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EXCLUSIVE AND CONCURRENT POWERS IN THE FEDERAL CONSTITUTION

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I. Grant of Powers a Fundamental Principle of the American Constitution.

An extensive argument is not necessary to prove that the powers originally enumerated in the Constitution, Article 1, Sec. 8, Article III Sec. 1, Article IV, or later added by amendments, thirteen, fourteen, fifteen, sixteen, eighteen and nineteen are delegations of authority from the States in the Union to the Federal Government, as this general proposition is universally admitted.

The Constitution, Amendment X, restates and re-affirms that fundamental principle that the powers above mentioned are grants of power, "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."

In the case of State of South Carolina, app't vs. United States[1] the principle of grant of powers was set forth in the following language, "We have in this republic a dual system of government—National and State—each operating within the same territory, and upon the same persons, and yet working without collision because their functions are different. There are certain matters over which the National Government has absolute control, and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to these the National Government is powerless."

"Two propositions in our Constitutional jurisdiction are no longer debatable. One is that the National Government is one of enumerated powrs." In the case of United States vs. McCullough[2] the court in passing on a demurrer used this language, "In ruling on this question certain fundamental principles so firmly established in the laws of this country as to become truisms must be borne in mind. Our National Constitu-

1 50 Law. Ed. 261.
2 221 Federal 288.

tion is one of purely delegated powers. When the validity of an act asserted to have been passed in pursuance of power thereby conferred on Congress is challenged in due form and proper manner, as in this case, the plaintiff must point to some provision therein found which either in express terms or by necessary implication authorizes and sustains the act."

II. The Character of the Grant.

Whether the grants and power in the Constitution resulted in vesting the several powers exclusively in the Federal Government, or whether the result was to give the Federal Government the power to exercise the power concurrent with the right of the State to exercise the same power has always been a subject of much interest.

In the Publius letters the question of exclusive and concurrent powers was discussed by Mr. Hamilton, who said, "An entire consolidation of the States into one complete sovereignty, would imply an entire subordination of the parts; altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments will clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation of State sovereignty, would only exist in three cases: Where the Constitution in express terms granted an exclusive authority to the Union; Where it granted in one instance, an authority to the Union, and in another, prohibited the States from exercising the like authority; and when it granted an authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant."[3]

In the case of Gibbons vs. Ogden[4] Mr. Oakley, attorney for respondents examined the question of exclusive and concurrent powers in detail, as follows:

"These delegated powers whether expressed or implied are: (1) those which are exclusively vested in the United States; and (2) those which are concurrent in the United States and the respective States."

3 The Federalist. No. 32.
4 6 Law. Ed. 23.

It is perfectly well settled that an affirmative grant of power to the United States does not of itself, divest the States of a like power. The powers vested exclusively in Congress are (1) Those which are granted in express terms (2 Those which are granted to the United States, and expressly prohibited to the States. (3) Those which are exclusive in their nature.

All powers which are exclusive in their nature may be included under two heads: (1) Those which have their origin in the Constitution and when the object of them did not exist previous to the Union. These may be called strictly National powers. (2) Those powers which by other provisions in the Constitution, have an effect and operation, when exercised by a State without or beyond the territorial limits of the State.

To ascertain whether any given power be concurrent, we must inquire, (1) Whether it was possessed by the States, previous to the Constitution, as appertaining to their sovereignty. (2) Whether it is granted in exclusive terms to the Union. (3) Whether it is granted to the Union and prohibited in express terms to the States. (4) Whether it is exclusive in its nature, either as operating, when exercised by the States, without their territorial limits, and upon other parts of the Union, or as having its origin and creation in the Union itself.

All concurrent powers may be divided into two classes, (1) Those where, from their nature, when Congress has acted on the subject matter, the States cannot legislate at all in any degree. (2) Those when the States may legislate though Congress has previously legislated on the same subject matter.

In Sturges vs. Crowninshield[5] the question was whether the State of New York had the power to pass a bankrupt law, it being alleged that the power to pass bankrupt laws was vested exclusively in Congress. In considering this question the Court in an opinion delivered by Chief Justice Marshall said, "In considering this question, it must be recollected that, previous to the formation of the Constitution, we were divided into independent states, united for some purposes, but in most respects, sovereign.

These states could exercise almost any legislative power, and among others that of passing bankrupt laws. When the

5 No. 4 L. Ed. 529.

American people created a National legislature, with certain enumerated powers, it was neither necessary or proper to define the powers retained by the States. Those powers proceed, not from the people of America, but from the people of the several States: and remain, after the adoption of the Constitution what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been that the mere grant of power to Congress did not imply a prohibition in the States to exercise the same power. But it has never been supposed that the concurrent power of legislation extended to every possible case in which its exercise by the States has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect is undoubtedly correct. Whenever the terms in which a power is granted to Congress, or the nature of the power requires that it should be exercised exclusively by Congress, the subject is as completely taken away from the State legislators as if they had been expressly forbidden to act on it."

The purpose of the remainder of this paper is to show what powers, either because of the terms in which they are granted to Congress, or because Constitutional prohibitions, or their nature, are exclusive or concurrent grants.

III. The Powers Considered.

A. The taxing power.

The constitutional provisions which bear upon this subject are:

Article 1, Sec. 8. Par. 1.

"The Congress shall have power to lay and collect taxes, duties and excises to pay the debts, and provide for the common defense and general welfare of the United States but all duties, general imports and excises shall be uniform throughout the United States."

There are two limitations in this clause; the revenue must be collected for a public purpose and all duties, imposts and excises must be uniform throughout the United States.

Article 1, Sec. 9. Par. 4.

"No capitation, or other direct tax shall be laid unless in proportion to the census or enumeration herein before directed to be taken.

Article 1. Sec. 9. Par. 5.

"No tax or duty shall be laid on articles exported from any state."

Article 1. Sec. 9. Par. 6.

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

Article 1. Sec. 10. Par. 2.

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

Article 1. Sec. 10. Par. 3.

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

Article V. of the Amendments provides that no one shall be deprived of "life, liberty or property without due process of law."

Article XVI granting Congress the right to lay and collect taxes on incomes without apportionment.

In examining the above constitutional provision it becomes necessary to note carefully the terms used in Article 1. Sec. 8, Par. 1.

"A tax is said to be an enforced contribution of money or other porperty assessed in accordance with some reasonable rule of apportionment by authority of a sovereign state on persons or property within its jurisdiction, for the purpose of defraying the public expenses."[6]

6 26 R. C. L. 2.

Taxes may be indirect or direct. Indirect are those which are levied on commodities before they reach the consumer, and are paid by those upon whom they ultimately fall, not as taxes, but as part of the price of the commodity. Direct taxes within the meaning of the Constitution are only capitation taxes and taxes on real estate.[7]

To the above enumeration of direct taxes was later added income taxes,[8] and these two classes, taxes so called, and "duties, imposts, and excises," apparently embrace all forms of taxation contemplated by the Constitution.

"Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circmstances has invited thorough investigation into sources of revenue."[9]

Thus the true meaning of Article 1, Sec. 8, Par. 1 would seem to be, Congress shall have power to lay and collect direct taxes and indirect taxes which consist of duties, imposts and excises, subject to limitations enumerated.

Duties in its broad sense is nearly equivalent to taxes in its restrained sense, and it is often used as equivalent to customs, or imposts.[10]

Imposts are duties on imported goods or merchandise.

An excise is a tax imposed upon the performance of an act, the engaging in an occupation, or the enjoyment of a privilege.

Every form of tax not imposed directly upon polls or property must constitute an excise if it is a valid tax of any description.[11]

As to whether the power to lay and collect the kinds of taxes mentioned are exclusive or concurrent grants one must remember that a grant may be exclusive because:

(1) The grant is made exclusive in express terms.

(2) There is a grant to the Federal Government and a prohibition on the States.

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7 Springer vs. U. S. 26 L. Ed. 253.
8 Pollock vs. Farmers Loan & Trust Co. 39 L. Ed. 759.
9 George C. Thomas vs. United States, 48 Law Ed. 481.
10 Bouvier's Law Dictionary.
11 26 R. C. L. 209.

(3) Those which are exclusive in their nature.

By Article 1, Sec. 8, Par. 1 of the Constitution, Congress shall have power "to lay and collect taxes, duties, imposts and excises."

According to Article 1, Sec. 10, Par. 2, "No State shall without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports and exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress."

There results consequently because of the constitutional prohibition an exclusive power in Congress to lay duties on imports and exports, with the particular exceptions mentioned, but this exclusive power is limited by Article 1, Sec. 9, Par. 5, prohibiting Congress from laying a tax on articles exported from any State, the result of this limimtation and Article 1. Sec. 10, Par. 3, being to limit Congress' exclusive power to tax to duties on imports and tonnage and this power to tax imports although exclusive is not unlimited, being subject to the general welfare and uniformity rule, and to limitations imposed by Article 1, Sec. 9, Par. 6.

The other taxing powers, that is power to levy taxes and excises are concurrent since there are no constitutional prohibitions on the States, the power is not exclusively granted, nor are they exclusive by their nature, and the mere grant of power to the United States does not imply a prohibition on the States to exercise the same power. As stated by Mr. Chief Justice Fuller in Pollock vs. Farmer's Loan and Trust Company, "The States not only gave to the nation the concurrent power to tax persons and property, but they surrendered their own power to levy taxes on imports and regulate commerce."

As to the extent of this concurrent power we find the Federal Government must impose direct taxes by the rule of apportionment, except income taxes, Article 1. Sec. 9, Par, 4 and indirect taxes by the rule of uniformity, Article 1. Sec. 8, Par. 1.

The taxing power of the State is limited by the Constitution. Article 1, Sec. 10, Par. 1, "No State shall pass any law impairing the obligation of contracts;" Article IV, Sec. 2, "the

citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" Article VI, Sec. 2, limitations which might be put upon its power by a treaty.

Both Federal and State governments are limited by the rule laid down in McCulloch vs. Maryland,[12] "That each government, national and state, are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers."

In the case of Dobbins vs. the Commissioners of Erie County,[13] the question was whether the Commissioners could impose a tax upon the income of Dobbins who was employed as captain of a United States revenue cutter at the Erie station in Pennsylvania. In holding the tax law unconstitutional the court described the taxing powers of the Federal government and of the States as follows: "Taxation is a sacred right, essential to the existence of government, an incident of sovereignty. The right of legislation is co-extensive with the incident to attach it upon all persons and property within the jurisdiction of the State. But in one system there are limitations upon that right. There is a concurrent right of legislation in the States, and the United States, except as both are restrained by the Constitution of the United States. Both are restrained upon this subject by express prohibitions in the Constitution; and the States by such as are necessarily implied when the exercise of the rights of a State conflicts with the perfect execution of another sovereign power delegated to the United States. This occurs when taxation by a State acts upon the instruments. emoluments and persons which the United States may use and employ as necessary and proper means to execute their sovereign powers."

B. To borrow money on the credit of the United States.

This is an exclusive power. The power had its origin in the Union and did not previously exist in the States.

C. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

In the case of Gilman vs. Philadelphia,[14] the court in considering the question of the right of the City of Philadelphia to

12 Law Ed. 579.
13 10 Law Ed. 434.
14 18 Law. Ed. 96.

construct a bridge over the navigable Schuykill river restated the fundamental principle that the States may exercise concurrent or independent power in all cases but three:

1. Where the power is lodged exclusively in the Federal Constitution.

2. Where it is given to the United States and prohibited to the States.

3. Where from the nature and subject of the power, it must necessarily be exercised by the National government exclusively.

The power here in question (power to regulate commerce) does not in our judgment fall within either of these exceptions.

If therefore, any of the powers possessed by Congress to regulate commerce are exclusive they would seem to be so, not because the grant is exclusive, nor because of constitutional prohibitions upon the States, but because of the nature and subject of the power, it must necessarily be exercised by the Federal government exclusively.

In Cooley vs. Board of Wardens of the Port of Philadelphia and[15] the court in sustaining a pilot law passed by the State of Pennsylvania used the following reasoning:

"The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising any authority over its subject matter. If they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power to the States, probably no one would deny that the grant of the power to Congress, as effectively and perfectly excluded the States from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power of taxation is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32 and with the judicial construction, given from time to time by this

15 13 Law Ed. 996.

court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, does not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States and that the States may legislate in the absence of congressional legislation.

"The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of the power like this is spoken of, when it is said that the nature of the power requires that it should be exclusively exercised by Congress, it must be intended to refer to the subject of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every part; and some like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation."

Either absolutely to affirm, or deny, that the nature of this power requires exclusive legislation by Congress is to lose sight of the nature of the subject of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan or regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. Whether or not, then, the power to regulate commerce is exclusive depends upon the nature of the subject to which, in each case, the power extends. If the nature of the subject is local, then the power is concurrent, at least until Congress has acted, while if subject is national, then the power is exclusive.

Conceding then, that in certain cases where the subject of the power is adaptable to local regulation the power to regulate is concurrent, yet to what extent can this concurrent legislation go? In Gibbon vs. Ogden, Chief Justice Marshall stated the

question to be, "Can a State regulate commerce with Foreign Nations and among the States, while Congress is regulating it?" Assuming a collision between the Federal and State law, then, says the Chief Justice, it will be immaterial whether these laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or in virtue of their power to regulate their domestic trade and police. The framers of the Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of laws made in pursuance of it. The nullity of any act inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law. From this it is seen that the concurrent power of the States "to regulate commerce with foreign nations and among the several States, and with the Indian tribes" can never be exercised in conflict with the Constitution or laws passed in pursuance thereof.

A few cases will be given tending to mark out those fields in which national uniformity, and consequently exclusive Federal control, is required, and those fields where local regulation, and consequently concurrent regulation may be exercised.

Group A: Cases Pertaining to Commerce with Foreign Nations.

In the Passenger Cases[16] the question was whether the statutes of the States of New York and Massachusetts, imposing taxes upon alien passengers arriving in the ports of those states were constitutional.

In discussing the question Justice McLean considered the case under two general heads the first of which was:

"Is the power to regulate commerce an exclusive power?" In answer to the question Justice McLean concluded that the power to regulate commerce was exclusively vested in the United States. Mr. Justice Wayne stated his opinion as follows: "The majority of us do not think it necessary in these cases to re-affirm with our brother McLean what this court has long since decided, that the constitutional power to regulate commerce with foreign nations and among the several

16 7 Wall 281.

states, and with the Indian Tribes is exclusively vested in Congress, and that no part can be exercised by a State."

The State Statutes were held unconstitutional as being an interference with Federal government's authority to regulate inter-state commerce.

The Passenger Caess were decided in 1849, while Cooley vs. Board of Wardens, previously discussed, was decided in 1851.

In case of Chy Lung vs. Freeman[17] the question of the validity of a California statute was before the court.

The statute provided that certain classes of persons should not be permitted to land until master of vessel had given a certain bond. The commissioner was given absolute power by the statute to determine what persons must have bonds provided for them and to make examination of such persons. In holding the statute unconstitutional the court said, "The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations, and the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the National government."

If it be otherwise, a single State can at her pleasure, embroil us in disastrous quarrels with other nations.

In the case of Lin Sing vs. Washburn[18] a tax of two dollars and fifty cents per month was levied upon persons of the Mongolian race with some exceptions. The court held the law to be unconstitutional since taxing Mongolians out of the State would be a direct interference with the Federal government's authority to admit them into the State.

In Railroad Commission of Louisiana vs. Texas and Pacific R. R. Co.[19] the court held that shipments of freight under local bills of lading calling for transportation from interior points in Louisiana to New Orleans, there to be delivered to the shippers or consignees order, but intended by the shippers to be exported to foreign countries, and treated accordingly by both shippers and carriers, constituted foreign commerce and was governed by Federal rates on freight on file with the Inter-

17 23 Law Ed. 551.
18 20 Cal. 534.
19 57 Law Ed. 1215.

State Commerce Commission. In discussing the cases the court held: "The principle enunciated in the cases was that it is the essential character of the commerce, not the accident of local or through bills of lading, which determines Federal or State control over it. And it takes character as inter-state or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country."

In Brown vs. Maryland[20] the court held that a state statute requiring all importers of foreign goods by the bale or package and other persons selling the same by wholesale, bale or package to take out a license for which they should pay fifty dollars was unconstitutional as conflicting with the Federal government's power to regulate commerce. In discussing the dividing line between the States' power to regulate commerce Chief Justice Marshall said, "It is sufficient for the present to say generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer in the warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

In Cooley vs. The Board of Wardens of the Port of Philadelphia, previosuly cited, the court held valid a pilot law of the State of Pennsylvania on the ground that the subject of pilots was one which did not demand a uniform rule, but rather was subject to difference rules in different localities.

That a State may regulate foreign commerce by a valid exercise of its police power is shown in the case of the State vs. The Steamship "Constitution."[21] In discussing the question as to whether or not a state could exclude paupers and other likely dependents on the State the court said: "In all the numerous adjudications which have been had in respect of the power of the several states to interfere with commerce under the clause of the Constitution above referred to, it has never been doubted that a state has the power, by proper police and sanitary regulations, to exclude from its limits paupers, vagabonds

20 11 Wheat. 419.
21 42 Cal. 578.

and criminals or sick, diseased, infirm, and disabled persons who were likely to become a public charge, or to admit them only on such terms as would prevent the State from being burdened with their support."

Group B: Cases Pertaining to Commerce Between the States.

As shown in the preceding group of cases the States may legislate concerning foreign commerce when the subject is a local one not requiring a uniform rule, or when it is a valid exercise of the States' police power. With these same exceptions in the provision in regard to inter-state commerce is exclusive.

In the case of the Southern Express Co. vs. Goldberg[22] the question was whether a State (Virginia) could fix the rates to be charged by an inter-state carrier for the carriage within the State of a shipment which is delivered to the carrier at a point in another State. In holding the law unconstitutional the court expressed its opinion as follows: "It has long been established by the Supreme Court of the United States to whose decisions we must look in determining questions of this character, that, as to all subjects of commerce which are material in their character, admitting of only one uniform system or plan of regulation, the power of Congress to regulate commerce among the States is not only supreme but exclusive, and its failure to act is not to be interpreted as licensing the States to act. The silence of Congress is held to be an emphatic assertion that the subject shall be left free from any restrictions, exactions, or burdens."

In Caldwell vs. American River Bridge Co.,[23] the question was whether the state of California could authorize the construction of a bridge over the navigable river which obstructed inter-state commerce. The court in sustaining the law said: "The general doctrine, now fully recognized, that the commercial power of Congress is exclusive of State authority only when the subjects upon which it is exerted are national in their character and admit and require uniformity of regulation affecting alike all the States, and that when the subjects within that power are local in their nature or operation or constitute mere aids to commerce, the states may provide for their regu-

22 62 L. R. A. 669.
23 28 Law Ed. 959.

lation and management, until Congress intervenes and supersedes their action."

In Hemington vs. State of Georgia,[24] the court considered the validity of a Georgia law making it a misdemeanor to run a freight train in the State on the Sabbath day. The court held the law valid and after citing authorities continued: "These authorities make it clear that the legislative enactments of the States passed under their admitted police powers and having a relation to the domestic peace, order, health, and safety of their people, but which by their necessary operation, affect, to some extent, or for a limited time the conduct of commerce among the States, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce, and if not obnoxious to some other constitutional provision or destruction of some right secured by the fundamental law, are to be respected in the courts of the Union until they are displaced by some act of Congress passed in the execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the powers which the states reserved, and never surrendered to Congress, [of providing for the public health, the public morals, and the public safety, and are not within the meaning of the Constitution and considered in their own nature, regulations of inter-state commerce, simply because for a limited time, or to a limited extent, they cover the fields occupied by those engaged in such commerce."

The control of intra-state commerce is under the tenth amendment, reserved to the States and this power is exclusively in the States with the exception named in the case of Huston, E. and W. T. Ry. Co. vs. United States;[25] that is, that the States cannot so exercise this power as to injure inter-state commerce.

Group C: Cases Pertaining to Commerce with the Indian Tribes.

Under the Articles of Confederation[26] the United States in Congress assembled was granted the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians.

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24 16 Sup. Ct. Rep. 1086.
25 234 U. S. 342.
26 Sec. IX.

In Worcester vs. State of Georgia, the court considered the power of the State of Georgia under the Constitution to impose a penalty upon one for residing within the territory of the Cherokee Indians by consent of the President of the United States, but without the consent of the Governor of Georgia, which consent was required by Georgia statute. In holding that the State of Georgia had no power to require such consent the court pointed out that the extra-territorial power of every legislature is limited in its action to its own citizens or subjects and that members of the Cherokee nation were not citizens or subjects of Georgia, that the treaties and laws of the United States contemplate the Indian Territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. Mr. Justice McLean in a concurring opinion said: "By the Constitution the regulation of commerce among the Indian Tribes is given to Congress. This power must be considered as exclusively vested in Congress, as the power to regulate commerce with foreign nations, to coin money, to establish post offices, and to declare war. It is enumerated in the same section and belongs to same class of powers."[27]

D. To Establish an Uniform Rule of Naturalization and Uniform Laws on the Subject of Bankruptcies Throughout the United States.

(a) To establish an uniform rule of Naturalization.

That the subject of the power here is one which admits of only one uniform rule was early stated in the case of Chirac vs. Chirac[28] where the court in an opinion delivered by Chief Justice Marshall expressed it in the following language: "That the power of Naturalization is exclusively in Congress does not seem to be and certainly ought not to be controverted. The States did not however, by the delegation of authority over naturalization to the Federal government, lose the right to confer State citizenship upon aliens.

In Dred Scott vs. Sandford[29] the court in the opinion delivered by Chief Justice Taney said, "We must not confound the rights of citizenship which a state may confer within its

27 Shaw Ed. 496.
28 4 Law Ed. 234.
29 15 Law Ed. 691.

own limits and the rights of citizenship as a member of the Union."

It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all the rights and privileges of the citizens of the State, and yet not be entitled to the rights and privileges of a citizen in any other State. For previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of a citizen and to endow him with all its rights. But this character of course, was confined to the boundaries of the State, and gave him no rights and privileges in other States beyond those secured to him by the laws of Nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Every State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons.

Yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor entitled to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently no State, since the adoption of the Constitution, can by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a state under the Federal Government, although, so far as the State alone was concerned he would undoubtedly be entitled to the rights and immunities which the Constitution and laws of the State attach to that character.

Under the 14th Amendment the citizens of the United States are citizens of the States in which they reside, but a citizen under States' laws is not, necessarily, a citizen of the United States.

(b.) To establish an uniform law on the subject of Bankruptcies throughout the United States.

In the case of Sturges vs. Crowninshield,[30] the court in considering the validity of a New York statute which liberated the person of the debtor and which discharged him from all liability for any debt contracted previous to his discharge, and in considering the power of New York to pass such a law, through Chief Justice Marshall said: "It is sufficient to say that until the power to pass uniform laws on the subject of Bankruptcies be exercised by Congress, the States, are not forbidden to pass a Bankrupt law, provided it contain no principle which violates the 10th Section of the 1st Article of the Constitution of the United States." The section here referred to is: "No State shall pass any law impairing the obligation of contracts."

In McMillan vs. McNeill,[31] the court held that a contract, though made subsequent to the passage of the act, yet when it was made in a different State by persons residing in that State and consequently, without any view to the law, the benefit of which was claimed by the debtor, it would not be discharged by a State bankrupt law, as that law would be unconstitutional, as impairing the obligation of a contract.

In Ogden vs. Saunders,[32] the court held, with Chief Justice Marshall, Mr. Justice Storey and Mr. Justice Duvall dissenting, that a state bankrupt law, which did not conflct with a federal law, was constitutional even though the debtor was discharged from the obligation of his contracts, if those contracts were made in the State passing the law and at a time subsequent to the passing of the law. But the court held that a discharge under such a law would be good only in the State granting the discharge and could not be plead in the Federal or other State courts.

The power of the States to pass bankrupt laws as announced by preceding cases then is:

1st. That the grant of the power to Congress is not an exclusive grant and the power may be exercised by the States, so long as Congress has not legislated on the subject.

2nd But such State law, if it attempts to discharge the debtor from obligations on contracts which were made before the passing of the law is unconstitutional, as being a violation of

30 4 Law. Ed. 549.
31 4 Law. Ed. 552.

the constitutional prohibition on the States forbidding the passing of laws which impair the obligation of contracts.

3d. As to contracts made subsequent to the law and made in the same State which has enacted the law, the law will be valid, even though the debtor is discharged from contract obligations, but the discharge cannot be plead in Federal or other State courts.

4th A State law will be unconstitutional if it impairs the obligation of contracts made subsequent to the law, but made in a State other than the State passing the bankrupt law.

E. To Coin Money, Regulate the Value Thereof, and of Foreign Coin, and Fix the Standards of Weights and Measures.

(a) To coin money, regulate the value thereof and of foreign coins.

By a constitutional prohibition on the States, Article 1, Sec. 10, Par. 1 this power is vested exclusively in the Federal Government.

(b) To fix the standards of weights and measures.

In the case of Weaver vs. Fegeley & Bro.,[32] the question was, whether a ton of coal consisted of 2000 or 2240 pounds. In holding that the question was to be determined by Pennsylvania law, the court restated the fundamental principle, "This exclusive delegation, or rather this alienation of State sovereignty, exists only in three cases:

1. When the Constitution in express terms granted exclusive authority to the Union.

2. Where it granted a nauthority to the Union and at the same time, prohibited the States from exercising the like authority.

3. Where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant."

It is not pretended that the grant of power to regulate weights and measures is exclusive in express terms, or that the States are expressly prohibited from exerciing it. The State sovereignties are therefore to be extinguished, as regards this subject, if at all, by mere implication.

[32] 6 Law Ed. 606.
[32] 29 Pa. State 27.

But that implication can only arise when the State authority is absolutely and totally contradictory, and repugnant to the power delegated to Congress. These terms necessarily imply the pre-existence of something to contradict or oppose, but there is nothing whatever either in the Constitution or the acts of Congress, which the act of the assembly in any respect contravenes or opposes. It is therefore perfectly constitutional."

F. To Provide for the Punishment of Counterfeiting the Securities and Current Coin of the United States.

In the case of Fox vs. the State of Ohio[33] the defendant was convicted under an Ohio statute providing that if any person shall counterfeit any of the coins of gold, silver, or copper currently passing in this State, or shall alter or put off counterfeit coin, knowing them to be such, etc. In sustaining the conviction and validity of the statute th ecourt pointed out the difference between counterfeiting and of passing base coin and held that the States had the authority to punish persons guilty of passing base coins on the ground that it was a cheat or misdemeanor practiced within the State and against those whom the State is bound to protect.

In the case of United States vs. Marigold[34] the validity of a Federal statute which provided:

1st. Against bringing counterfeit coin into the United States, and

2d. Provided punishment of persons who shall pass, utter, publish, or sell any such false, forged, or counterfeit coin, was in question. The court sustsained the first clause, under the commerce clause, and the second under the implied authority of Congress to protect the object of the power granted to coin money and regulate the value thereof. It would therefore seem that the power to punish for uttering counterfeit moneys is concurrent. In meeting the point made in Fox vs. the State of Ohio that the concurrent power would result in a double punishment for one and the same crime, and that this would be in violation of the 5th Article of the Constitutional Amendments the court pointed out that this amendment was an exclusive restriction on the Federal government and admitting that one might twice

[33] 12 Law. Ed. 213.
[34] 13 Law Ed. 257.

be punished for the same act, the court continued: "This would by no means justify the conclusion that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which these authorities might ordain, and affix to their perpetration."

In the case of Sexton vs. The People of the State of California,[35] the court said: "The case of counterfeiting the money of the United States is excepted by statute from the law giving exclusive jurisdiction to the United States Courts of offences against the laws of the United States."

G. To Establish Post Offices and Post Roads.

Considering the nature of the subject of this power the grant to the Federal government would seem to be exclusive, at least this would be so when the power has been exercised by Congress.

In ExParte Rapier,[36] the court in sustaining the power of Congress to exclude certain materials from the mails said: "When the power to establish Post Offices and Post roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the power which made that power effective."

In Hoover vs. McChesney,[37] in discussing the nature of the power, the court expressed its opinion that the power having been exercised by the Federal government, is exclusive of the power of the several states to establish any postal system, and has been by law made a monopoly excluding all private individuals from establishing competing postal systems in the United States.

H. To Promote the Progress of Science and the Useful Arts, by Securing for a Limited Time to Authors and Inventors the Exclusive Right to their Respective Writings and Discoveries.

In the case of Woollen vs. Banker,[38] the court was considering the validity of an Ohio statute which provided "that any note, the consideration for which shall consist in whole or in part of the right to make, use, or vend any patent invention or

35 47 Law Ed. 833.
36 Law Ed. 93.
37 81 Fed. 472.
38 Fed. Cas. No. 18030.

inventions claimed to be patented, shall have the words, given for a Patent Right, prominently and legibly written or printed on the face of such note or instrument above the signature thereof, and such note in the hands of any purchaser or holder shall be subject to the same defenses as in the hands of the original holder." In holding the law unconstitutional on the ground that it impaired the value of patent right property, created by the Constitution and laws of the United States the court said: "That the Constitution of the United States has conferred upon the Congress the power, 'To promote the progress of science and the useful arts, by securing for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries' by Section 8 Article 1 is no more certain than that such power has been exercised by the enactment of patent laws, and that no state can limit control, or even exercise the power."

The Supreme Court of Indiana in the case of Helm vs. the First National Bank[39] held that as the Federal government has continuously, from the adoption of the Constitution down to the present time, legislated upon the subject of the power, it can not conveniently be exercised by the States, it must necessarily be exercised by the National government exclusively.

I. To Constitute Tribunals Inferior to the Supreme Court.

This power did not exist prior to the adoption of the Constitution, and was consequently, never possessed by the States, before the adoption of the Constitution, and no power is granted to the States over this subject by the Constitution. The power is then exclusively in Congress.

J. To Define and Punish Piracies and Felonies Committed on the High Seas and Offences Against the Law of Nations.

The restrictions imposed on the States by the Constitution, Article 1. Sec. 10 Par. 3., "No state shall without the consent of Congress keep troops, or ships of war in times of peace" would of course nullify any power which the States might be assumed to have over this subject. But considering the nature of the power it clearly falls in that class of powers which are exclusively vested in the Federal government because there would be a

39 43 Ind. 167.

direct repugnancy or incompatibility in the exercise of it by the States.

K. To Declare War, Grant Letters of Marque and Reprisal and Make Rules Concerning Captures on Land and Water.

Due to the Constitutional limitations imposed on the States in the Constitution, Article1, Sec. 10, Par. 1 and 3, this power is exclusively in the Federal Government, it being a power which is granted to the Federal government and prohibited to the States.

L. To Raise and Support Armies but no Appropriation of Money to that Use Shall be for a Longer Term Than Two Years.

This power being granted to the Federal government, and prohibited to the States, Constitution Article 1 Sec. 10, Par. 3, is exclusively vested in the Federal government.

M. To Provide and Maintain a Navy.

This power, being prohibited to the States, Constitution, Article 1. Sec. 10, Par. 3, is an exclusive grant.

N. To Make Rules for the Government and Regulation of the Land and Naval Forces.

In the case of the United States vs. Tarbel[40] the question before the court was whether or not a State judge had authority to issue habeas corpus for the discharge of a person held under the authority of the United States by a United States Marshal, the person held being an enlisted soldier. In holding the State judge had no such authority the court said: "Now among the powers assigned to the Federal government is the power 'to provide for the government and regulation of the land and naval forces.' The execution of these powers falls within the lines of its duties: and its control over the subject is plenary and exclusive."

The exercise of this power by the States would plainly be repugnant to and incompatible with the exercise of the same power by the Federal Government.

40 20 Law. Ed. 597.

In Kurtz vs.. Moffit[41] the court in holding that a police officer of a state or a private citizen had no authority to arrest and detain a deserter from the United States Army without a warrant said: "In the United States, the line between civil and military jurisdiction has always been maintained. The 5th Article of the Amendments to the Constitution, which declares that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, 'expressly excepts cases arising in the land and naval forces,' and leaves such cases subject to the rule for the government and regulation of those forces which by the 8th section of the 1st Article of the Constitution, Congress is empowered to make. Court martials form no part of the judicial system of the United States, and their proceedings, within the limit of their jurisdiction, cannot be controlled or revised by the civil courts."

O. To Provide for Calling Forth the Militia. To Execute the Laws of the Union, Suppress Insurrection, and Repel Invasions.

In Huston vs. Moore[41] the question was whether a state court martial had jurisdiction to try a militiaman, who had disobeyed the call of the President, and to enforce the laws of Congress against such delinquents.

The court held that unless Congress enact another rule a militiaman when called by the President is not actually in the service of the United States until he reaches the place of rendezvous and sustained the right of the State court martial to enforce the penalties enacted by Congress. In concluding its opinion, after a detailed review of United States statutes, the court said: "At all events, this is not one of those clear cases of repugnancy to the Constitution of the United States where I should feel myself at liberty to declare the law to be unconstitutional."

If the militia have actually entered the service of the United States, the Federal government's power is then exclusive. As to State militia, the State having full power over its armed forces prior to the formation of the Constitution, that power

[41] 5 Law Ed. 19.

continues in all respects, excepting the limitations imposed on it by the Constitution which are enumerated in the next following division.

P. To Provide for Organizing, Arming and Disciplining the Militia, and for Governing such Part of Them as may be Employed in the Service of the United States Reserving to the States Respectively the Appointment of Officers and the Authority of Training the Militia According to the Discipline Described by Congress.

In Huston vs. Moore[41] it was pointed out that so long as the State's militia are acting under the military jurisdiction of the States to which they belong, the powers of legislation over them are concurrent in the Federal and State governments, Congress having power to provide for organizing, arming and disciplining them, and this power being unlimited, except in the two particulars of officering and training them according to the discipline to be prescribed by Congress.

If Congress should fail to exercise its power the States would then be competent to provide for organizing, arming and disciplining their respective militia, in such manner as they might think proper. (Huston vs. Moore, Supra).

Q. To Exercise Legislation in all Cases Whatsoever, over such District (not exceeding ten miles square) as may, by Cession, Become the Seat of the Government of the United States, tnd 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 Erections of Forts, Magazines, Arsenals, Dock Yards and Other Needful Buildings.

The power here granted belongs to that class which by the terms of the grant is exclusively vested in the Federal Government.

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41 5 Law Ed. 19.
42 Supra.

R. 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.

Concerning this clause Chief Justice Marshall in McCulloch vs. The State of Maryland[43] definitely fixed its status as a granting clause, basing his decision on the following reasons:

1. The clause is placed among the powers of Congress, not among the limitations on those powers. .

2. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted.

"The result (continued the Chief Justice) of the most careful and attentive consideration bestowed upon this clause is that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested a sufficient one is found in the desire to remove all doubts respecting the right to legislate on the vast mass of incidental powers which must be involved in the Constitution if that instrument be not a splendid bauble."

Since, then it is a granting clause the powers granted must previous to the Constitution have been vested in the States. The grant by its terms is not exclusive, neither is there any consitutional limitation placed on the States pertaining to the exercise of this power. Then suppose a State enact a law, could it on any ground be held unconstitutional as conflicting with this clause? It would indeed be difficult to conceive of a case where a State law would be held invalid, as repugnant and incompatible to this grant.

The true solution of the question would seem to be that by this clause, the members of the Constitutional Convention hope to escape the evils resulting from the expressly delegated theory as maintained in Article 2 of the Articles of Confederation,[44] and that the clause under consideration cannot be regarded as limiting the powers of the States further than they

[43] 4 Law. Ed. 579.

would have been limited by a broad construction of the delegated powers, and that the States, granting that they still have the right to exercise the power, may still use all the means necessary for efficiently carrying it into execution.

S. The Judicial Power of the United States shall be Vested in one Supreme Court, and such Inferior Courts as Congress May from Time to Time Ordain and Establish.

The power to establish inferior courts of the Federal Government not having existed prior to the Constitution, is exclusively vested in Congress. An attempt to exercise this power by a State would clearly be repugnant to the Constitution.

T. 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.

The power to declare the punishment of treason is exclusively in Congress, but in those cases ,in which this exclusive right of legislation exists, it rests with Congress to determine whether the general government shall exercise the power to punish exclusively or to give to the States a concurrent power. Huston vs. Moore.[44]

From the nature of the power, an exercise of it by a state would be repugnant to and incompatible with the exercise of the same power by Congress.

U. New States May be Admitted by the Congress into the Union.

This power not having existed in the States, prior to the Constitution, is exclusively in the Federal government.

V. The Congress Shall have Power to Dispose of and to Make all Needful Rules and Regulations Respecting the Territory or Other Property Belonging to the United States: and Nothing in this Constitution Shall be Construed as to Prejudice any Claims of the United States or of any Particular State.

Any attempt by any State to exercise this power would clearly be unconstitutional as repugnant to the Constitution.

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[44] Supra.

In Murphy vs. Ramsey[45] it was said: "The people of the United States, as sovereign owners of the National territories, have supreme power over them and their inhabitants. In the exercise of this soverign dominion they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself."

W. The Powers Granted in the 19th and Civil War Amendments, being Rather Limitations on the Powers of the States than Affirmative Grants to Congress will not be Discussed.

X. 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.

This is a concurrent power as was shown when the taxing power was treated.

Y. After One Year from the Ratification of This Article, the Manufacture, Sale, or Transportation of Intoxicating Liquors Within, the Importation Thereof into, or the Exportation Thereof from, the United States, and all Territories Subject to the Jurisdiction Thereof, for Beverage Purposes, is Hereby Prohibited.

The Congress and the Several States Shall Have Concurrent Power to Enforce This Article by Appropriate Legislation.

This grant is expressly made concurrent. In discussing the meaning of the word "concurrent," the court said in Huston vs. Moore,[46] "Why may not the same offence be punishable both under the laws of the States and of the United States? Every citizen of a State owes a double allegiance. He enjoys the protection and participates in the government of both the State and the United States. The actual exercise of the concurrent right of punishing is familiar in every day practice. The laws of the United States have made many offences punishable in their

[45] 114 U. S. 44.
[46] Supra.

courts, which were and still continue punishable under the laws of the States; witness the case of counterfeiting the current coin of the United States in which the States' right of punishing is expressly recognized, witness also the crime of robbing the mail on the highway, which is unquestionably cognizable as highway robbery under the State laws although made punishable under those of the United States.

In ex parte Crookshank[47] the court, in considering the validity of a prohibition law enacted by the City of Bakersfield in the State of California, held: "It would never be competent for any State, in a matter respecting the use of liquor, to enlarge upon rights limited by Congressional action. It might legislate more rigorously than Congress, in furtherance of more complete prohibition, but in view of the supremacy of Congress in the field, it could not legislate more liberally. Nor would the fact that different, particularly more drastic, penalties are prescribed by the inferior sovereignty, necessarily result in their invalidity.

In the United States vs. Lanza[48] the question was whether the defendant who had committed an act prohibited by the National Prohibition Act and also by a State Prohibition Act could be punished both by the Federal government and the State for committing one act. In holding defendant subject to State and Federal punishment the United States Supreme Court held: "We have two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government, in determining what shall be an offence against its peace and dignity, is exercising its own sovereignty, not that of the other."

"It follows that an act denounced as a crime by both the National and State sovereignties is an offense against the peace and dignity of both, and may be punished by each. The 5th amendment applies only to proceedings by the Federal government, and the double jeopardy therein forbidden is a second prosecution under the authority of the Federal government after

47 269 Fed. 980.
48 67 Law. Ed. 314.

a first trial for the same offense under the same authority. Here the same act was an offense against the State of Washington because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendant thus committed two different offenses, by the same act, and a conviction by the court of Washington of the offense against that State is not a conviction of the different offense against the United States, and so is not double jeopardy."