannot abolish the Supreme Court, but it may abolish the other courts. And that is one of the glories of our Constitution, that while we are a free people—freer than any other people anywhere on the Earth, where there is more regard paid to the rights of man than anywhere else on the Earth—yet we are hemmed around by our own fundamental law. We have put checks upon ourselves so that we cannot hastily and too readily change the fundamental law.

Article VII. Here comes a provision that I think one of very great importance. There are some people in the country that do not think much of it. “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved”⁶³⁶

Now, you ask yourselves, why did they say or imply that Congress might abolish the right of trial by jury where the case did not exceed twenty dollars? Some men will argue, “Is this a rich man’s government that they should make the distinction above twenty dollars as against those under that?” Well, that amendment was in consideration of the rights of the poor.

Let me suppose a suit against a man for ten dollars, if a suit of that sort could be brought in federal court, and a jury had to be summoned. Why, the expenses of the officer in serving the process and organizing that jury and the pay to the jurors would be two or three times more than the amount in question. In such a case, the man would say, “I will pay this ten dollars. I won’t run the risk of the expenses.”

What does the right of trial by jury mean? It is referred to in the preceding section. I read to you in a former part of the Constitution that the trial of all crimes, except in the case of impeachment, shall be by jury, and then the accused is entitled to a speedy and public trial by an impartial jury.⁶³⁷ What sort of jury? One of three or eight men? No, a jury of twelve men, a common law jury of twelve men, so that is it not in the power of the Congress of the United States to abolish the right of trial by jury in common law cases where the amount exceeds twenty dollars. The

⁶³⁶ U.S. CONST. amend. VII.

⁶³⁷ *Id.* amend. VI.

men who framed this Constitution regarded that right of trial by jury as a very important one, as a very sacred one, and I entirely agree with them.

How far does that provision govern in the states? May a state in a state court have a jury of less than twelve? Well, many of the states do, and it has been held that that was a matter for the states, with which the federal government could not interfere, although the question may not be finally considered as put to rest.⁶³⁸ I agree with the old-fashioned notion that the best scheme ever devised by the human intellect for the trial of facts is a jury. And I believe in a jury of twelve men, and not in any less number. And there is one reason why I hold on to that idea of the jury, of the right to trial by jury. It is the one mode above all others by which the plain man—the people, the plain people—are tied to the government under which they live, made part and parcel of it and made interested in it.

We talk about magnificent spectacles sometimes when we think of great political assemblages, and other assemblages, but to my mind—speaking of secular and political matters only—one of the most interesting sights to me, and it ought to be to any man that loves our institutions, is to go out into the country among the plain people, walk into a country courthouse while the court is being held. It is not a rich country. There are no rich people about there. They are all plain people of moderate means, but it is court time.

And you walk into that courthouse and see one man sitting on a bench, the courthouse crowded, probably some great case being argued, some great lawyer about to make a speech, a case interesting the public, and the courthouse is packed. The word of that one man brings that crowd to silence. An order from that one man to the sheriff can take a man out of that courthouse and put him in jail for making disorder, or acting in contempt of the authority of that court. That one man opens his mouth to talk to that jury, instruct them as to the case, and that crowd of several hundred people are sitting as quietly as if they were in church, listening to what is being said. It is the majesty of the law.

And who are these twelve men sitting on the bench? What are they there for? Most of them are men of ordinary means and ordinary station in society, but they are part and parcel of the community. Here sit two men before them, the plaintiff and the defendant, with their lawyers. They have a disputed matter. Those twelve men are deciding. The decision of those twelve men is accepted quietly and without a murmur.

⁶³⁸ See, e.g., *Pearson v. Yewdall*, 95 U.S. 294, 296 (1877).

The community accepts it, but what do those twelve men feel? Why, they go back to their farms in the country with a recognition of the fact that they are part and parcel of the government under which they live. That judge alone up there cannot settle this matter. We are called in and we help him to determine this dispute between two of our neighbors. He tells us what the law is, we determine the facts, and we in connection with the judge settle this dispute and keep down brawls and disturbances.

Now, that is one of the reasons why I say that that jury—the old-fashioned jury, that has the right to determine the facts of the case—is the best mode that we have in our institutions of connecting the ordinary man with the government of the country in which he lives. And makes him feel that he is part and parcel of that country, and that he, as well as that judge, participates in governing that country.

Now, I call your attention to the last clause of that amendment, it is very interesting. “[A]nd 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.”⁶³⁹

Let me suppose a case in the federal courts against a railroad for damages on account of its negligence resulting in a personal injury to the plaintiff, and the case is tried. I will assume that no error of law was committed by the court in admitting or rejecting evidence. That the court in its charge to the jury laid down no principle of law that was wrong. But the court, holding to the line of the law, said to the jury: “You determine the facts. Was this railroad negligent? It is for you, gentlemen of the jury, to determine under the rules that I have laid down. Was there negligence? You are to consider the facts bearing on that. Will you believe this, that, and the other evidence? It is for you, gentlemen of the jury, to say where the weight of the evidence would lead your minds, because if a man says so and so in his testimony, you are not obliged by the law to accept it unconditionally. You may not believe that man. You have a right not to take his statement, if you think he is not telling the truth. If his cross-examination showed that he was an unworthy witness, and you don’t choose to found your verdict upon his testimony, you have a right not to do so.”

Now suppose, in a case of that sort, they return a verdict for the plaintiff for \$50,000 in damage. A new trial is refused, and then it goes up to higher federal court. What may that higher federal court do?

⁶³⁹ U.S. CONST. amend. VII.

Now, the judges of the federal court may say, “We don’t think, upon this evidence, there ought to have been \$50,000 damages. That is excessive.” Yet, that federal court could not reverse that case on that ground alone, and they could not do it in the light of the clause I have just read. “[N]o 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.”⁶⁴⁰

An appellate court could not sit in judgment on the facts. All that it can do is to consider questions of law. If A offers certain evidence, and it is rejected, he takes an exception, makes a bill of exceptions. That raises a question of law as to whether or not that evidence was competent. If so, the court erred in excluding it.⁶⁴¹

In our court, we had a case of a woman coming to this country from abroad, started to Saratoga on the New York Central Road, and she took with her on the train only twenty-eight trunks, and when she opened her trunks at Saratoga, she said some valuable laces, that were heirlooms in her family, were abstracted between New York and Saratoga while the trunks were in the care of the railroad. The railroad denied it.⁶⁴²

Well, there was a trial.⁶⁴³ She swore that those laces were very rare, could not be reproduced anywhere in the world, and were worth a hundred thousand dollars, and the jury gave her a verdict for ten thousand dollars, which is in itself a pretty large amount for laces for one woman. The point was made in our court that it was an excessive verdict. We said that we had nothing to do with the amount of the verdict. That depended upon the facts, and we could only look into the law of the case.

Eighth article of amendment. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁶⁴⁴

What do you mean by bail? Well, a man is arrested. The grand jury does not meet for four months, perhaps. If the case is ordinarily a bailable

⁶⁴⁰ *Id.*

⁶⁴¹ *See, e.g.*, *Capital Traction Co. v. Hof*, 174 U.S. 1, 9 (1899); *Walker v. N.M. & S. Pac. R.R. Co.*, 165 U.S. 593, 596 (1897).

⁶⁴² *R.R. Co. v. Fraloff*, 100 U.S. 24, 25 (1879) (Harlan, J.). The plaintiff was Olga de Maluta Fraloff, a wealthy Russian touring the United States with six trunks. *Id.* at 24–25. She was traveling to Niagara with two trunks, when two hundred yards of dress-lace were stolen from one of them. *Id.* at 25.

⁶⁴³ In fact, there were two trials. The first, in 1873, resulted in a mistrial. *Id.* at 26. The second, in 1875, resulted in a verdict of \$10,000. *Id.*

⁶⁴⁴ U.S. CONST. amend. VIII.

one, he does not want to go to jail, and he asks to give bail, which means a bond with security that he will appear at the time named in the bond to answer any indictment found against him. Or, if he has not been indicted and the trial is not coming off for some time, he will give his recognizance or a bond. Now, why the provision of excessive bail?

Now, there are some offenses for which bail is not always allowed. Murder is one. But in our country, no other felony is denied bail. A man may have robbed a bank of an enormous sum of money, and may be charged in enough counts of that indictment to send him to the penitentiary for a hundred years, if a judgment is rendered on all of them, but he is not for that reason to be denied bail. Well then, what is excessive bail? It is bail out of all proportion to the offense, and to the ability of the man to give bail.

Give you the case of the man that has no property at all, no particular force or standing in society, and say to that man, "I will require you to give bail in the amount of \$100,000," is to deny him bail. He cannot give that amount. There is nobody, anywhere, willing to risk their estate to that extent. He cannot get any security, therefore, that bail is excessive.

I do not mean to say that bail is excessive simply because a man has no means. The court must take into consideration the nature of the offense. If a man in sudden heat and passion should knock a man down—bruise him somewhat, and therefore be subject to indictment—and he were arrested, held to bail, why, no court would think of requiring the bail in that case that they would require of a man in whose cellar they found all the implements of a forger, one engaged in the business of forging United States notes or bonds. A court in the case of a forger of that sort would take care to require bail enough to ensure his attendance at court when his trial was called. The fact that he had no property, no friends, the court would not give much attention to. The true rule though is to inquire how much can this man probably give, what is the nature of his offense, strike a fair balance, and determine what is reasonable and just in the matter.

"[N]or excessive fines imposed."⁶⁴⁵

Fines beyond the offense. I told you, I believe, of a case of a man tried in Vermont in a county court there under the liquor law.⁶⁴⁶ And they proved against him 400 odd cases, and the county judge imposed a fine in each of the cases. And the result was that if he had served his time out

⁶⁴⁵ *Id.*

⁶⁴⁶ *O'Neil v. Vermont*, 144 U.S. 323 (1892). This is Harlan's first reference to the case.

under the judgment in that case, he would have been in the house of correction of that state 75 years. Upon appeal he got it reduced so as to bring it down to 55 years, and they tried to get it to our court. But the majority of our court were of the opinion that the question of jurisdiction was not presented.⁶⁴⁷

But “excessive fine” means a fine in excess of the offense of which the man is found guilty. What would be thought, for instance, of an act of Congress that would authorize the police court of this city to impose upon a man who sold liquor without a license a fine of a million of dollars? Now, everybody would say at once that is cruelty, that belongs to a past age, that is way out of proportion to the offense itself.

“[N]or cruel and unusual punishments inflicted.”⁶⁴⁸

It is not sufficient to say of an act of Congress that the punishment imposed is cruel, it must also be unusual.

Judge, does that apply to the army and navy when the soldiers or sailors are in actual war?

That amendment applies to every authority exercised by federal agency. Men in the army and navy may be tried by court-martial. That is because the Constitution authorizes it—that is, with reference to offenses committed by them in the army or navy, a particular mode of trial before an army court-martial or naval court-martial. But they have no more right to impose cruel or unusual punishments than a civil tribunal has. If an act of Congress authorized cruel and unusual punishments the courts would strike it down. If there was any regulation in the army or navy of the United States that authorized a court-martial to inflict such a punishment, the courts would take hold of it and stop it.

Now, what is a cruel punishment, what is an unusual punishment is not always easy to tell. Those things are to be determined in large measure by the period in which we live. What may not have been cruel fifty or seventy-five years ago might be deemed cruel now.⁶⁴⁹ I can imagine some

⁶⁴⁷ John O’Neil was convicted on 307 counts of violating Vermont’s liquor law. *Id.* at 327. The court assessed a fine of \$6,638.72 or imprisonment for 19,914 days, about 54 years, which was affirmed on appeal. *Id.* at 330. The United States Supreme Court dismissed O’Neil’s writ of error for lack of jurisdiction. *Id.* at 336–37. Justice Field dissented, arguing, *inter alia*, that the Court had jurisdiction under the Privileges or Immunities Clause of the Fourteenth Amendment, and that the judgment violated the Eighth Amendment. *Id.* at 337, 359–60 (Field, J., dissenting). Harlan also dissented, agreeing with Field on that point. *Id.* at 370 (Harlan, J., dissenting).

⁶⁴⁸ U.S. CONST. amend. VIII.

⁶⁴⁹ As of 1898, the basis for determining whether a punishment was “cruel and unusual” under the Eighth Amendment was unclear. In 1878, the Court held that the Eighth

forms of punishment that used to subsist in the Anglo-Saxon race in England that we would not tolerate today in this country.

Suppose the Congress of the United States were to provide by statute that for a particular offense the accused, if found guilty, should be taken out in the public square in the town where he was and burned alive—that the officers of the law should build a funeral pyre around him and then set it afire and burn him to death. I do not think there would be any difficulty in the courts of this country—at this day in this Christian era—regarding that as not only cruel, but unusual. And the court would lay its hand upon a proceeding of that sort and stop it.

I am inclined to think that an act of Congress today that would authorize a man to be hung up by his thumbs, as was the form of punishment once among our ancestors in England—we would today say that was cruel and unusual. If the government of the United States for some offense should provide a dungeon under the floor of some penitentiary or public building, into which the light never entered, and should require the court to impose for certain offenses imprisonment for life in a dungeon of that sort, so that the man would never see the light of day—would never see the face of a human being—I think the courts would say that was cruel and unusual punishment.

I do not mean to say that solitary confinement might be so deemed if it was connected with an opportunity to see the light of day. I do not know that the court would strike that down. But where a man was put into a dark dungeon for life, I think the courts would hold that cruel and unusual. But of course, it is idle to conjecture what would be adjudged by the courts, for it is certain that the tendency in this Christian era is to make punishments too light rather than too severe.

Judge, was the question as to whether electrocution was cruel and unusual ever considered?

Yes, case that same from the state of New York, and that case sent off upon the idea that that was for the state, as it was in the state court, and not

Amendment only prohibited punishments that would have been considered “cruel and unusual” in 1789. *Wilkerson v. Utah*, 99 U.S. 130, 136–37 (1878). But in 1890, it held that execution by electrocution “might be said to be unusual because it was new, but that it could not be assumed to be cruel in the light of that common knowledge which has stamped certain punishments as such.” *In re Kemmler*, 136 U.S. 436, 447 (1890). Eventually, in 1910, it held that the meaning of “cruel and unusual punishment” may change over time. *Weems v. United States*, 217 U.S. 349, 373 (1910) (“Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes.”).

for the United States to control.⁶⁵⁰

Now, the Ninth Amendment, which you might call a glittering generality in this: that it was perhaps unnecessary, but the people are naturally jealous of the encroachments of power, therefore they wanted that.⁶⁵¹

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁶⁵²

Some of the men who opposed the adoption of the Constitution were afraid that one of the results to come from its acceptance would be the destruction of the rights of the people, and the concentration of all power in this country in a central head that would destroy the rights of individual men. Well, there was never any reason, because the Constitution is an enumeration of power, and this government has no powers except those granted to it. But this was put in here, and it must be understood that the mere enumeration of certain rights of the people do not mean that they have got no others. On the contrary, they have all the rights with any power than the people ought to have, except what they have surrendered in this Constitution.

Article X. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁶⁵³

These ten amendments were added at the first Congress, and that is the closing one, and it is a declaration of what may be called “states’ rights.” That phrase is often found in the mouths of people of this country, politicians. You see it often in newspapers, and you are not quite certain what a man means when he says that he is a states’ rights man. We know

⁶⁵⁰ Harlan refers to *In re Kemmler*, in which the Court affirmed a decision of the New York Court of Appeals holding that execution by electrocution did not violate the Eighth Amendment. 136 U.S. at 447.

⁶⁵¹ When James Madison submitted The Bill of Rights to the House of Representatives, he stated:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.

1 ANNALS OF CONG., *supra* note 288, at 456.

⁶⁵² U.S. CONST. amend. IX.

⁶⁵³ *Id.* amend. X.

when some men say, "I am a states' rights man," he means to say that the national government has got no rights that the state is bound to respect.

That is what some men mean by it, and men who know that the governor of every state, the judges of every state, the members of the legislature of every state, and every public officer in every state in the Union takes an oath to support the Constitution of the United States, which Constitution says it is the supreme law of the land, anything in the constitution or law of any state to the contrary notwithstanding. There are men who say that, "When my state makes a declaration, I stand by it, that is the law for me, I do not care what the Constitution of the United States says, that is the law for me."

Well now, that sort of a states' rights man is a very poor sort of a states' rights man. That man's notions are mischievous. They lead to disorder, to disruption.

There is another class of men that I have said you want to watch and guard against as much as you would that class of people. It is the fellow that has no sort of regard for the rights of the states. It is the fellow that wants a great government here that is to do as it pleases, to have no checks upon its legislation, or its powers in any way. That is omnipotent. That sort of a fellow is a crank, and a crank of a mischievous sort.

But there is a sort of a states' rights man that ought to represent every friend of this Constitution. It is the states' rights man who recognizes the fact that there is a government of the United States. That the people of the different states have organized that government, and have invested that government with certain power. That that government is not to be obstructed in the execution of the powers granted to it. But at the same time, he stands for the rights of the states, with which they have never parted.

The states have rights that they have never surrendered. There are some things that they are entitled to, entitled to do because they have never agreed to surrender the power to do so. Because before this government was established, they were sovereign, independent states. And when they put the machinery of the national government into motion, they put it into motion only for the accomplishment of certain objects. They are enumerated in this Constitution, and with the exception of the powers here granted to the national government, the states have got all the powers they ever had.

Now, the man who says he is a states' rights man in that sense is the best states' rights man. That is all that article meant to say. The power not delegated to the United States by the Constitution, or prohibited to it by the states, is reserved to the states respectively. And in determining that, the

disputes between political parties have been because one set of men look at this instrument too broadly, and others too narrowly.

Article XI. This was not added until some years after the adoption of the Constitution. Let me explain to you. Way back in 2 Wallace, I believe it is, a man by the name of Chisholm sued the State of Georgia.⁶⁵⁴ The State of Georgia said, “I am a sovereign state, and no man has the right to call me to the bar of any court, federal or state. Georgia has not agreed to be sued. She does not admit the right of any power, certainly not of any individual, to sue her.”

That case came to the Supreme Court of the United States, reported as Chisholm versus the State of Georgia, debated by great lawyers and determined by great judges, several of whom were in the convention which framed the Constitution.⁶⁵⁵ The majority of the court—I believe all except one—said that the Constitution as it was authorized a suit of that character, because it was a suit arising under the Constitution and laws of the United States.⁶⁵⁶

Well, immediately that case was so decided, there was some excitement in the country. Massachusetts and Virginia joined hands on the question of opposing that decision, said that would never do. They agreed in holding to the proposition that it was never intended by the framers of the Constitution to authorize an individual to sue a state. And the result was this Eleventh Amendment, so as to put that question at rest forever.

Now, let me read it to you, in the light of that explanation.

“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.”⁶⁵⁷

That closed the door against suits by individuals against a state. It did not prevent a state from suing individuals.

⁶⁵⁴ Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

⁶⁵⁵ Chisholm v. Georgia was argued for the plaintiff by Edmund Randolph, the first Attorney General of the United States. Edmund Jennings Randolph, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/ag/aghistspage.php?id=0> (last visited June 16, 2013). The State of Georgia refused to appear, contending that it was not subject to suit without its consent. Chisholm, 2 U.S. at 419–20. The case was heard by Chief Justice John Jay and Associate Justices John Blair, James Iredell, William Cushing, and James Wilson. See id. at 419–79.

⁶⁵⁶ Harlan is correct: Jay, Blair, Cushing, and Wilson voted for the plaintiff; Iredell voted for the defendant. See id.

⁶⁵⁷ U.S. CONST. amend XI.

Now, many questions have arisen under that clause, and only one or two that I will refer you to, because it illustrates probably all the balance. Let me suppose that the State of Kentucky passes a statute relating, if you choose, to taxation. And there is about to be imposed on the real estate in Kentucky certain taxes, and upon certain kinds of personal property. Well, a citizen of Massachusetts owns real estate in Kentucky, and he owns some of this personal property, and he says that that act of the state legislature is void, because it is repugnant to the Constitution of the United States, the supreme law of the land.

This Massachusetts man, therefore, raising this question, cannot sue the State of Kentucky and have process served on the governor in the federal court sitting in Kentucky. That Eleventh Amendment says the judicial power of the United States shall not extend to a suit by a citizen of another state against one of the states of the union.

What is the remedy therefor? It is to sue the taxing officer and set out, "This taxing officer proposes to lay his hands upon my property and sell it, and he proposes to do so under a statute passed by the legislature of Kentucky, which we say is void under the Constitution of the United States." If the Massachusetts man had not that remedy, he would have no remedy, because he cannot sue the state. Now, it has been held time and again that a suit against an officer of a state to prevent him from executing an unconstitutional law of that state is not a suit against the state, and that it can be instituted.

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We reached in our examination of the Constitution the Twelfth Amendment, relating to the election of the President and Vice-President. It is the mode now adopted, and has been the subject of consideration before, and I have nothing more to say.

Article XIII introduces for the first time the word slavery into the Constitution. I have before called your attention to the fact that the Framers of the Constitution carefully avoided the use of the word slave.⁶⁵⁸ They probably apprehended the great troubles which were to come by reason of the existence of slavery, especially as our Fathers had declared that all men were created equal and free. This article abolishes slavery.

“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.”⁶⁵⁹

Now, we know what slavery is. The word implies the ownership by one man of the body of another man. But this article not only prevents the existence of slavery, but also involuntary servitude, which may exist without being slavery. If a man is in jail, behind iron bars, he is in a condition of involuntary servitude, but that is not prohibited if the man is there by reason of some crime which has been committed. You cannot take a man’s liberty, except as punishment for crime, and not simply that, but “crime whereof the party shall have been duly convicted . . .”⁶⁶⁰ Wherever the authority of the United States extends, whether in a state, fort, or arsenal, or district, throughout the jurisdiction of the United States, there is this prohibition against slavery. This amendment is something more than a negation of this condition of things. It appertains to everybody his affirmative right of freedom that belongs to everybody.

At this day, some perhaps who think that this is not a good condition of things. Some men who think that it is unfortunate that this institution of African slavery went down. But you may be sure that the ideas of those men belong to the past generation, and do not belong to our present day. It is well for us that that it is gone, never to be restored. And whatever the perils may be against which this country will have to contend, they will be a less evil than was the existence of African slavery in this country.

⁶⁵⁸ See *supra* Lecture 5.

⁶⁵⁹ U.S. CONST. amend. XIII.

⁶⁶⁰ *Id.*

It had come to this, that this institution had its hands on the throats of this country, and this country had to perish under that institution, or that institution had to die. It had come to pass that there was no such thing as freedom of thought, when it bore on this institution. A man who was not prepared to speak of this institution as of divine origin was looked upon with distrust and suspicion. And in other parts of this country it was very difficult with some people to treat with Christian moderation the sentiments expressed by people about that institution, who were in favor of it. Now, it's gone, and we are glad of it. People of all sexes, and all states are glad of it. If the question were submitted today to the voters of those states where this institution had formerly existed, I have no doubt that each one of them would vote against it.

There were horrors under it that we do not care to look at, to this day. Even in those parts of the United States where it was under the most modified form, there were practices that were horrible to the sight of the Christian man. I have seen myself, standing on the steps in front of the courthouse door in the city where I passed my earlier life, a grown man and woman, and a half-dozen children, or more, both boys and girls of that race, who belonged to some man who had become unfortunate in his business—who was as we might call it at this day insolvent—and whose property had to be sold to satisfy the demands of his creditors. I have seen the father sold to one man and the mother to another in a distant part of the country, and the children sold one by one, and separated, one to be sent to one state, and one to another, according to the location of the owner, the family divided and separated.⁶⁶¹

That cannot occur anymore. Every human being, since the addition of that amendment, is free to do as he pleases, to work for his own salvation, so far as mere worldly affairs are concerned. To make their way in their lives as far as they can. To aspire as other people have who are free. To do what they can for themselves, and their race.

Of course, there is before us the probability of trouble, on account of this race. Some people talk about it more than they ought to. You occasionally meet with a man, as I did about a year ago, who never did an honest day's work in his life, and who never earned the salt that he ate on

⁶⁶¹ Presumably, Harlan refers to the Cheapside Auction Block in Lexington, Kentucky, which was next to the Fayette County Courthouse. See *Slavery in Fayette Co./Cheapside Slave Auction Block*, HIST. MARKER DATABASE, <http://www.hmdb.org/marker.asp?marker=16411> (last updated Feb. 23, 2009). When Harlan attended law school at Transylvania University in 1853, the Cheapside Auction Block hosted one of the largest slave markets in the country. See *id.*

his food. That was his only aim in life, to live upon somebody else. This man was greatly disturbed at the probability that that race would come into contact with the whites in this country.

Well, the white man who has got self-respect, that has got humanity in his nature, who has respect for a human being, because he is one, wherever he sees him, that sort of man is not much disturbed by the fact that the black man is bettering himself, here and there, taking an education, laying up a little property, learning a trade, and advancing. We need not be alarmed at that race getting ahead of us. I am ready to say that if there is a black man who can get ahead of me, I will help him along, and rejoice. And his progress in life does not excite my envy. And I am glad to feel and know that it is the desire of the white people in this country that that race shall push themselves forward in the race of this life. This world is big enough for us all, and this country is big enough for us all. And if a man gets along, whether he be white or black, there is room enough in this broad free land of ours for all of us.

Now I come to the Fourteenth Amendment. "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."⁶⁶²

I have explained to you before what was the origin of that amendment. I called your attention a long while ago to the contest in the Supreme Court of the United States in the Dred Scott case, where the Court held that a man of African descent was not one of the people of the United States, for whom the Constitution was established, and that even if he was a citizen of the United States, he was not a citizen of the state wherein he resided.⁶⁶³ And therefore a man whose parents were of African descent could not be a citizen of a state, without the consent of that state.

Out of that decision grew the Civil War, the greatest war in modern times. One of the results of that war was to uproot the doctrine of the Dred Scott case, and this amendment was the expression of that result. It is broad enough to include all persons. "All persons," mark the words, "born or naturalized in the United States," and "of the State wherein they reside."⁶⁶⁴

Therefore, it follows that every negro in the United States, if he had been born there or has been naturalized in the United States, when this

⁶⁶² U.S. CONST. amend. XIV, § 1, cl. 1.

⁶⁶³ See *supra* Lecture 3; see also *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

⁶⁶⁴ U.S. CONST. amend. XIV, § 1, cl. 1.

amendment was adopted became a citizen of the United States and of the state wherein he resided. Therefore, if the state says, we do not intend to recognize you, Mr. Negro, this amendment steps in and says, "You must."

We had an illustration of the application of this amendment in the present term of our court. It was the case about the Chinese subject, to which I had called your attention heretofore.⁶⁶⁵ It was the case of the Chinaman born in San Francisco, twenty-odd years ago, of Chinese parents. Father and mother were living in San Francisco, the father engaged in business there, but they were subjects of the Emperor of China. And this boy was born to them in San Francisco. And the question was whether or not this Chinaman, the son of Chinese parents—residing in the United States, but nevertheless subjects of the Emperor of China—was a citizen of the United States, by reason of the fact that he was born there.

The question turns upon two or three words of this amendment: "All persons born in the United States." Well, he was born here. But now come the words, "and subject to the jurisdiction thereof." Now, if that boy was within the meaning of that clause, "subject to the jurisdiction" of the United States, then he became a citizen of the United States, and of the state wherein he resided. The majority of the Court held that he was. The minority held that he was not born to the jurisdiction of the United States, as to this Constitution. He was not born subject to the political jurisdiction of the United States. Of course, he owed allegiance to our laws, as every man who comes here, but he was not born under the jurisdiction of the United States, within the meaning of this article of the Constitution.

I was one of the minority, and of course I was wrong.⁶⁶⁶ Suppose an English father and mother went down to Hot Springs to get rid of the gout, or rheumatism, and while he is there, there is a child born.⁶⁶⁷ Now, he goes back to England. Is that child a citizen of the United States, born to the jurisdiction thereof, by the mere accident of his birth? My belief was never intended to embrace everybody in our citizenship if he was the child of parents who cannot under the law become naturalized in the United States. I was unable to believe that when the boy's parents could not become

⁶⁶⁵ See *supra* Lecture 21; see also *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

⁶⁶⁶ Harlan joined Justice Fuller's dissent. See *id.* at 705 (Fuller, C.J., dissenting).

⁶⁶⁷ Presumably, Harlan refers to Hot Springs, Bath County, Virginia, a spa resort renowned for the curative powers of its hot springs, especially in relation to rheumatism and gout. See generally SAMUEL C. TARDY, *HOT SPRINGS, BATH COUNTY, VIRGINIA: WITH SOME ACCOUNT OF THEIR MEDICINAL PROPERTIES AND AN ANALYSIS OF THE WATERS* (Richmond, Gary, Clemmitt & Jones 1869).

citizens of the United States, that it was possible for him to become a citizen of the United States.

One of the results of the opposite view is that when that man goes back to China, and the Emperor should conclude to cut his head off—a custom which prevails to a very great extent among these people—we would have to prevent it. And if we could not do this, make him pay for it afterwards. Or, if they impress him into the Chinese army, we would have to protect him. Of course, I am wrong, because only the Chief Justice and myself held these views, and as the majority decided the other way, we must believe that we were wrong.

But the last clause of that section is a very important one. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”⁶⁶⁸ Now, that’s a great right, with which we are all invested. I cannot stop to discuss what are the privileges and immunities of citizens of the United States. But whatever are the privileges and immunities of citizens of the United States, that amendment says that no state shall lay its hands on them, and if it does he may appeal to the law, supreme in this country.⁶⁶⁹

“[N]or 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.”⁶⁷⁰

You will remember that in the Fifth Amendment of the Constitution there was a provision similar to this.⁶⁷¹ But this amendment of the Constitution was construed to be applicable to federal power, or federal adjuncts only. The state was at liberty, until this Fourteenth Amendment, to do anything it pleased. But this is all changed by the Fourteenth Amendment.

⁶⁶⁸ U.S. CONST. amend. XIV, § 1, cl. 2.

⁶⁶⁹ Many of Harlan’s dissents in civil rights cases relied on the Privileges or Immunities Clause. See *Twining v. New Jersey*, 211 U.S. 78, 114–27 (1908) (Harlan, J., dissenting); *Patterson v. Colorado*, 205 U.S. 454, 463–65 (1907) (Harlan, J., dissenting); *Maxwell v. Dow*, 176 U.S. 581, 605–17 (1900) (Harlan, J., dissenting). Harlan’s reliance on the Privileges or Immunities Clause was unusual. For further discussions of the original meaning of the Privileges or Immunities Clause, see Josh Blackman, Alan Gura & Ilya Shapiro, *The Tell-Tale Privileges or Immunities Clause*, 2010 CATO SUP. CT. REV. 163 (2010); Josh Blackman & Ilya Shapiro, *Keeping Pandora’s Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL’Y 1 (2010).

⁶⁷⁰ U.S. CONST. amend. XIV, § 1, cl. 2.

⁶⁷¹ See *id.* amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

Now, what is due process of law? It is not any process that the state chooses to call due process of law, because that would make the will of the state final and conclusive. Due process of law refers to what was due process of law at the time when the Constitution was adopted. We cannot well cover the whole ground of due process of law, but there are some things which we are able to say is not due process of law.

For instance, if a man sues me on a note and does not issue a summons against me, but nevertheless the court renders judgment on the suit, and the sheriff orders that property sold, I can stop that sale, because I have never been notified of that suit.⁶⁷² This thing is at the very basis of Anglo-Saxon liberty. A man's property cannot be taken from him without notice—personal notice—for him to appear in court, and defend against the action. If that were not done, then there would not be due process of law.

Suppose an act of the legislature took my property for private use. That act would be void under this clause. That would not be due process of law, because it does not belong to any government to take private property and apply it to private use. Nor does it belong to any government to take private property and apply it to public use, without due process of law.

Let me suppose a man is in jail, and sends for a lawyer. The man is behind the bars, and the lawyer comes and says to the warden, "By what authority have you got this man here?" "Well," says the warden, "here is my mittimus to me."⁶⁷³ Well, so far that seems to be regular, but the lawyer goes to the court where the proceedings were had, and examines them, and finds that the man was proceeded against by information, while under the law he was entitled to be proceeded against by indictment only. Well, if that is so, the man is being deprived of his liberty without due process of law, and could regain his liberty under the Constitution.⁶⁷⁴

Here is a man in jail, and is going to be hung in ten days from this time. "Well, Mr. Sheriff, by what authority are you going to take this man's life?" "Well," says the sheriff, "here is the order from the court, which is my authority." Well, we go to the court, and find that the proceedings there were conducted contrary to the recognized principles in the country. We find that the man was tried in secret session, that the court

⁶⁷² See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 733–34 (1877).

⁶⁷³ A mittimus is "a court order or warrant directing a jailer to detain a person until or ordered otherwise." BLACK'S LAW DICTIONARY (9th ed. 2009).

⁶⁷⁴ See *Hurtado v. California*, 110 U.S. 516, 538 (1884) (holding that criminal prosecution by information satisfies due process, if permitted by state law). *But see id.* at 539 (Harlan, J., dissenting) (arguing that due process requires criminal prosecution by indictment in capital cases).

did not assign him counsel. And therefore this judgment would be void, and that man can regain his liberty, because that would not have been due process of law.

Now, it is a great deal for every American to know, that notwithstanding the vastness of this country, no man can be deprived of his life, his liberty, or his property, except in accordance with due process of law. I am under an existing statute entitled to issue a writ of habeas corpus and order any man released from custody, who has been put there without due process of law.⁶⁷⁵ Any man between the two oceans can come to me and claim this protection.

“[N]or deny to any person within its jurisdiction the equal protection of the laws.”⁶⁷⁶

No state can make any distinction. A man is not to be legislated against, because he is of a certain race or color. When here, he is entitled to the equal protection of the law. There underlies our institutions the thought of “equality” before the law. The law condemns no man because of his race or color. The blackest man ever seen, when in the courthouse, is entitled to the same protection as the man who is white. It is this amendment that says to the states, take care that you do not apply class legislation.⁶⁷⁷

When the Fourteenth Amendment was adopted, there was an apprehension that this amendment would overthrow some of the states, but we have lived long enough under that amendment to satisfy ourselves that there is no provision in the Federal Constitution to which we should cling harder than the Fourteenth Amendment. It puts it in the power of the United States to protect local interests against the power of vast interests, which are so powerful that they have the state governments by the throat and can do just as they please.

In the remaining amendment, “[t]he right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”⁶⁷⁸

⁶⁷⁵ Habeas Corpus Act, ch. 27, 14 Stat. 385 (1867).

⁶⁷⁶ U.S. CONST. amend. XIV, § 1, cl. 2.

⁶⁷⁷ See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE & DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 61–62 (1993) (arguing that the *Lochner* Court’s police power jurisprudence was motivated by opposition to “class legislation,” now known as special interest legislation). *But see* David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 12 (2003) (arguing that Gillman exaggerates the influence of the *Lochner* Court’s opposition to class legislation on its police power jurisprudence).

⁶⁷⁸ U.S. CONST. amend. XV, § 1.

This amendment does not confer the right of suffrage. That right is regulated by the states.⁶⁷⁹ It only says that, as to citizens of the United States, their right to vote shall not be abridged on account of race, color, or previous condition of servitude. Or, in other words, no state can deny a black man—a citizen of the United States—the right to vote, because he is a black man. Since that gentleman from China was adjudged to be a citizen of the United States, this amendment says you shan't deny him the right to vote. So that this gentleman is not only entitled to vote, but he is entitled to become President of the United States, so far as his citizenship is concerned. And that, too, in the face of the fact that the race itself is excluded from naturalization by the laws of the United States.

I am asked the question whether or not a woman can be President of the United States. Yes, if the men are willing that this should occur, she may. There is no prohibition against this in the Constitution. Then there often occurs the question, may a state discriminate against a woman on account of her sex, as far as her right to vote is concerned? Yes, this amendment only says that the right to vote shall not be abridged “on account of race, color, or previous condition of servitude.” The word sex is not there.

Sometimes the question is propounded, may a state make education a test for the qualification of voters? Yes, it may. The state may say that no man shall be allowed to vote unless he has a certain amount of education or a certain amount of property, provided that it is not so put together that it reaches a certain race, as a race.⁶⁸⁰

Now, a word or two more, and then I will end. I cannot convey to you in words the pleasure which I have had during this term in meeting you for the purpose of examining into this instrument. A great deal more might have been said, if time had permitted. My object has not been to cover every question and every phase that might arise under it, but it has been, in the first place, to make you acquainted with the greatness of this instrument, and to bring about, if I could, a desire in you to know more about it than you do. To induce you to study the history of this instrument, and read the lives of the men who laid the foundation of this government. Read their letters, and their speeches, from which light will come on the words of this instrument. If the result of these lectures has been to make the study of this instrument so instructing to you, I shall be amply repaid.

⁶⁷⁹ See *United States v. Reese*, 92 U.S. 214, 217–18 (1875).

⁶⁸⁰ See *Williams v. Mississippi*, 170 U.S. 213, 225 (1898) (holding that literacy tests violate the Fourteenth Amendment only if they “discriminate between the races”).

How little the people at the time of the adoption of the Constitution thought of it is well expressed by the celebrated historian, McCauley, who wrote that our Constitution was “all sail and no anchor.”⁶⁸¹ And he continues by saying that the republic which was established under this Constitution will be laid waste in the twentieth century, just as Rome was laid waste to in the fifth. But only with this difference, that whereas the Huns and Vandals who destroyed Rome came from without, our Huns and Vandals will come from our own institutions.⁶⁸²

But time has shown how idle and senseless have been these prophesies. And time has shown that instead of being divided, we are today more closely united than ever before in our past history. And that today the principles of law and order, as they rest upon a written Constitution, are stronger than ever before. And that today, more than ever before, the people respect all the rights of the states, as well as of the United States.

And as we stand at the close of this century, and think as to what will be our condition in the next century, there is nothing to disturb our vision. If the world never knew so before, they have been convinced within the last fortnight that this great republic of ours, in all the future destinies of the world, is to be reckoned with in the government of European affairs.⁶⁸³ And that the power on this Earth today that is likely to shape the destinies of Europe and the Far Eastern countries, and of the whole human race in the next century, are the United States of America.

⁶⁸¹ Letter from Thomas Babington Macaulay to Henry S. Randall (May 23, 1857), in *WHAT DID MACAULAY SAY ABOUT AMERICA?: TEXT OF FOUR LETTERS TO HENRY S. RANDALL* 23, 25 (1925).

⁶⁸² *Id.* (“As I said before, when a society has entered on this downward progress, either civilisation or liberty must perish. Either some Caesar or Napoleon will seize the reins of government with a strong hand; or your republic will be as fearfully plundered and laid waste by barbarians in the twentieth Century as the Roman Empire was in the fifth; with this difference, that the Huns and Vandals who ravaged the Roman Empire came from without, and that your Huns and Vandals will have been engendered within your own country by your own institutions.”).

⁶⁸³ Presumably, Harlan refers to the declaration of war against Spain. On April 20, 1898, President McKinley signed a joint resolution of Congress demanding that Spain withdraw from Cuba and authorizing the use of military force. *See Milestones: 1866–1898, The Spanish-American War, 1898*, U.S. DEP’T OF ST., OFFICE OF THE HISTORIAN, http://history.state.gov/milestones/1866-1898/Spanish_american_war (last visited June 16, 2013). On April 21, Spain suspended diplomatic relations with the United States and the U.S. Navy blockaded Havana. *See id.* Spain declared war on April 23, and on April 25, Congress declared that a state of war had existed since April 21. *See id.*