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TABLE OF CASES.

In the Supreme Court of the United States

October Term, 1919.

THE STATE OF MISSOURI, *Appellant,*

vs.

RAY P. HOLLAND, United States Game Warden.

No. 609.

BRIEF OF RICHARD J. HOPKINS, ATTORNEY GENERAL, AND SAMUEL W. MOORE, AMICI CURIAE, AND IN BEHALF OF THE STATE OF KANSAS.

STATEMENT.

Counsel for the State of Kansas, by permission of the court, file this brief in support of the appeal taken by the State of Missouri from the decree of the District Court dismissing its bill brought to restrain the federal game warden from enforcing the Migratory Bird Treaty Act of July 3, 1918, and the regulations of the Secretary of Agriculture made thereunder.

The State of Kansas is interested in the result of this litigation in like manner and to the same extent as the State of Missouri. It has now pending in the United States District Court for the District of Kansas its bill in equity similar to the bill brought by its sister state, the general purpose of which is to establish the right, which it has always enjoyed, to control and regulate the taking of migratory game birds within its borders.

The legislature of Kansas has declared in express terms that the wild game within its borders is the property of the state, saying:

> The ownership of and title to all wild animals, birds and fishes, both resident and migratory, in the state, not held by private ownership legally acquired, shall be and are hereby declared to be in the state. (Sec. 4932, Ch. 44, General Statutes of Kansas, 1915.)

The legislature has also undertaken to control and regulate the taking of wild game and has created an open season for wild geese, wild brant and wild ducks, from September 1st to April 15th of each year (Sec. 4936, Ch. 44, General Statutes of Kansas, 1915).

The number of birds that may be taken in any one day is prescribed in Section 4936.

The legislature of Missouri has also declared in express terms that the ownership and title to all birds, fish and game is in the state, saying:

> The ownership and title to all birds, fish and game, whether resident, migratory or imported, in the State of Missouri, not now held by private ownership legally acquired, is hereby declared to be in the State. (Sec. 6508, Rev. Stat. Mo. 1909.)

The legislature has also undertaken in subsequent sections to control and regulate the hunting of wild game and has created an open season (Sec. 6516) from January 1st to April 30th, and from September 15th to December 31st of each year.

It is apparent, therefore, that there is a sharp conflict between the statutes of the States of Kansas and Missouri on the one hand and the regulations of the Secretary of Agriculture on the other hand. The state statutes permit spring shooting; the regulations entirely forbid it. The regulations permit the taking of twenty-five wild ducks in any one day during the open season which it prescribes. By the laws of Missouri, the limit is fifteen in any one day. In Kansas the limit is twenty in one day.

It is apparently assumed by the lower court, in its opinion, that the wild ducks and geese which cross the states of Missouri and Kansas during their migrations, have their breeding places in Canada, and this assumption is made use of in support of the treaty between the United States and Great Britain. We desire to point out, however, that the most reliable information upon the subject indicates that their breeding places are within the United States, and that in their migrations they do not pass beyond its boundaries into Canada. The United States Department of Agriculture in 1906 published Bulletin No. 26 of the Biological Survey, entitled "Distribution and Migration of North American Ducks, Geese and Swans." The bulletin was transmitted to the Secretary of Agriculture for the purpose of "furnishing information as to present range, abundance and migration of the several species (of ducks, geese and swans) with reference to practical legislation." Copies of this publication are lodged with the clerk. At page 10 appears a statement

to the effect that the species of duck and geese with which the laws of Missouri and Kansas are concerned have their breeding places in the United States, as follows:

> The problem of the legal protection of ducks, geese and swans has two phases—protection during the breeding season and protection during migration and in winter. The first phase concerns 24 species of ducks breeding in the United States, while 46 species come under the head of winter residents of the United States. It happens, however, that from the economic point of view, the 24 species of ducks and geese that breed in the United States comprise the most important North American species; among this number, also, are all the species that at the present time need protection while breeding. Of the 24 species, five are numerically unimportant and are confined to the southern portions of the United States and southward, so that they are of little importance for the market and as objects of sport. These five are the Florida duck, mottled duck, masked duck, black-bellied tree-duck and fulvous tree-duck.
>
> The other 19 species *that breed regularly and commonly in the United States* are as follows:
>
> American merganser, *Merganser americanus.*
> Hooded merganser, *Lophodytes cucullatus.*
> Mallard, *Anas Boschas.*
> Black duck, *Anas obscura.*
> Gadwall, *Chaulelasmus streperus.*
> Baldpate, *Mareca americana.*
> Green-winged teal, *Nettion carolinense.*
> Blue-winged teal, *Querquedula discors.*
> Cinnamon teal, *Querquedula cyanoptera.*
> Shoveler, *Spatula clypeata.*
> Pintail, *Dafila acuta.*
> Wood duck, *Aix sponsa.*
> Redhead, *Aythya americana.*
> Canvasback, *Aythya vallisneria.*
> Lesser scaup, *Aythya affinis.*

Ring-neck duck, *Aythya collaris.*
Ruddy neck, *Erismatura jamaicensis.*
Canada goose, *Branta canadensis.*
White-cheeked goose, *Branta canadensis occidentalis.*

A glance shows that this list comprises the species that in later years have decreased most in numbers, and hence that most need protection.

It thus appears upon the authority of the Department of Agriculture that the wild duck and geese with which we are concerned in this hearing, while migratory in their habits, limit their migrations to the United States and have neither breeding places nor feeding grounds in Canada. It should be noted that while in the treaty it is recited that "many species of birds, in the course of their annual migrations, traverse certain parts of the United States and the Dominion of Canada," yet it is nowhere stated, either in the treaty or in the act that the species of ducks and geese with which we are concerned, pass into or out of Canada during their migrations.

Attention is called to the fact that the Migratory Bird Treaty Act is broader in its scope than the treaty itself. Paragraph 2 of the treaty provides:

> The closed season on migratory game birds shall be between March 10th and September 1st.

Then follows an *executory agreement* of the contracting parties for further legislation, as follows:

> The season for hunting shall be further restricted to such period not exceeding three and one-half months as the High Contracting Powers may severally deem appropriate and define by law or regulation.
>
> The High Contracting Powers agree themselves to take, or propose to their respective appropriate law-

making bodies, the necessary measures for insuring the execution of the present convention.

The regulations made by the Secretary of Agriculture prohibit the hunting of migratory birds in Kansas and Missouri except from September 16th to December 31st. If the treaty be given the effect of a law, it prohibits spring shooting *only after March 10th.* A closed season between January 1st and March 10th is created by the regulations of the Secretary of Agriculture, but *not* by the treaty itself.

The bill of complaint is based upon the alleged invalidity of the Migratory Bird Treaty Act of March 3, 1918, and regulations of the Secretary of Agriculture made thereunder. No question is made in the bill of the validity or invalidity of the Migratory Bird Treaty between this country and Great Britain, although that question is made the controlling one in the opinion of the lower court. It was there held in substance that an act of Congress standing by itself and without the aid of a prior treaty is unconstitutional and void in so far as it undertakes to control or regulate the hunting of wild game within a state, for the reason that the subject matter pertains to the police power of the state and is within the latter's exclusive control. But the court also held that where an act of Congress is preceded by a treaty with Great Britain undertaking to regulate the subject of migratory birds, the domain of national legislative power is broadened by the treaty so that it may operate upon and control matters of police within a state, and supersede the state's control thereof.

It is our contention that the legislative power of Congress is limited and defined by the Constitution and that it can neither be narrowed nor broadened by any treaty,

regardless of what may be its subject matter, and that an act of Congress which is powerless to invade the police power of the state is equally powerless to do so after a treaty has been made with a foreign country touching the same subject matter. A discussion of this exceedingly important question involves a consideration of various provisions of the Constitution of the United States, as follows:

> All legislative powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of Representatives. Sec. 1, Art. I.
>
> No state shall enter into any treaty, alliance or confederation. Article I, Section 10, Clause 1.
>
> No state shall, without the consent of Congress, enter into any agreement or compact with any state, or with a foreign power. Article I, Section 10, Clause 2.
>
> 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. Article II, Section 2, Clause 2.
>
> This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding. Article VI, Clause 2.
>
> 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. (Tenth Amendment.)

Do these constitutional provisions, or any of them, invest the national Government with power and authority,

to be exercised by Congress or by the President and Senate in the form of a treaty, to regulate the open and closed hunting seasons of game birds in the states of Missouri and Kansas? Can the police power of the states of Missouri and Kansas be thus controlled by the Federal Government? Can the legislative power of the national Government conferred upon it by the Constitution be added to or broadened by the execution of a treaty with a foreign nation, so as to give to it the right to control the police power of the state, which without the treaty it confessedly could not do? What is the effect of the Tenth Amendment to the Constitution of the United States reserving to each state the exercise of its police power?

BRIEF.

I.

Every state possesses the absolute right to deal as it may see fit with property held by it, either as proprietor or in its sovereign capacity as a representative of the people, and this right is paramount to the exercise by the national Government of its legislative or treaty-making power.

Missouri and Kansas, as above stated, have each declared through its legislature in the most emphatic manner, that the wild game within its borders is its own property to deal with as it may see fit, for the common benefit of its citizens.

The Supreme Court of Missouri (*State* v. *Heger,* 194 Mo. 707) has held that the absolute ownership of wild game is vested in the people of the State, and that the exclusive right to prescribe open and closed seasons is vested in the State legislature, as appears from the first syllabus:

> The absolute ownership of wild game is vested in the people of the state, and the legislature, as the representative of the people, may grant to individuals the right to hunt and kill game at such times and upon such terms and under such restrictions, as it may see proper, or prohibit it altogether, as the legislature may deem best. The regulation of such a matter falls within the police power of the state.

The Supreme Court of Kansas reached the same conclusion in *State* v. *McCullough,* 158 Pac. 557, where it is said:

> Congress has no power to prescribe regulations for the protection of migratory game birds while within the boundaries of a state.

The many cases cited in the brief of the State of Missouri are unanimous in upholding the right of a state to regulate the hunting and taking of game birds within its borders for the common benefit of the people of the state. It is a proper exercise of the power legitimately belonging to each state.

This court in *Geer* v. *State,* 161 U. S. 519, said:

> The right to preserve game flows from the undoubted existence in the state of a *police power* to that end.

In *People* v. *Hesterberg,* 211 U. S. 31, a statute of the state of New York was upheld making it a penal offense to have possession of game out of season. The court said:

> In the case of *Geer* v. *Connecticut,* 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. Rep. 600, the plaintiff in error was convicted for having in his possession game birds killed within the state, with the intent to procure transportation of the same beyond the state limits. It was contended that this statute was a direct attempt by the state to regulate commerce between the states. *It was held that the game of the state was peculiarly subject to the power of the state, which might control its ownership for the common benefit of the people,* and that it was within the power of the state to prohibit the transportation of game killed within its limits beyond the state, such authority being embraced in the right of the state to confine the use of such game to the people of the state. After a discussion of the peculiar nature of such property, and the power of the state over it, Mr. Justice White, who delivered the opinion of the court in that case, said:

"Aside from the authority of the state, derived from the common ownership of game and the trust for the benefit of its people which the state exercises in relation thereto, there is another view of the power of the state in regard to the property in game, which is equally conclusive. *The right to preserve game flows from the undoubted existence in the state of a police power to that end,* which may be none the less efficiently called into play because by doing so interstate commerce may be remotely and indirectly affected. *Kidd* v. *Pearson,* 128 U. S. 1, 32 L. Ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Hall* v. *De Cuir,* 95 U. S. 485, 24 L. Ed. 547; *Sherlock* v. *Alling,* 93 U. S. 99, 103, 23 L. Ed. 819, 820; *Gibbons* v. *Ogden,* 9 Wheat. 1, 6 L. Ed. 23. Indeed, the source of the police power as to game birds (like those covered by the statute here called in question) *flows from the duty of the state to preserve for its people a valuable food supply. Phelps* v. *Racey,* 60 N. Y., 19 Am. Rep. 140; *Exparte Maier and Magner* v. *People, ubi supra,* and the cases there cited. The exercise by the state of such power therefore comes directly within the principle of *Plumley* v. *Massachusetts,* 155 U. S. 461, 473, 39 L. Ed. 223, 227, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154. The power of a state to protect, by adequate police regulation, its people against the adulteration of articles of food (which was, in that case, maintained), although, in doing so, commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply *which belongs in common to all the people of the state,* which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the state, and subject to the conditions which it may deem best to impose for the public good."

It is held by the lower court in this case that the right to regulate the taking and hunting of game birds is a part of the police power of the state, and so beyond the control of

the Federal government *in the absence of a treaty.* It is said (Rec. 8):

> Primarily, the state, both as trustee for the rights of all its people and in the exercise of its police power, has control over the right to reduce animals *ferae naturae* to possession.
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> *Manchester* v. *Mass.,* 139 U. S. 240.
> The Abby Dodge, 223 U. S. 166-174.
> *Geer* v. *Conn.,* 161 U. S. 519-522-528.
> *Ward* v. *Race Horse,* 163 U. S. 504.
> *Patsone* v. *Penn.,* 232 U. S. 138.
> *United States* v. *McCullagh,* 221 Fed. 288.
> *United States* v. *Shauver,* 214 Fed. 154.
> *Silz* v. *Hesterberg,* 211 U. S. 31.
> *Kennedy* v. *Becker,* 241 U. S. 556.
> *State* v. *Rodman,* 56 Minn. 393.
> *Smith* v. *Maryland,* 18 How. 71-75.
> *Lawton* v. *Steele,* 152 U. S. 133.
> *Carey* v. *South Dakota,* 250 U. S. 118.
>
> And in the absence of treaty there appears to have been no delegation of paramount authority to the Federal Government. Under the foregoing authorities, therefore, as well as on principle, this Act, in the absence of treaty, would be unconstitutional as exceeding the legitimate powers of Congress; and so it has been in cases substantially identical.
>
> *United States* v. *Shauver,* 214 Fed. 154.
> *United States* v. *McCullagh,* 221 Fed. 288.

It is said by the lower court, in substance, that Congress in the exercise of all the powers delegated to it by the Constitution cannot lawfully prescribe the open and closed seasons for the hunting of game birds in Missouri and Kansas, but that when a treaty has been made, its legislative powers are broadened and given an added potency and vigor so that they may be exercised upon subjects otherwise within the exclusive police power

of those states. A treaty, it is said, possesses the extraordinary power of breathing the breath of life into an act of Congress which otherwise would be unconstitutional and void.

We respectfully submit that these conclusions involve a misconception and misconstruction of the provisions of the Constitution; that the treaty-making power is limited in its operation and must act in subordination to other provisions of the Constitution, including the Tenth Amendment; that it may not invade or control the police power reserved to the several states; that the control and regulation by a state of the wild life within its borders is not a proper subject of the treaty-making power, but on the contrary is a part of the police power of the state; that the legislative power of Congress cannot be increased by the mere making of a treaty with a foreign nation; that a treaty, in order to be "the supreme law of the land" must be made "under the authority of the United States," which means that it must be made in the exercise of the powers delegated to the United States by the Constitution.

(a) The constitutional limtation prohibiting a state without the consent of Congress from entering into any agreement or compact with any state or with a foreign power, prohibits "the formation of any combination tending to the increase of political power in the states which may encroach upon or interfere with the just supremacy of the United States." It has no application to agreements or compacts which a state may make in the control and regulation of its own property or property rights.

Our contention is that a state in the exercise of its police power possesses the exclusive power to regulate the

hunting and taking of game birds within its borders, and to make contracts with other states or foreign powers, if necessary for that purpose, and that this right has never been delegated to the Federal Government; that it is not included within the subject-matter of the constitutional limitation prohibiting a state from making a compact or agreement with another state or with a foreign power without the consent of Congress; that it is not embraced within the constitutional limitation forbidding any state to enter into any treaty, alliance or confederation, and that it is not a proper subject of a treaty which, under the Constitution, the President may make with the advice and consent of the Senate.

First, as to constitutional provision:

> No state shall, without the consent of Congress, enter into any agreement or compact with any state or with a foreign power.

Does this constitutional limitation prohibit a state from entering into an agreement or compact with another state or with a foreign power, concerning the regulation and control of migratory game birds? If so, then it may be plausibly argued that the framers of the Constitution intended to take from the individual states their power over this subject-matter and transfer to the national Government. If not, then it may be argued with great force that the framers of the Constitution intended that each state should retain its police power in this respect and should be permitted to exercise it free from any Federal restraint imposed.

We are able to say, upon the authority of this court, that the purpose of the constitutional limitation above re-

ferred to was not to interfere with the right of each individual state to control and regulate its own property, whether held by it as a proprietor or in trust for the common benefit of the people of the state. Its purpose was to preserve the just and proper relation of each state to every other state as well as to the national Government. No state should be permitted by agreement or compact with a foreign power, to secure to itself any political or material advantage not shared by the other states, nor should any state be permitted to increase its political power over that of some other state, nor should it be permitted to encroach upon or interfere with the just supremacy of the United States. The consent of the United States is required only for the purpose of enabling it to preserve its own supremacy and to prevent any encroachment upon it by the states, as well as to prevent the political or commercial aggrandizement of one state at the expense of another, by refusing its consent where such appears to be the purpose or effect of any agreement or compact made by one state with another or with a foreign power. The country's unhappy experience under the Articles of Confederation had taught it the stern necessity of this provision.

There was no thought in the minds of the framers of the Constitution of prohibiting agreements or compacts between states or with a foreign power or requiring the assent of Congress thereto, when the subject matter could in no respect concern the United States, such as compacts or agreements concerning the administration of a state's own property. Indeed, it has been ruled by this court that this constitutional inhibition does not prevent states, among other things, from making agreements between themselves, without securing the consent of Congress, with

respect to their boundaries, to the management of their own property, with respect to the prevention of disease, and for the mutual comfort and convenience of states bordering on each other. Doubtless the same rule would apply with respect to compacts and agreements between states and a foreign power. The purpose of this constitutional provision and its limitations are clearly set forth in *Stearns* v. *Minnesota,* 179 U. S. 223, 21 Sup. Ct. Rep. 73, where the court says:

> Section 10 of Article I of the Constitution provides that "no state shall, without the consent of Congress, * * * enter into any agreement or compact with another state." It was early ruled that these negative words carried with them no denial of the power of two states to enter into a compact or agreement, with one another, but only placed a condition upon the exercise of such power. Thus in *Green* v. *Biddle,* 8 Wheat. 1, 5 L. Ed. 547, a compact between Virginia and Kentucky was sustained, and it was held no valid objection to it that within certain restrictions it limited the legislative power of the state of Kentucky. In *Poole* v. *Fleeger,* 11 Pet. 185, 9 L. Ed. 680, 955, an agreement between Kentucky and Tennessee as to boundary was upheld, Mr. Justice Story, speaking for the court, saying (p. 209, L. Ed., p. 690):
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> "It cannot be doubted that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the states of this Union, unless it has been surrendered under the Constitution of the United States. So far

from there being any pretense of such a general surrender of the right, that it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress. The Constitution declares that no state shall, without the consent of Congress, enter into any agreement or compact with another state, thus plainly admitting that with such consent it might be done, and in the present instance that consent has been expressly given. The compact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both states."

The same doctrine was announced in *Virginia* v. *Tennessee,* 148 U. S. 503, 37 L. Ed. 531, 13 Sup. Ct. Rep. 728, and in the opinion in that case it was intimated that *there were many matters in respect to which the different states might agree without the formal consent of Congress.* In this case the difference between the agreement which states might enter into between one another and those from which they were debarred without the consent of Congress was noticed, and it was said (p. 518, L. Ed., p. 542 13 Sup. Ct. Rep., p. 734):

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

cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering states to agree to unite in draining the district, and thus remove the cause of disease. So in case of threatened invasion of cholera, plague or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?

"Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of *any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.* Story, in his Commentaries (Sec. 1403), referring to a previous part of the same section of the Constitution in which the cause in question appears, observes that its language "may be more plausibly interpreted from the terms used, 'treaty, alliance or confederation,' and upon the ground that the sense of each is best known by its association (*noscitur a sociis*) to apply to *treaties of a political character;* such as *treaties of alliance for purposes of peace and war;* and *treaties of confederation, in which the parties are leagued for mutual government, political co-operation and the exercise of political sovereignty,* and *treaties of cession of sovereignty,* or *conferring internal political jurisdiction,* or *external political dependence,* or *general commercial privileges';* and that 'the latter clause, "compacts and agreements," might then very properly apply to such as regarded

> what might be deemed mere *private rights of sovereignty;* such as questions of *boundary,* interests in *land* situate in the territory of each other, and other *internal regulations for the mutual comfort and convenience of states bordering on each other.*" And he adds: "In such cases the consent of Congress may be properly required, *in order to check any infringement of the rights of the national government;* and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief."

The constitutional provision in question was never designed to prevent arrangements between the states in the exercise of their *private rights of sovereignty,* to facilitate the free intercourse of their citizens or to remove barriers to their peace and prosperity. For this purpose the consent of Congress is not necessary. The states have full authority, *without congressional sanction,* to make agreements among themselves regulating the rights of *fishing* in the waters adjacent to both. This is decided in *Wharton* v. *Wise,* 153 U. S. 155 (s. c. 38 L. Ed. 669). There a compact had been entered into in 1785 between Maryland and Virginia, duly ratified by the legislature of each state, which, among other things, governed the right of fishing in certain rivers between the two states, the seventh and eighth clauses being as follows:

> The seventh clause provided that "the citizens of each state, respectively, shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; *but the right of fishing in the river shall be common to and equally enjoyed by the citizens of both states; provided, that such common*

> *right be not exercised by the citizens of the one state to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other."*
>
> The eighth clause provided that "all laws and regulations which may be necessary for the *preservation of fish,* or for the performance of quarantine in the river Potowmack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out ballast or giving any other obstruction thereto, shall be made *with the mutual consent and approbation of both states."*

It was held by the court that the compact was one which it was lawful for the states to make under the Articles of Confederation, the court quoting and relying upon the reasoning of *Virginia* v. *Tennessee,* 148 U. S. 503. The court said:

> The validity of the compact of 1785 has been questioned as in conflict with the second clause of the sixth article of the Confederation, which provided that no two or more states should enter into any treaty, confederation or alliance whatever between them without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same was to be entered into, and how long it should continue; and also as having been superseded by the Constitution of the United States subsequently adopted. A few words upon each of these positions. The articles inhibiting any treaty, confederation or alliance between the states without the consent of Congress *were intended to prevent any union of two or more states, having a tendency to break up or weaken the league between the whole; they were not designed to prevent arrangements between adjoining states to facilitate the free intercourse of their citizens, or remove barriers to their*

peace and prosperity; and whatever their effect, such arrangements could not be subject of complaint by the states making them until, at least, the Congress of the Confederation interposed objections to their adoption or enforcement, which was never done.

In determining the effect of the prohibition of the clause in the sixth article of the Confederation upon the validity of the compact, the observations of this court, in the recent decision of the controversy between Virginia and Tennessee, upon the meaning of the clause of the Constitution of the United States which is similar, in one particular, with that in the Articles of Confederation, and broader in another, may be properly considered. The article of the Confederation inhibits "any treaty, confederation or alliance" between two or more states without the consent of Congress. The Constitution of the United States prohibits, without such consent, any "agreement or compact" of one state with another. In the case mentioned there was an agreement between the states of Virginia and Tennessee to appoint commissioners to run and mark the boundary between them, made without the consent of Congress, and the question considered was whether the agreement was within the prohibition of the clause cited from the Constitution of the United States, and we said:

(Quotation from *Virginia* v. *Tennessee, supra.*)

So, in the present case, looking at the object evidently intended by the prohibition of the Articles of Confederation, *we are clear they were not directed against agreements of the character expressed by the compact under consideration. Its execution could in no respect encroach upon or weaken the general authority of Congress under those articles.*

In the light of these decisions, it is clear that the states were left entirely free to manage and administer their own

properties and property interests. There was no intention to place any restraint whatsoever upon their action in that respect. They were free to contract with other states or with a foreign power. The consent of Congress was not required.

The states of Missouri and Kansas have each made regulations for the hunting and taking of migratory birds, which in its judgment are best calculated to protect the interests of its citizens. No further regulations appear to them as necessary or desirable. If, however, in the future, some agreement with Canada or a neighboring state should become necessary for their mutual benefit or protection, they possess ample power to make such compacts or agreements as may be mutually advantageous. Such mutual arrangements would not affect the just and proper relation of the states to each other nor would it encroach upon the sovereignty of the United States. There would be no necessity for securing the consent of Congress.

The outstanding feature of this branch of the case, however, is that in adopting the Constitution the people reserved to themselves the power of business administration, regulation and control of the properties of the several states, whether owned by them as proprietors or held in trust for the benefit of the people. This reservation is at once manifest from the fact that the power just referred to is excluded from the powers delegated to the federal government to prohibit altogether compacts and agreements between states or with foreign powers, or to prohibit all such compacts and agreements as did not receive the express assent of Congress. *A fortiori,* this reserved power did not pass to the general government so as to constitute a proper subject-matter of a treaty with a foreign nation.

(b) The treaty-making power conferred upon the President and Senate does not include the right to regulate and control the property and property rights of an individual state held by it in its quasi-sovereign capacity.

It is clearly established, we respectfully submit, that the constitutional limitation forbidding a state, without the consent of Congress, from entering into any agreement or compact with any state or with a foreign power, does not prevent a state from entering into such contracts concerning the control and administration of its property either held in fee or in trust for its people. This rule applies to its absolute ownership of fixed property, such as the capitol building and grounds, state university and other institutions, and it likewise applies with equal force to its qualified ownership in the wild life within the state.

It remains to consider, therefore, whether the constitutional power conferred upon the President to make treaties by and with the advice and consent of the Senate includes the power to control and regulate the property or property rights of an individual state. In other words, is the property right which an individual state possesses in the wild life within its borders a proper subject-matter of a treaty between the United States and a foreign country? We feel this question should be answered in the negative, and proceed to state our reasons.

It is certain that treaties made by the national government are necessarily and essentially different from the "agreements or compacts" which a state may make with another state or with a foreign power, with or without the consent of Congress, as the case may be.

This must be so, because the framers of the Constitution have themselves made the distinction when they provided in one clause of Section 10 of Article I "that no state shall

enter into any treaty, alliance, or confederation," and in another clause of the same section have provided that "no state, without the consent of Congress, shall enter into any agreement or compact with any state or with a foreign power," and then in another section have conferred upon the President the power, with the concurrence of the Senate, to make "treaties." It is impossible to suppose that there is not a clear line of demarkation between an "agreement or compact" on the one hand and a "treaty" on the other. In this greatest document of all history every sentence and every word was used with great accuracy and after the most momentous deliberation. No part of it may be ignored.

It is certain that the expression "any agreement or compact" deals with contracts which a state may desire to make in its own interest. It is the state as a unit, and not the nation, whose rights are sought to be protected.

But a treaty made by the national government with a foreign nation, in the exercise of its treaty-making power, must be something more than a "compact or agreement" affecting an individual state in its relation to another state or to a foreign country. A treaty is a contract involving an exertion of national authority within the enumerated powers of the Constitution, in which the relation of the federal government, as a unit, to some foreign nation is the subject-matter. A treaty involves international relations of a political character, an alliance for purposes of peace or war, a confederation of nations in which the parties are leagued for mutual government, political cooperation and the exercise of political sovereignty. It may involve a cession of sovereignty, the conferring of internal political jurisdiction or external political dependence or general commercial privileges. This is the view taken by

Judge Story in his Commentaries, Sec. 1403, quoted with approval by this Court in *Stearns* v. *Minn.*, 179 U. S. 223; *Wharton* v. *Wise,* 153 U. S. 155, and *Virginia* v. *Tennessee,* 148 U. S. 503. The author says that the treaty-making power of the national government concerns:

> Treaties of a political character; such as treaties of alliance for purposes of peace and war, and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty, and treaties of cessation of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges.

These observations, it is submitted, find support in the opinion of Chief Justice Taney, with whom concurred Justices Story, McLean and Wayne, in *Holmes* v. *Jennison,* 14 Peters 540, where the state of Vermont had undertaken to deliver to Canada a fugitive from justice. The Supreme Court was evenly divided upon the question of jurisdiction, and hence the judgment appealed from was affirmed, but the following represents the judgment of the four justices named, without dissent on the part of their associates, as to the subject-matter upon which the national power to make treaties may properly operate:

> The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it; and, consequently, it was designed to include all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty, and which are *consistent with the nature of our institutions,* and *the distribution of powers between the general and state governments.* And without attempting to define the exact limits of this treaty-making

power, or to enumerate the subjects intended to be included in it, it may safely be assumed that *the recognition and enforcement of the principles of public law, being one of the ordinary subjects of treaties, were necessarily included in the power conferred on the general government.* And, as the rights and duties of nations towards one another, in relation to fugitives from justice, are a part of the law of nations, and have always been treated as such by the writers upon public law, it follows that the treaty-making power must have authority to decide how far the right of a foreign nation in this respect will be recognized and enforced when it demands the surrender of anyone charged with offenses against it. * * * Indeed, the whole frame of the Constitution supports this construction. All the powers which relate to *our foreign intercourse* are confided to the general government. Congress have the power to *regulate commerce;* to define and *punish piracies and felonies* committed on the high seas; and *offenses against the laws of nations;* to *declare war;* to *grant letters of marque and reprisal;* to *raise and support armies;* to *provide and maintain a navy.* And the President is not only authorized, by and with the advice and consent of the Senate, to make treaties, but he also nominates and, by and with the advice and consent of the Senate, appoints ambassadors and other public ministers, through whose agency negotiations are to be made and treaties concluded. He also receives the ambassadors sent from foreign countries; and *everything that concerns our foreign relations, that may be used to preserve peace or to wage war, has been committed to the hands of the federal government.* The power of deciding whether a fugitive from a foreign nation should or should not be surrendered was, necessarily, a part of the powers thus granted.

The subject-matter of treaties is thus defined in 38 Cyc. 966:

> Generally speaking the treaty-making power extends to all proper subjects of negotiations between the governments of different nations. As expressed in the Constitution of the United States the treaty-making power is in terms unlimited, and subject only to those restraints which are found in that instrument against the action of the government or its departments and those arising from the nature of the government itself and of that of the states. To what extent it is thus limited has been considerably discussed without being definitely defined, no treaty having ever been declared by the courts to be void. It would seem clear, however, that the treaty power does not extend so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, and it has also been stated that it would not authorize a cession of any portion of the territory of a state without the consent of that state; but subject to the limitations mentioned it may be said generally to extend to all matters which are proper subjects of negotiation between our government and the governments of other nations, such as matters relating to extradition, property rights and disabilities of aliens, rights, powers and duties of ambassadors and consuls, and the jurisdiction of consular courts, regulation of commercial relations with foreign countries, regulation and protection of trade-marks, submission to arbitration of controversies with other governments in which public interests are concerned, and the acquisition of territory.

The subject of the treaties made between the United States and foreign nations referred to in the foregoing quotation has in each instance been within the scope of the powers delegated to the national government by the express terms of the Constitution. In no instance has there been

any invasion of the police power of an individual state. The fact should not be overlooked that while the game birds in question are migratory, yet their migrations are limited to the United States. Their periodical journeys do not take them into Canada, according to the Biological Survey Bulletin No. 26 published by the United States Department of Agriculture, quoted in our statement. Of what concern is it therefore to Great Britain? What justification is there for any treaty with a foreign nation?

The regulation of migratory birds is not properly within the treaty-making power. It was never intended that the property rights of an individual state should be the subject-matter of contract with a foreign power. It was never intended that Great Britain should ever participate in the determination of the open and closed seasons for the hunting of game birds in the states of Missouri and Kansas, so as to invalidate the regulations which those states themselves have made in that behalf. If the President of the United States by contract with a foreign nation with the assent of the Senate may regulate and control the property of the states of Missouri or Kansas, in respect to migratory birds, there is no reason why the same authority may not assume to regulate all other property of those states. If this right exists, then a treaty with a foreign country may take jurisdiction of a state capitol, state university, and many other state institutions, and regulate them to the exclusion of the states themselves.

Why may not the subject of marriage and divorce be regulated by a treaty which would result in one uniform law throughout the United States, and thus the evils arising from conflicting state laws be removed? Certain of the states have laws concerning the organization of corporations and the conduct of their affairs which are regarded by many thoughtful persons as entirely too lax. A treaty

with some foreign country upon the subject of the organization and control of corporations would, if valid, result in uniformity of laws throughout our country, remove the inequality of conditions in the different states, and put all corporations upon an equal footing. A treaty with foreign countries might prescribe uniformity in the laying out and beautification of parks, the construction of boulevards, and the general planning of our cities, as well as the construction and maintenance of our highways in the country. Child labor laws could thus be made uniform throughout the states and uniform rules laid down covering the conditions of labor, including wages in stores, factories and mines.

Migratory game birds, which, as it has been held repeatedly, are the absolute property of the people of the several states, sustain no more intimate relation to treaties of alliance for purposes of peace and war, for political cooperation, or for the exercise of political sovereignty, than do the matters of internal police just enumerated. They are all in the same class and constitute a part of the internal police of each state. The national government has no control over them.

II.

Congress' lack of legislative power to divest a state of its property right and control over the wild game within its borders cannot be supplied by making a treaty with Great Britain.

The lower court held that in the absence of a treaty, the federal government had no paramount authority to regulate the taking of game birds within the boundaries of the state. It said:

> And in the absence of treaty there appears to have been no delegation of paramount authority to the fed-

> eral government. Under the foregoing authorities, therefore, as well as on principle, this Act, in the absence of treaty, would be unconstitutional as exceeding the legitimate powers of Congress; and so it has been held in cases substantially identical.
>
> *United States* v. *Shauver,* 214 Fed. 154.
> *United States* v. *McCullagh,* 221 Fed. 288.

But the lower court sustained the Migratory Bird Treaty Act as constitutional, upon the sole ground that the making of the treaty with Great Britain in 1916 had so added to and broadened the legislative powers of Congress that its Act with the treaty back of it was valid, where its Act without the treaty would have been unconstitutional and void.

If this be true, then the legislative powers granted to Congress under Section 1, Article I, of the Constitution, instead of being fixed and defined by that instrument, are shifting powers, or at least powers capable of expansion or contraction, as the President, and two-thirds of the Senators who happen to be present, may from time to time make or unmake treaties upon some particular subject. While Congress itself cannot make treaties and in this way *enlarge* its legislative powers, yet where a treaty has been made by the treaty-making authorities, Congress may, if it chooses, pass an Act in conflict with the treaty and so abrogate it and thus automatically cause a *shrinkage* in its legislative authority.

We strenuously insist that this extraordinary view is unsound. Our contention is that the legislative power of Congress, as fixed by the Constitution, cannot be increased or decreased by the making of a treaty, and that inasmuch as an Act of Congress standing alone would be ineffectual to take away from the individual states their power to control

the game birds of the state, this lack of authority cannot be supplied by making a treaty. The treaty-making power must be exercised "under the authority of the United States," which means that it can only act within the limits of the delegated powers of the national government and subject to the limitations prescribed by the Constitution itself.

It is interesting in this connection to note that by Clause 2 of Article VI of the Constitution it is provided that the Constitution and laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, whereas it is stated that treaties made or which shall be made "under the authority of the United States shall be the supreme law of the land." The use of the words "treaties made under the authority of the United States" was not accidental. The intention was to include treaties previously made by the United States under the articles of Confederation, which could not be described as made "in pursuance of the Constitution," for the reason that the Constitution was not then in existence. This is explained by William Rawle of Philadelphia in his work on the Constitution, page 66, where he says:

> There is a variance in the words descriptive of laws and those of treaties. In the former it is said those which shall be made in pursuance of the Constitution, but treaties are described as having been made, or which shall be made, under the authority of the United States. The explanation is that at the time of adopting the Constitution certain treaties existed, which had been made by Congress under the Confederation, the continuing obligations of which it was proper to declare. The words "under the authority of the United States" were considered as extending equally to those previously made and to those which should subsequently be effected. But although the former could not

> be considered as made pursuant to a Constitution which was not then in existence, the latter would not be "under the authority of the United States" unless they are conformable to its Constitution.

The expression "made under the authority of the United States" can have no other meaning than made in pursuance of the authority conferred upon the United States by its Constitution. This is an obvious and important limitation upon the treaty-making power. Every treaty must find its warrant within the scope of the enumerated powers granted by the people to the United States, such as power to regulate commerce with foreign nations, to establish a uniform rule of naturalization, to define and punish piracies and felonies, to declare war, to raise and support armies, to provide and maintain a navy, etc.

Every instance in which a treaty has been sustained by the courts will be found to lie within the lawful domain of federal legislation. For illustration, numerous treaties concerning the rights of aliens within the United States have been sustained, and they are supported by the fact that under the Constitution the federal government retains control, supervision and authority over all aliens within their territory.

If the ruling of the lower court be correct, then a treaty with a foreign nation is a species of super-law beyond the power of Congress to enact. The President, with the concurrence of two-thirds of the Senators present, may thus make treaties which shall be the supreme law of the land upon a subject-matter quite beyond the legislative power of Congress. It would seem to follow as a necessary consequence of this doctrine that where a treaty thus beyond the Congressional legislative domain comes into force and effect as the supreme law of the land, it will be beyond the

power of Congress to modify or repeal it, and thus it will continue in effect indefinitely and for all time, with the permanency of a fixed star, unless it shall happen that the President and two-thirds of the Senators present, with the concurrence of some foreign nation, agree upon a new treaty which shall have the effect of either modifying or abrogating the prior one. The Migratory Bird Treaty with Great Britain is thus placed beyond the power of Congress to repeal or modify. Its only power is to enforce.

But fortunately no such legislative impasse is likely to occur. It is firmly established by repeated adjudication of this Court that a treaty and an Act of Congress stand upon an equal footing. They are of equal force. Neither one has any paramount authority over the other. A treaty will repeal a prior Act of Congress with which it is in conflict. An Act of Congress will repeal a prior treaty with which it conflicts. A treaty is said by this Court to be equivalent to an Act of a legislature. The reason of this rule is that both treaties and Acts of Congress have for their foundation the delegated powers granted by the Constitution. If a treaty were a super-law enacted in the exercise of a power beyond the legislative power of Congress, then it would necessarily result that an Act of Congress could not repeal it.

It is said by this Court in the Chinese Exclusion Case (130 U. S. 581), where a subsequent Act of Congress was held to effect a repeal of a prior treaty:

> *The treaties were of no greater legal obligation than the Act of Congress.* By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and *no paramount authority is given to one over the other.* A treaty, it is true, is in its nature a contract between nations, and is often

> merely promissory in its character, requiring legislation to carry its stipulations into effect. *Such legislation will be open to future repeal or amendment.* If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative Act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control. * * *

A treaty which creates rights or imposes obligations upon the individual is regarded in courts of justice as equivalent to an Act of Congress. In *U. S.* v. *Rauscher,* 119 U. S. 407, the court said:

> A treaty is in its nature a contract between two nations, not a legislative Act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial, but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice *as equivalent to an Act of the Legislature,* whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, *the treaty addresses itself to the political, not the judicial, department; and the Legislature must execute the contract before it can become a rule for the court. Foster* v. *Neilson,* 2 Pet. 253, 314 (27 U. S. bk. 7, L. Ed. 415, 435).

In the Head Money Cases, 112 U. S. 580, an Act of Congress of March 3, 1882, imposed upon the owners of steam or sailing vessels bringing passengers from a foreign port

into a port of the United States a duty of fifty cents for each such passenger not a citizen of this country. This was held to be a valid exercise of the power to regulate commerce with foreign nations. It was objected that the Act violated provisions in numerous treaties of our government with friendly nations. The court said:

> In short, we are of the opinion that so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, *it is subject to such Acts as Congress may pass for its enforcement, modification, or repeal.*

In *Horner* v. *United States,* 143 U. S. 570, it is said:

> The proposition that that section is void if it contravenes a treaty between the United States and Austria is not tenable. *The statute is a law equally with the treaty, and, if subsequent and conflicting with the treaty, supersedes the latter.* Head Money Cases, 112 U. S. 580; *Whitney* v. *Robertson,* 124 U. S. 190; Chinese Exclusion Case, 130 U. S. 581.

In *United States* v. *Lee Yen Tai,* 185 U. S. 213, 220, it is said:

> That it was competent for the two countries by treaty to have superseded a prior Act of Congress on the same subject is not to be doubted; for otherwise the declaration in the Constitution that a treaty, concluded in the mode prescribed by that instrument, shall be the supreme law of the land, would not have due effect. As Congress may by statute abrogate, so far at least as this country is concerned, a treaty previously made by the United States with another nation, so the United States may by treaty supersede a prior Act of Congress on the same subject. In *Foster* v. *Neilson,* 2 Pet. 253, 314, 7 L. Ed. 415, 435, it was said that a treaty was

> "to be regarded in courts of justice as *equivalent to an Act of the Legislature,* whenever it operates of itself without the aid of any legislative provision." In the case of The Cherokee Tobacco, 11 Wall. 616, 621, *sub. nom.* 207 *Half Pound Papers Smoking Tobacco* v. *United States,* 20 L. Ed. 227, 229, this court said: "A treaty may supersede a prior Act of Congress, and an Act of Congress may supersede a prior treaty." So, in the Head Money Cases, 112 U. S. 580, 599, *sub. nom. Edye* v. *Robertson,* 28 L. Ed. 798, 804, 5 Sup. Ct. Rep. 247, 254, this court said: "So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such Acts as Congress may pass for its enforcement, modification or repeal." Again, in *Whitney* v. *Robertson,* 124 U. S. 190, 194, 31 L. Ed. 386, 388, 8 Sup. Ct. Rep. 456, 458: "By the Constitution a treaty is placed on the same footing and made of like obligation with an Act of legislation. *Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.*"

It seems clear from the foregoing authorities that it is entirely competent for Congress, if it should choose to do so, to repeal the Migratory Bird Treaty with Great Britain of 1916 (assuming it to be valid). It could do so by passing an Act expressly repealing it or making some provision in conflict with it. Congress in so doing would be acting within the lawful scope of its legislative powers. How, then, can it be plausibly said that the treaty-making power is different in its scope from the legislative power of Congress or that it possesses any greater force and effect than an Act of Congress?

We respectfully submit that the doctrine that a treaty is a super-law, or that a treaty may act upon subjects beyond

the power of Congress to affect by direct legislation, is fundamentally unsound. If the Migratory Bird Treaty Act, without the treaty, would be invalid, as the lower court held, then it is inconceivable that it may be given life and vitality by the mere fact that it has a treaty behind it, which it seeks to put into effect.

III.

The treaty-making power of the national Government is limited by other provisions of the Constitution, including the Tenth Amendment. It cannot, therefore, divest a state of its police power or take away its ownership or control of its wild game.

The foundation of the lower court's judgment, as indicated in its opinion (Rec. 9, *et seq.*), is that, although the legislative power of Congress may not invade and control the police power of a state, yet this result may be accomplished by making a treaty with a foreign power. Before an exercise of the treaty-making power, it is said all state constitutions, state laws and all other powers, including *police powers,* are forced to yield. Our contention is that this doctrine is manifestly unsound. We insist that a state in the exercise of its powers of internal police, particularly in the control and administration of its own property, is exempt from the exercise of the treaty-making power, to the same extent as it is exempt from the exercise of the legislative power of Congress.

The treaty-making power of the national government, like every other constitutional power possessed by it, is subject to the restrictions and limitations of the Constitution itself, including the amendments. It cannot be so exercised as to nullify any other constitutional provision.

Thus the provisions in Section 9 of Article I that "no title of nobility shall be granted by the United States" cannot be nullified by the making of a treaty with some foreign power, creating hereditary titles; nor can the treaty-making power override the First Amendment of the Constitution prohibiting the making of any law respecting an establishment of religion, or abridging the freedom of the press, or the right of the people peaceably to assemble. Nor can a treaty defeat the right of the people to keep and bear arms, as provided in the Second Amendment. Nor can it confer the right to quarter soldiers in any house in time of peace, without the consent of the owner, in defiance of the Third Amendment. No one will contend that a treaty can detract from the force of the Fourth, Fifth, Sixth or Seventh or other amendments.

Mr. Wharton, in his "International Law Digest," Vol. II, paragraph 131a, quotes Dr. Ernest Meier, as follows:

> Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the "treaty making power" be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives. The Constitution gives Congress the control of the Army. Participation in this control would be snatched from the House of Representatives by a treaty with a foreign power by which the United States would bind itself to keep in the field an army of a particular size. The Constitution gives Congress the right of de-

> claring war; this right would be illusory if the President and Senate could by a treaty launch the country into a foreign war. The power of borrowing money on the credit of the United States resides in Congress; this power would cease to exist if the President and Senate could by treaty bind the country to the borrowing of foreign funds. By the Constitution "no money shall be drawn from the Treasury, but in consequence of appropriations made by law"; but this limitation would cease to exist if by a treaty the United States could be bound to pay money to a foreign power * * * Congress would cease to be the law-making power as is prescribed by the Constitution; the law-making power would be the President and the Senate. Such a condition would become the more dangerous from the fact that treaties so adopted being on this particular hypothesis superior to legislation, would continue in force until superseded by other treaties. Not only, therefore, would a congress consisting of two Houses be made to give way to an oligarchy of President and Senate, but the decrees of this oligarchy, when once made, could only be changed by concurrence of President and of senatorial majority of two-thirds.

The power of the national government to regulate commerce among the states and with foreign nations is limited by the provisions of the Fifth Amendment, so that under the guise of improving navigation the government cannot take private property without paying just compensation. In *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, it is said:

> *But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted.* Congress has su-

> preme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish postoffices and post roads; but if Congress wishes to take private property upon which to build a postoffice, it must either agree upon the price with the owner or in condemnation pay just compensation therefor.

Will it be contended that the treaty-making power is not also subject to the Fifth Amendment? Can the government, under the authority of a treaty, take private property without making just compensation?

In *Prout* v. *Starr,* 188 U. S. 537, it is said:

> The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity.

Is not the treaty-making power, therefore, subject to the limitations imposed in the Tenth Amendment, which provides that the powers not delegated to the United States by the Constitution are reserved to the people? It is unthinkable that the treaty-making power should apply to the other amendments and not to the Tenth, and if the Tenth Amendment be a limitation of the treaty-making power, then it is beyond the authority of the national government to regulate the police power of a state, much less to regulate the use of property, such as wild game, which it is conceded belongs to the state.

If we for a moment indulge in the assumption that the treaty-making power of the government is not limited by

other provisions of the Constitution and by its amendments, including the Tenth Amendment, the most absurd and disastrous consequences will necessarily follow. For illustration, the prohibitory amendment recently ratified by the states will be nullified if the President and two-thirds of the Senate make a treaty with France covering the importation of wines, and with Great Britain covering the importation of whiskies, followed by congressional legislation in aid of the treaty establishing regulations for the drinking of intoxicating liquors. A treaty might be made with some native tribe in Africa providing for the importation of its natives and creating a condition of slavery and involuntary servitude, and thus the Thirteenth Amendment would become a nullity.

It was never intended that the treaty-making power should override the amendments to the Constitution, or extend beyond the lawful domain of federal legislation, or that it should invade the police powers of the states, or undertake to control the property of the states. It is said in *DeGeofroy* v. *Riggs,* 133 U. S. 258:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, *and those arising from the nature of the government itself and of that of the states.* It would not be contended that it extends so far as to authorize what the Constitution forbids, *or a change in the character of the government or in that of one of the states,* or a cession of any portion of the territory of the latter, without its consent.

What are the restraints against the exercise of the treaty-making power "arising from the *nature* of the gov-

ernment itself and of that of the states" referred to in the foregoing quotation, except those arising from our dual form of government, wherein the national power, as defined by the Constitution, is complete within itself, and the reserved state power is likewise complete within itself? What is meant by "a change in the *character* of the government or in that of one of the states" which the court says is forbidden, unless it be a disarrangement of the relative legislative powers possessed by each? If the effect of a treaty be to take away from a state its reserved powers and give their exercise to the national government, that would immediately effect a change in the character of both the state and national government as they were originally fixed by the Constitution and the first ten amendments.

If a treaty may invade the reserved police powers of a state and transfer their exercise to the national government, the effect is far reaching and well nigh revolutionary. The states would be shorn of their power whenever the President and Senate saw fit to make a treaty with some foreign power. It is difficult to think of any attribute of sovereignty which would ultimately remain to the states if the treaty power be resorted to to supply the lack of power in Congress.

An interesting illustration may be drawn from Article 23 of the Treaty of Peace with Germany, which contains the following provision:

> Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the members of the League:
>
> (a) will endeavor to secure and maintain fair and humane conditions of labor for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations

extend, and for that purpose will establish and maintain the necessary international organizations.

If the United States becomes a party to this treaty, it is thereby invested with constitutional authority to control the employment of labor, in local industries, within each of the sovereign states, to determine the conditions of labor, to prescribe a minimum wage, to regulate hours of labor, to prohibit child labor, and to determine the innumerable questions of a similar character which have always been supposed to be a matter of state regulation, and to be removed from the control of the national government? If this be the result, the complete centralization of our government can be readily brought about by a free use of the treaty-making power.

But the framers of our Constitution never intended that the vesting of the treaty-making power in the national government should accomplish such extraordinary and revolutionary results. The reservation of the Tenth Amendment to the people of the states of all powers not expressly granted was intended as a limitation upon the treaty-making power as well as upon the legislative power of Congress. In the very matter of wild game, it is said by the court in *Geer* v. *State,* 161 U. S. 519, that the colonies possessed the right to control the taking of animals *ferae naturae,* and that this right passed to the states with their separation from the mother country. The states in the adoption of the Constitution reserved to themselves this same right by not granting it to the national government, and the Tenth Amendment was adopted as a guaranty to the states that all powers not granted to the national government were reserved to the people of the states.

In *Buffington* v. *Day,* 11 Wallace 113, it was held that Congress could not under the Constitution of the United

States impose a tax upon the salary of a judicial officer of the state. The court said:

> It is a familiar rule of construction of the Constitution of the Union that the sovereign powers vested in the state governments by their respective constitutions remained unaltered and unimpaired except so far as they were granted to the Government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the states respectively, or to the people." The Government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.
>
> The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; *but the states within the limits of their powers not granted, or, in the language of the Tenth Amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the states.*

The history of the adoption of the Tenth Amendment, the purpose to be served by it, and the liberality of construction to which it is fairly entitled, are expressed by Mr. Justice Brewer, speaking for this Court in *Kansas* v. *Colorado,* 206 U. S. 46. It is there said:

> The powers affecting the internal affairs of the states not granted to the United States by the Consti-

> tution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States.

In *Hammer* v. *Dagenhart,* 247 U. S. 251, this Court said:

> The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.
>
> *The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution.*
>
> Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. "This," said this court in *United States* v. *Dewitt,* 9 Wall. 41, 45, 19 L. Ed. 593, "has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion." See *Keller* v. *United States,* 213 U. S. 138, 144, 145, 146, 29 Sup. Ct. 470, 53 L. Ed. 737, 16 Ann. Cas. 1066; Cooley's Constitutional Limitations (7th Ed.), p. 11.

The Tenth Amendment, it is respectfully submitted, is a barrier beyond which federal power may not assert itself except in the limited instances in the Constitution where a power has been delegated to the national government, the exercise of which is co-extensive with the territorial limits of the country. The power to regulate the currency of the country, the power to levy and collect internal revenue

taxes, the power to prescribe uniform laws of bankruptcy, are illustrations of the express powers conferred upon the national government by the Constitution, which are not reserved to the people under the Tenth Amendment. As to these powers Congress possesses the power of legislation, and to these subjects of legislation the treaty-making power may extend in appropriate cases.

But there has been no delegation by the states to the general government of any power of control or regulation over the property of the states, whether such property be real, personal, or mixed, or whether it consist of the title to the wild game of a state. Congress has no power to legislate; neither had the President and Senate any power to regulate by treaty.

In *Pierce* v. *State,* 13 N. H., it is said:

> An attempt on the part of the United States, by compact with a foreign government, to qualify the right of suffrage in a state, prescribe the time and mode of elections, or to restrain the power of taxation under state authority, would transcend the limits of the treaty-making power, and be entirely void; and an agreement with a foreign government, prescribing the terms on which highways should be laid out in the states, regulating the support of paupers, or the sale of goods by auctioneers, or by hawkers and peddlers, would be of the same character. The police of the several states, regarded as separate governments, is not a subject matter to which the treaty-making power extends. And it is not pretended that the treaties which admit liquors, the manufacture of other countries, into this, on the most favorable terms, contain any stipulations which purport to limit the legislation of the several states, after the import has taken the character of property within a state, the act of importation being fully accomplished and perfected.

> Nothing of that kind, it is believed, has been or will be attempted by the Government of the United States.

In *Ward* v. *Race Horse,* 163 U. S. 504 (reported in lower court, 70 Fed. 598), the facts were as follows:

Race Horse was a member of the Bannock tribe of Indians living on the Ft. Hale Indian reservation in Idaho. By Article 4 of a treaty duly consummated between the United States and his tribe in 1868 (15 Stat. 673) it was provided as follows:

> The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; *but they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.*

By Act of Congress thereafter passed a territorial form of government was provided for the territory of Wyoming. Act July 25, 1868, c. 235, 15 Stat. 178. This Act provides as follows:

> Nothing in this Act shall be construed to impair the rights of persons or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians.

Wyoming was admitted as a state of the Union in 1890. In July, 1895, the Legislature of that state passed an Act regulating the killing of game within the state. Laws 1895, c. 98. Thereafter, in October, Race Horse killed

elk in Uinta county in that state on public lands of the United States, as he was authorized to do under the treaty made between the United States and his tribe, but in violation of the Act of the Legislature of the state of Wyoming. Being prosecuted under the laws of the state, he justified his conduct under the provision of the treaty with his tribe above quoted. He was convicted and sentenced under the state law. His application for discharge on a writ of *habeas corpus* being denied him, he appealed to the Supreme Court. Both the state law and the treaty being in full force at the time he killed the elk, the question presented was which should yield, the law of the state or the treaty of the government with his tribe, made by virtue of express authority of the national Constitution? Mr. Chief Justice White, delivering the opinion of the court, said:

> *The power of a state to control and regulate the taking of game cannot be questioned. Geer* v. *Connecticut,* 161 U. S. 519 (16 Sup. Ct. 600, 40 L. Ed. 793). * * * The argument now advanced, in favor of the continued existence of the right to hunt over the land mentioned in the treaty, after it had become a subject of state authority, admits that the privilege would cease by the mere fact that the United States disposed of its title to any of the land, although such disposition, when made to an individual, would give him no authority over game, and yet that the privilege continued when the United States had called into being a sovereign state, *a necessary incident of whose authority was the complete power to regulate the killing of game within its borders.* This argument indicates at once the conflict between the right to hunt in the unoccupied lands, within the hunting districts, and the assertion of the power to continue the exercise of the privilege in question in the state of Wyoming in defiance of its laws. * * * *The power of all*

> *the states to regulate the killing of game within their borders will not be gainsaid;* yet, if the treaty applies to the unoccupied land of the United States in the state of Wyoming, that state would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the state.

It was there held the simple fact of the admission of Wyoming into the Union as a state, possessing like and equal unrestricted control over the wild animal life within her borders, authorized the Legislature of the state, in the exercise of such plenary power of control, to prohibit and make criminal the doing of an act guaranteed by solemn treaty of the government to Race Horse as a member of his tribe.

In *Coyle* v. *Smith,* 221 U. S. 559 (s. c. 31 Sup. Ct. Rep. 688), the court held to be invalid a provision inserted in the Enabling Act for the admission of Oklahoma providing that the capital of the new state should be at the city of Guthrie until 1913, upon the ground that that was a matter over which the state had exclusive jurisdiction. In the course of its opinion the court referred to the case of *Ward* v. *Race Horse,* 163 U. S. 504, in the following language:

> In *Ward* v. *Race Horse,* 163 U. S. 504, 41 L. Ed. 244, 16 Sup. Ct. Rep. 1076, the necessary equality of the new state with the original states is asserted and maintained *against the claim that the police power of the state of Wyoming over its wild game had been restricted by an Indian treaty made prior to the admission of the state of Wyoming.*

In *Patsone* v. *Pennsylvania,* 232 U. S. 138, there was a statute of the state of Pennsylvania prohibiting any un-

naturalized foreign born resident of Pennsylvania from owning or having in his possession a shotgun for the purpose of killing any wild bird or animal. The defendant was a citizen of Italy and claimed the benefit of the treaty with Italy, giving to its citizens "the same rights and privileges as are or shall be granted to the natives," etc. The court said:

> It is to be remembered that the subject of this whole discussion is wild game, which the state may preserve for its own citizens if it pleases. *Geer* v. *Conn.,* 161 U. S. 519. *We see nothing in the treaty that purports or attempts to cut off the exercise of their powers over the matter by the states to the full extent.*

In *Heim* v. *McCall,* 239 U. S. 175, the court, referring to the Patsone case, *supra,* said:

> It was held that a law of Pennsylvania making it unlawful for unnaturalized foreign born residents to kill game, and to that end making the possession of shotguns and rifles unlawful, did not violate the treaty. Adopting the declaration of the court below, it was said "that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property." *And the ruling was given point by a citation of the power of the state over its wild game, which might be preserved for its own citizens.* In other words, the ruling was given point by the *special power of the state over the subject matter*—a power which exists in the case at bar, as we have seen.

In *Truax* v. *Raich,* 239 U. S. 33 (s. c. 36 S. C. R. 7), there came under consideration the validity of an Act of Arizona which provided that every employer who employs more than five workers at any one time shall employ not less than 80 per cent qualified electors or native born citi-

zens of the United States or some subdivision thereof. The complainant, a native of Austria, invoked the Fourteenth Amendment, and insisted that the Act was unconstitutional, and it was so held. The Patsone case was approved. The court in the course of its opinion said:

> The discrimination defined by the Act does not pertain to the regulation or distribution of the public domain, or of the *common property or resources of the people of the state,* the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states. Thus in *McCready* v. *Virginia,* 94 U. S. 391, 396, 24 L. Ed. 248, 249, the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulations related to the common property of the citizens of the state, and an analogous principle was involved in *Patsone* v. *Pennsylvania,* 232 U. S. 138, 145, 146, 58 L. Ed. 539, 544, 34 Sup. Ct. Rep. 281, *where the discrimination against aliens upheld by the court had for its object the protection of wild game within the states, with respect to which it was said that the state could exercise its preserving power for the benefit of its own citizens if it pleased.* The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein* v. *Lynham,* 100 U. S. 483, 25 L. Ed. 628; *Blythe* v. *Hinckley,* 180 U. S. 333, 341, 342, 45 L. Ed. 557, 562, 563, 21 Sup. Ct. Rep. 390); and it should be added that the Act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise.

In *Cantini* v. *Tillman,* 54 Fed. 969, the Dispensary Law of South Carolina was under consideration and the complainant claimed rights under a treaty between Italy and the United States. It was held that the Dispensary Law being a reg-

ulation of the sale of liquor within the state was a matter of local regulation which was not affected by the treaty. The court said:

> Under these articles the complainants have the same rights as citizens of the United States. It would be absurd to say that they had greater rights. We have seen that the right to sell intoxicating liquors is not a right inherent in a citizen, and is not one of the privileges of American citizenship; that it is not within the protection of the fourteenth amendment; that it is within the police power. *The police power is a right reserved by the states, and has not been delegated to the general government. In its lawful exercise, the states are absolutely sovereign. Such exercise cannot be affected by any treaty stipulations.*

In *Leong Mow* v. *Board of Commissioners,* 185 Fed. 223, it was held that the Act of the Legislature of Louisiana, 1910, for the protection of birds, game, and fish, was valid as against a treaty with China which gave Chinese subjects the same privileges and rights as native citizens and provides that they should not be charged any higher imposts or duties than those paid by the natives. The court said:

> The bill in this case presents practically the same questions as the *Matter of John Ashon* v. *Board of Commissioners, etc.* (previously decided), 185 Fed. 221, with the exception that the plaintiff is a subject of the Emperor of China, and contends that Acts Nos. 245 and 132 of the Legislature of Louisiana, Session of 1910, discriminate against him, in violation of the treaties between China and the United States. He relies principally upon the most favored nation clause of the Chinese treaties, and refers to various treaties with European nations, all of which provide that citizens of foreign nations shall have the same privileges and rights and shall not be charged any higher imposts or duties than those paid by native citizens.

> I do not find that the rights contemplated by the general terms of said treaties include the right to fish; in fact, the right of fishing has been usually the subject of special treaties. *The state, as trustee for its citizens, owns the beds of all tide waters in its jurisdiction, the waters themselves, and the fish in them. The right to fish is a property right, and not a mere privilege of citizenship.* *McCready* v. *Virginia,* 94 U. S. 395, 24 L. Ed. 248.
>
> It is clear to my mind that *the treaties relied on by plaintiff do not prevent the state of Louisiana from prohibiting a subject of the Emperor of China from fishing in the waters of the state at all.* So it necessarily follows that, if permission is granted, the state can impose any condition it sees fit, notwithstanding the license fee exacted may be higher than that required of its own citizens.

In the case of *Wong Yung Quy,* 6 Sawy. 442, 451, it appeared that a statute of California made it an offense to disinter and remove from the place of burial the remains of a deceased without first having obtained a permit for which a fee of $10.00 was charged. It was held that this statute did not violate the provisions in Article IV of the treaty with China, which provided that Chinese subjects in the United States should enjoy entire liberty of conscience and should be exempt from all disability or persecution on account of their religious faith. Judge Sawyer said:

> Besides, it may well be questioned whether the treaty making power would extend to the protection of practices under the guise of religious sentiment deleterious to the public health or morals, *or to a subject matter within the acknowledged police power of the state.*

In *Compagnie Francaise de Navigation* v. *Board of Health,* 51 La. Ann., s. c. 25 So. Rep. 591, it is held that a

quarantine Act of the state of Louisiana establishing a board of health, and regulations made by it later, did not violate the treaties of the United States with France and Italy granting to the citizens of the latter countries the right of free visitation and trade, and *such treaties must be deemed to have been made with reference to, and subsidiary to, the rightful exercise by the state of its police power.* The court said:

> The conclusion we have reached as to the provisions of Act No. 192 not being unconstitutional as infringing upon the right and power of Congress to regulate commerce carries with it, *as a result,* the holding by this court that the Act was not in contravention of the treaties of the United States with France or Italy, or of the immigration laws of the general government, or of any rights secured by the Fourteenth Amendment to the Constitution of the United States. *The treaties and laws of the United States must be held to have been passed with reference to, and subsidiary to, the rightful exercise of the police power by the different states in aid of the protection and preservation of the public health within their respective borders.* We scarcely think it could be pretended that an Act of the General Assembly of Louisiana, under the provisions of which a shipload of citizens of the state of New York could be legally prevented from being landed in the city of New Orleans during an epidemic, could, by reason of a treaty, be held as against foreigners coming to our shores, to be inoperative, null and void. They could have no broader rights than our own citizens in this matter, and should be subjected to the same restrictions and inconveniences which they are, when these are demanded at their hands for the preservation and protection of the public health.

The case of *Compagnie Francaise* v. *State Board of Health,* 51 La. Ann. 645, quoted above, went to the Supreme

Court of the United States and was there affirmed (22 Sup. Ct. Rep. 811), the court saying:

> Reliance is placed, to sustain this proposition, on the provisions of a treaty concluded with the Kingdom of Italy on February 26, 1871; on the terms of a treaty with Great Britain of July 3, 1815, as also a treaty between the United States and the Kingdom of Greece, concluded December 22, 1837, and one concluded with the Kingdom of Sweden and Norway on July 4, 1827. The treaties of other countries than Italy are referred to upon the theory that as by the treaty concluded with France on April 30, 1803, by which Louisiana was acquired, it was provided that France should be treated upon the footing of the most favored nation in the ports of the ceded territory, therefore the treaties in question made with other countries than France were applicable to the plaintiff in error, a French subject. Conceding *arguendo*, this latter proposition, and therefore assuming that all the treaties relied on are applicable, we think it clearly results from their context that *they were not intended to, and did not, deprive the government of the United States of those powers necessarily inhering in it and essential to the health and safety of its people.* We say the United States, because if the treaties relied on have the effect claimed for them that effect would be equally as operative and conclusive against a quarantine established by the government of the United States as it would be against a state quarantine operating upon and affecting foreign commerce by virtue of the inaction of Congress. Without reviewing the text of all the treaties, we advert to the provisions of the one made with Greece, which is principally relied upon. The text of Article 15 of this treaty is the provision to which our attention is directed, and it is reproduced in the margin.
>
> It is apparent that it provides only the particular form of document which shall be taken by a ship of the Kingdom of Greece and reciprocally by those of the United States for the purpose of establishing that infec-

> tious or contagious diseases did not exist at the point of departure. But it is plain from the face of the treaty that the provision as to the certificate was not intended to abrogate the quarantine power, since the concluding section of the article in question expressly subjects the vessel holding the certificate to quarantine detention if, on its arrival, a general quarantine had been established against all ships coming from the port whence the vessel holding the certificate had sailed. In other words, the treaty having provided the certificate and given it effect, under ordinary conditions, proceeds to subject the vessel holding the certificate to quarantine, if, on its arrival, such restriction had been established in consequence of infection deemed to exist at the port of departure. *Nothing in the text of the treaty, we think, gives even color to the suggestion that it was intended to deal with the exercise by the government of the United States of its power to legislate for the safety and health of its people or to render the exertion of such power nugatory by exempting the vessels of the Kingdom of Greece, when coming to the United States, from the operation of such laws. In other words, the treaty was made subject to the enactment of such health laws as the local conditions might evoke not paramount to them. Especially where the restriction imposed upon the vessel is based, not upon the conditions existing at the port of departure, but upon the presence of an infectious or contagious malady at the port of arrival within the United States, which, in the nature of things, could not be covered by the certificate relating to the state of the public health at the port whence the ship had sailed.*

The following from the dissenting opinion of Mr. Justice Brown and Mr. Justice Harlan is significant:

> If the law in question in Louisiana, excluding French ships from all access to the port of New Orleans, be not a violation of the provision of the treaty that

> vessels "shall be subjected to no other quarantine than such as may be necessary for the visit of the health officer of the port where such vessels shall have arrived, after which said vessels shall be allowed immediately to enter and unload their cargoes," I am unable to conceive a state of facts which would constitute a violation of that provision.

In *People of the State of New York* v. *Becker,* 241 U. S. 556, s. c. 36 Sup. Ct. Rep. 705, the United States by treaty with the Seneca Indians conveyed certain land with a reservation in favor of the Indians of "the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed." After the lands in question had become a part of New York state, three Seneca Indians were arrested for fishing within the limits of the lands covered by the treaty. *It was held that with the coming of statehood the jurisdiction of the state over the property extinguished the fishing and hunting rights granted by the treaty.* The court said:

> The right thus reserved was not an exclusive right. Those to whom the lands were ceded, and their grantees, and all persons to whom the privilege might be given, would be entitled to hunt and fish upon these lands, as well as the Indians of this tribe. And, with respect to this nonexclusive right of the latter, it is important to observe the exact nature of the controversy. It is not disputed that these Indians reserved the stated privilege both as against their grantees and all who might become owners of the ceded lands. We assume that they retained an easement, or profit *a prendre,* to the extent defined; that is not questioned. The right asserted in this case is against the state of New York. It is a right sought to be maintained in derogation of the sovereignty of the state. It is not a claim for the vindication of a right

of private property against any injurious discrimination, for the regulations of the state apply to all persons equally. It is the denial with respect to these Indians, and the exercise of the privilege reserved, *of all state power of control or reasonable regulation as to lands and waters, otherwise admittedly within the jurisdiction of the state.*

It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the state (*Geer* v. *Connecticut,* 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. Rep. 600; *Ward* v. *Race Horse,* 163 U. S. 504, 507, 41 L. Ed. 244, 245, 16 Sup. Ct. Rep. 1076) subject, of course, to any valid exercise of authority under the provisions of the Federal Constitution. It is not denied—save as to the members of this tribe—that this inherent power extended over the *locus in quo* and to all persons attempting there to hunt or fish, whether they are owners of the lands or others. The contention for the plaintiffs in error must, and does, go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty *quoad hoc.* As the plaintiffs in error put it: "The land itself became thereby subject to a joint property ownership and the dual sovereignty of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be." We are unable to take this view. It is said that the state would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo,* either would be free to destroy the subject of the power. *Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both.* * * *. But the existence of the sovereignty of the state was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in

> the conveyance to regard it as an attempt either to reserve sovereign prerogative, or so to divide the inherent power of preservation as to make its competent exercise impossible. *Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised.*

In *George* v. *Pierce,* 148 N. Y. Supp. 230, it appeared that the state of New York had made treaties with the Onondaga Indians prior and during the existence of the Articles of Confederation and also after the adoption of the Constitution in 1789, by the terms of which the Indians ceded to the state of New York all their lands except certain tracts reserved for the use of the Indians.

In 1795 the United States made a treaty with the six nations whereby it acknowledged the land reserved to the Onondaga Indians in a treaty with the state of New York to be their property, and specified that the same "shall remain theirs until they choose to sell the same to the people of the United States who have the right to purchase." The court said, p. 237:

> The United States government thus recognized the rights of the state to make treaties with the Onondagas as to their lands, not only under the Articles of Confederation, but under the Constitution, recognized that such agreements are not such treaties as states are prohibited from making. How far the treaty interfered with the pre-emptive rights of the state is another question. It is true that this treaty was "constitutionally made in the exercise of the treaty-making power

> of the federal government, and became under the Constitution the supreme law." *Seneca Nation* v. *Christie,* 126 N. Y. 122-139, 27 N. E. 275. It is also true that all judges are bound thereby.
>
> *But if this treaty was an attempt to transfer from the people of the state to the people of the United States the fee and the right of pre-emption of the Onondaga lands it would be in so far ineffective.* A reasonable construction must be given to the Constitution, having regard to the circumstances under which it was formed and its purposes. *The authority of the United States as to treaties is not unlimited. It may not, under the guise of a treaty, deprive a state of those governmental powers which are a part of its inherent rights. It may not transfer its property.* *Geofroy* v. *Riggs,* 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642; *Provost* v. *Greenaux,* 19 How. 1, 15 L. Ed. 572; *Seneca Nation* v. *Christie,* 125 N. Y. 122-143, 27 N. E. 275. Probably, however, such a result was never intended. Certainly no such effect has ever been given to this treaty. For in July, 1795, in February, 1817, and in February, 1822, three treaties were made between the state and the Onondagas, whereby the latter ceded to the people portions of their reservation, until there were left to them the 7,300 acres they now occupy.

In *Bondi* v. *MacKay,* 89 Atl. 228, it appeared that a Vermont statute imposed a higher hunter's license as against an alien than a resident. A citizen of Italy claimed that the treaty between the United States and Italy gave him the same rights as a resident. The court held that the treaty was not operative in respect to the subject-matter which was within the exclusive control of the state in the exercise of its police power. The court said:

> The nature of all property interests in wild game is fully set forth in our decisions. "The wild game in the state belongs to the people of the state in their collect-

ive and sovereign capacity, and not in their individual and private capacity, except so far as private ownership may be acquired therein under the Constitution. * * *

Zanetta v. *Boles,* 80 Vt. 345, 67 Atl. 818. See also, *State* v. *Niles,* 78 Vt. 266, 62 Atl. 795, 112 Am. St. Rep. 917; *Payne* v. *Sheets,* 75 Vt. 335, 55 Atl. 656; *State* v. *Haskell,* 84 Vt. 429, 79 Atl. 852, 34 L. R. A. (N. S.) 286. The right of the Legislature, in the exercise of the police power, to take measures for the preservation and increase of this common property is fully recognized. *State* v. *Theriault,* 70 Vt. 617, 41 Atl. 1030, 43 L. R. A. 290, 67 Am. St. Rep. 695. It is equally within the power of the Legislature to provide for and regulate its decrease, if its development becomes injurious to other property rights. * * *

The petitioner urges, further, that the provision, as we construe it, is in conflict with the treaty between the United States and Italy (17 Stat. 845), in that it denies him rights and privileges to which the treaty entitles him. The provision in question is, in substance, that the citizens of each country shall receive in the states and territories of the other the most constant security and protection for their persons and property, and shall enjoy in this respect *the same rights and privileges which are granted to natives,* provided that they submit themselves to the conditions imposed on natives. The treaties of the United States are the law of the land, superior to the Constitution and statutes of any state, and binding upon all courts. Const. U. S. Art. 6. Treaty provisions which confer rights upon the subjects of another nation residing in this country partake of the nature of municipal law, and when the right conferred is one that can be enforced in a court of justice, and the treaty prescribes a rule by which the right is to be determined, the court resorts to the treaty for the rule of decision as it would to a statute. *Edye* v. *Robertson,* 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798. The provision under consideration is to receive a reasonable construction, having reference to the pur-

> pose of the treaty and the intention of the contracting parties. Under this provision the Italians residing here are to receive complete protection for the property they have or may acquire, and are to have in respect to such property the rights and privileges granted to natives. *But there is nothing in this which entitles them to share equally with the natives in such privileges as the Legislature may grant in the wild game of the state, and nothing which seems intended to protect them from the minor discriminations incident to the ordinary exercise of the police power.*
>
> Our conclusion is that the petitioner, although by the agreed statement a resident of Barre, is not entitled to a resident hunter's license, because not a citizen of the United States and of this state.

In *Downes* v. *Bidwell,* 182 U. S. 318 (s. c. 21 Sup. Ct. Rep. 770, 796), it was held that the island of Porto Rico by the treaty of cession became territory appurtenant to the United States, but not a part of the United States within the revenue clauses of the Constitution. In the course of a concurring opinion, Mr. Justice White, with whom concurred Mr. Justice Shiras and Mr. Justice McKenna, said:

> Let me come, however, to a consideration of the express powers which are conferred by the Constitution, to show how unwarranted is the principle of immediate incorporation (of territory acquired by treaty) which is here so strenuously insisted on. In doing so it is conceded at once that the true rule of construction is not to consider one provision of the Constitution alone, but to contemplate all, and therefore to limit one conceded attribute by those qualifications which naturally result from the other powers granted by that instrument, so that the whole may be interpreted by the spirit which vivifies, and not by the letter which killeth. Undoubtedly, the power to carry on war and to make treaties implies also the exercise of those incidents

which ordinarily inhere in them. Indeed, in view of the rule of construction which I have just conceded—that all powers conferred by the Constitution must be interpreted with reference to the nature of the government and be construed in harmony with related provisions of the Constitution—it seems to me impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United States without the express or implied approval of Congress. And from this it must follow that there can be no foundation for the assertion that, where the treaty-making power has inserted conditions which preclude incorporation until Congress has acted in respect thereto, such conditions are void and incorporation results in spite thereof. *If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions. If the proposition be true, then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the Government be overthrown.* While thus aggrandizing the treaty-making power on the one hand, the construction at the same time minimizes it on the other, in that it strips that authority of any right to acquire territory upon any condition which would guard the people of the United States from the evil of immediate incorporation. The treaty-making power, then, under this contention, instead of having the symmetrical functions which belong to it from its very nature, becomes distorted, vested with the right to destroy upon the one hand, and deprived of all power to protect the government on the other.

> And, looked at from another point of view, the effect of the principle asserted is equally antagonistic, not only to the express provisions, but to the spirit of the Constitution in other respects. Thus, if it be true that the treaty-making power has the authority which is asserted, what becomes of that branch of Congress which is peculiarly the representative of the people of the United States, and what is left of the functions of that body under the Constitution? For, although the House of Representatives might be unwilling to agree to the incorporation of alien races, it would be impotent to prevent its accomplishment, and the express provisions conferring upon Congress the power to regulate commerce, the right to raise revenue—bills for which, by the Constitution, must originate in the House of Representatives—and the authority to prescribe uniform naturalization laws, *would be in effect set at naught by the treaty-making power.* And the consequent result—incorporation—would be beyond all future control of or remedy by the American people, since *at once and without hope of redress or power of change,* incorporation by the treaty would have been brought about. The inconsistency of the position is at once manifest. The basis of the argument is that the treaty must be considered to have incorporated, because acquisition presupposes the exercise of judgment as to fitness for immediate incorporation. But the deduction drawn is, although the judgment exercised is against immediate incorporation and this result is plainly expressed, the conditions are void because no judgment against incorporation can be called into play.

The Chief Justice, with whom concurred Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice Peckham, said, in the same case (21 S. C. Rep. 819):

> Indeed, a treaty which undertook to take away what the Constitution secured, *or to enlarge the Federal jurisdiction,* would be simply void.

It need hardly be said that a treaty cannot change the Constitution, or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government. *The Cherokee Tobacco,* 11 Wall. 620, *sub nom.* 207 *Half Pound Papers of Smoking Tobacco* v. *United States,* 20 L. Ed. 229.

So, Mr. Justice Field in *Geofroy* v. *Riggs,* 133 U. S. 267, 33 L. Ed. 645, 10 Sup. Ct. Rep. 297: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising *from the nature of the government itself and of that of the states.* It would not be contended that it extends so far as to authorize what the Constitution forbids, or *a change in the character of the government or in that of one of the states,* or a cession of any portion of the territory of the latter, without its consent."

And it certainly cannot be admitted that the power of Congress to lay and collect taxes and duties can be curtailed by an arrangement made with a foreign nation by the President and two-thirds of a quorum of the Senate. See 2 Tucker, Const., Secs. 354, 355, 356.

In the language of Judge Cooley: "The Constitution itself never yields to treaty or enactment; it neither changes with time nor does it in theory bend to the force of circumstances. It may be amended according to its own permission; but while it stands it is 'a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.' Its principles cannot, therefore, be set aside in order to meet the supposed necessities of great crises. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

Mr. Justice Harlan, in the same case, said (21 S. C. Rep. 826):

> Of course no territory can become a state in virtue of a treaty or without the consent of the legislative branch of the government; for only Congress is given power by the Constitution to admit new states.

Mr. Justice Daniel in his separate opinion in the License cases, 5 How. 504, 611, said:

> By the 6th article and 2d clause of the Constitution it is thus declared: "That this Constitution and the laws of the United States made in pursuance thereof, and treaties made under the authority of the United States, shall be the supreme law of the land."
>
> This provision of the Constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the general government. *Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no "authority of the United States," save what is derived mediately or immediately and regularly and legitimately, from the Constitution.* A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a state or any citizen of a state.

Mr. Chief Justice Taney, in the Passenger cases, 7 How. 283 (12 L. Ed. 281), said, in the course of his dissenting opinion:

> And the first inquiry is, whether, under the Constitution of the United States, the federal government has the power to compel the several states to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit. In my judgment this question lies at the foundation of the controversy in this case. I do not mean to say that the general government have, by treaty or act of Congress, required the state of Massachusetts to permit the aliens in question to land. I think there is no treaty or Act of Congress which can justly be so construed. But it is not necessary to examine that question until we have first inquired whether Congress can lawfully exercise such a power, and whether the states are bound to submit to it. For if the people of the several states of this Union reserved to themselves the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, *then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the state, would be an usurpation of power which this court could neither recognize nor enforce.* I had supposed this question not now open to dispute. It was distinctly decided in *Holmes* v. *Jennison* (14 Pet. 540), in *Groves* v. *Slaughter* (15 Pet. 449), and in *Prigg* v. *The Commonwealth of Pennsylvania* (16 Pet. 439).

In *Holmes* v. *Jennison,* 14 Pet. 616, Mr. Justice Baldwin uses the following language:

> Every state has acknowledged power to pass and enforce quarantine, health and inspection laws to prevent

> the introduction of disease, pestilence or unwholesome provisions; such laws interfere with no power of Congress or *treaty stipulations;* they regulate internal police, and are subjects of domestic regulation within each state, over which no authority can be exercised by any power under the Constitution, save by requiring the consent of Congress to the imposition of duties on exports or imports, and their payment into the treasury of the United States.

And at page 619 he says:

> Whenever internal police is the object, *the power is excepted from every grant and reserved to the states.*

In Tucker's Limitations on the Treaty-Making Power, p. 339, the author states his conclusions as follows:

> A careful consideration of the relation of the states to the Federal Government, and the purposes and objects for which the Government was formed, together with an examination of the provisions of the Constitution itself, lead strongly to the conclusion that no essential power of a state, whether a reserved power or a police power, can by reasonable construction be constitutionally taken from it, in furtherance of the treaty-making power.

In the Virginia Convention which adopted the Constitution, Patrick Henry objected to the treaty-making provision of the proposed Constitution. He urged that the President and two-thirds of a quorum of the Senate "might relinquish and alienate territorial rights, and our most valuable commercial advantages. In short, if anything should be left us, it would be because the President and Senators were pleased to admit it."

Mr. George Mason likewise declared "That there is nothing in that Constitution to hinder a dismemberment

of the empire. Will any gentlemen say that they may not make a treaty, whereby the subjects of France, England and other powers may buy what lands they please in this country?"

George Nicholas in defending the provisions said:

> The provision of the 6th article is, that this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all the treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. *They can, by this, make no treaty which shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers.* The treaties they make must be under the authority of the United States to be within their province. It is sufficiently secured, because it only declares that, in pursuance of the powers given, they shall be the supreme law of the land, notwithstanding anything in the Constitution or laws of particular states.

Mr. Madison, in his concluding argument on the subject, said:

> I think it (the treaty provision) rests on the safest foundation as it is. The object of treaties is the regulation of intercourse with foreign nations, *and is external.* I do not think it possible to enumerate all the cases in which such *external regulations* would be necessary. Would it be right to define all the cases in which Congress could exercise this authority? The definition might, and probably would, be defective.

In *House* v. *Mayes,* 219 U. S. 270 (s. c. 31 Sup. Ct. Rep. 234), the court said:

> Briefly stated, those principles are: That the government created by the Federal Constitution is one of enumerated powers, and cannot, by any of its

> agencies, exercise an authority not granted by that instrument, either in express words or by necessary implication; that a power may be implied when necessary to give effect to a power expressly granted; that while the Constitution of the United States and the laws enacted in pursuance thereof, *together with any treaties made under the authority of the United States,* constitute the supreme law of the land, a state of the Union may exercise all such governmental authority as is consistent with its own Constitution, and not in conflict with the Federal Constitution; that such a power in the state, generally referred to as its police power, is not granted by or derived from the Federal Constitution, but exists independently of it, by reason of its never having been surrendered by the state to the general government; that among the powers of the state, not surrendered—which power therefore remains with the state—is the power to so regulate the relative rights and duties of all within its jurisdiction as to guard the public morals, the public safety, and the public health, as well as to promote the public convenience and the common good; and that it is with the state to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own Constitution or the Constitution of the United States.

Are we not justified, therefore, in our contention that the treaty-making power "under the authority of the United States" is limited by the Tenth Amendment and may not transcend the legislative power of Congress under the Constitution? If this be true, it necessarily results that the states of Missouri and Kansas have never been divested of their right under the police power to regulate and control the hunting and taking of game birds within their re-

spective jurisdictions, and they, and not Congress, have exclusive power of control over that field of legislation.

IV.

The courts have never upheld a treaty whose subject matter extended beyond the constitutional domain of Congressional legislation.

Several of the powers delegated to the national government by the Constitution of the United States affect the control of the local affairs of the state. Treaties, as well as acts of Congress, may operate within, but not beyond, the scope of these powers.

Thus the authority to control immigration, to admit or exclude aliens, is vested solely in the federal government (*Fong Yue Ting* v. *U. S.,* 149 U. S. 698, 713; *Truax* v. *Raich,* 239 U. S. 33; Chinese Exclusion cases, 130 U. S. 581). It may directly through legislation, or by treaty, control aliens during their residence in this country, require them to register, deport them if deemed advisable, and in general throw around them such safeguards as may be deemed necessary.

In *Yamataya* v. *Fisher,* 189 U. S. 86 (23 Sup. Ct. Rep. 611), it is said:

> The constitutionality of the legislation in question, in its general aspects, is no longer open to discussion in this court. That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention—are

principles firmly established by the decisions of this court. *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 35 L. Ed. 1146, 12 Sup. Ct. Rep. 336; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 37 L. Ed. 905, 13 Sup. Ct. Rep. 1016; *Lem Moon Sing* v. *United States,* 158 U. S. 538, 39 L. Ed. 1082, 15 Sup. Ct. Rep. 967; *Wong Wing* v. *United States,* 163 U. S. 228, 41 L. Ed. 140, 16 Sup. Ct. Rep. 977; *Fok Yung Yo* v. *United States,* 185 U. S. 296, 305, 46 L. Ed. 917, 921, 22 Sup. Ct. Rep. 686, 690.

Aliens are entitled to the protection of the Fourteenth Amendment (*Truax* v. *Raich,* 239 U. S. 33). Many of our treaties concern the rights of aliens while in this country, to hold property by purchase or by descent or to administer upon the estates of their fellow countrymen. The effect of such treaties is to *remove the disability of alienage;* but they do not qualify or modify or interfere with the laws of descent of the different states.

In *Fairfax's Devisee* v. *Hunter's Lessee,* 7 Cranch. 603, it was held that the treaty of 1794 with Great Britain removed the disability of alienage so as to permit Fairfax, a British subject, to take by descent, notwithstanding the law of Virginia. In *Chirac* v. *Chirac,* 2 Wheat. 259, a treaty with France gave to the subjects of France the right to purchase and hold lands in the United States, and it was held that a French subject had the right to sell or otherwise dispose of lands acquired by descent or devise in a state where, except for the treaty, they would escheat to the state. In *Geofroy* v. *Riggs,* 133 U. S. 258, it was held that a treaty with France made in 1800 giving to the citizens of France the right of taking by inheritance from citizens of the United States, permitted them so to do, notwithstanding the provisions of the common law. To the same effect are *Hauenstein* v. *Lynham,* 100 U. S. 483, and a number

of state decisions cited in Crandall on Treaties, Their Making and Enforcement (2d Ed.), p. 250.

So, also, treaties have been upheld which give the right to a foreign consul to administer affairs of a deceased fellow countryman. (*McEvoy* v. *Wyman,* 191 Mass. 276; *Succession of Rabasse,* 47 La. Ann. 1452.) It may be doubted, however, if these cases were properly decided, in view of *Rocca* v. *Thompson,* 223 U. S. 317; *In re D'Adamo's Estate,* 212 N. Y. 241; *In re Servas's Estate,* 146 Pac. Rep. 651, and *In re Lis's Estate,* 139 N. W. Rep. 300.

All of these cases, however, are instances of the assertion of the conceded power of the general government to legislate concerning the status, duties, obligations, and privileges of aliens residing in this country. As the power of national legislation exists, so also the power exists to make treaties.

None of the adjudicated cases upon this subject indicate that the treaty-making power may lawfully extend beyond the lawful domain of federal legislation.

Congress is expressly authorized to regulate commerce with the Indian tribes, and this power may be exercised directly by legislative acts, or by treaty. Thus in *U. S.* v. *Sandoval,* 231 U. S. 28, an indictment was found for introducing intoxicating liquor into the Santa Clara Pueblo in the state of New Mexico. The defense was that the act of Congress on which the prosecution was based and which was a part of the Enabling Act providing for the admission of New Mexico as a state, was invalid because it invaded the police power of the state. It was held, however, that inasmuch as the congressional legislation was a legitimate exercise of the power of Congress to regulate commerce with the Indian tribes, it did not encroach upon the

police power of the state or disturb the principle of equality among the states. To the same effect are *Brader* v. *James*. 246 U. S. 88, and *Talley* v. *Burgess*. 246 U. S. 104.

It is apparent that the power of the government over Indians, whether referred to the commerce clause in the Constitution, or the general power of the government over them as the wards of the nation, is plenary, and may be exercised either by act of Congress or by treaty. There is no invasion of the right reserved to the people by the Tenth Amendment.

The respective powers of the government and of the states over a particular subject matter is illustrated by the existing situation with respect to the employment of child labor. In the case of *Hammer* v. *Dagenhart,* 247 U. S. 251 (38 Sup. Ct. Rep. 529), it was held that an act of Congress which attempted to regulate the employment of child labor was void because commerce between the states, which was the limit of congressional authority, was not involved. On the other hand, in the recent income tax bill approved in February, 1919 (the validity of which is now before this Court for decision), a tax is laid upon the income from child labor, under the constitutional power to lay and collect taxes. In other words, the government invokes the rule that while the power to regulate commerce among the states cannot invade the police power of the state, yet the power to lay and collect taxes on incomes recognizes no territorial limit, but is effective everywhere within the United States.

The lower court refers to the opinion of Attorney General Griggs, 22 Opinions of Attorneys General 214. It is there ruled that the United States by treaty with Great

Britain may regulate fishing in the waters contiguous to the territory of the United States and Canada along the international boundary line from the Atlantic to the Pacific ocean and on the Great Lakes. The waters of the lakes and rivers forming the boundary between the United States and Canada upon this side of the boundary line are within the territorial jurisdiction of the several riparian states.

The ruling of the Attorney General was to the effect that *although the regulation of these fisheries was beyond the power of Congress,* yet the object might be attained by making a treaty with Great Britain, and that such a treaty, when made, superseded the laws of the several states.

For the reasons which have been heretofore stated, we respectfully submit that the opinion was erroneous in this respect. Our contention is that treaties may not operate upon subjects concerning which Congress has no power to legislate.

The Attorney General also says that the several states are by the Constitution forbidden to enter into any such agreement with a foreign power, and that unless the United States may regulate the subject by treaty, it is impossible of regulation. This, we respectfully submit, entirely overlooks the inherent power which a state possesses as an attribute of its sovereignty to prescribe rules and regulations for the administration of its own property, to the exclusion of any other authority, and to make compacts and agreements in reference thereto with other states or with a foreign power.

The treaty-making power is to be applied to the delegated powers of the central government as expressed in the Constitution. It takes them as it finds them. It can neither

add to nor take from. If these delegated powers are of such a nature that they may be exercised within the local affairs of the states, the treaty power may do likewise. If they may not invade the police power of the states, the treaty power is limited in the same manner. To the extent that powers possessed by the United States have been delegated to it by the public, they have not been reserved by the Tenth Amendment. But to the extent that powers have not been thus delegated, and so have been reserved to the people, neither Congress nor the treaty-making power can exercise any authority.

The situation is the same as though the Constitution had read:

> To the extent that power has been delegated by the people to the national government, Congress may act and the treaty-making power may act, and when they have thus acted, the laws or the treaties, as the case may be, shall be the supreme law of the land. All matters to which the delegated power of Congress does not extend are reserved to the states in the exercise of their own sovereignty. Where, for this reason, an act of Congress would be void, there also a treaty is without validity.

The Act of Congress of 1913, undertaking to regulate the game laws of the states, was void because of the lack of power in the national government to control a subject matter within the exclusive jurisdiction of the state legislatures. For the same reason the Treaty of 1916 was invalid. The Act of 1918 is subject to the same infirmity.

V.

The lower court held that an act of Congress undertaking to regulate the game birds of a state would be unconstitutional in the absence of a treaty. The treaty in this case does not, by its terms, purport to create a closed season between December 31st and March 10th. Its executory agreement to pass future legislation, covering this period, is not the supreme law of the land and cannot have the effect of giving validity to an unconstitutional act.

Our contention is that the treaty is void, and the Migratory Bird Treaty Act is also void, because they both undertake to control a subject matter within the exclusive jurisdiction of the states. But even if it should be held that the treaty, by its own force, operated to create a closed season between March 10th and September 1st, yet it cannot be successfully contended that the treaty can add anything whatsoever to the act of Congress insofar as the latter, or the regulations made by the Secretary of Agriculture, undertake to create a closed season between December 31st and March 10th. It is the act of Congress and not the treaty with which we have to deal.

The express language of Article II of the treaty is as follows:

> The closed season on migratory game birds shall be between March 10th and September 1st.

Assuming for the sake of argument that this provision of the treaty is the law of the land (although it is strenuously denied) and it does not by any means follow that the same can properly be said of the following provision:

> The season for hunting shall be further restricted to such period not exceeding three and one-half months

> as the High Contracting Parties may severally deem appropriate and define by law or regulation.

This is nothing more than an *executory agreement* of the two governments to further reduce the open season to such period, if at all, as may be deemed appropriate. It does not create a right or impose an obligation upon any *individual. It is not, therefore, the law of the land.* It is not operative, as a rule of conduct, *ex proprio vigore.* It is not self-executing or self-enforcing.

In *Whitney* v. *Robertson,* 124 U. S. 190, 194 (s. c. 31 L. Ed. 386, 388), the court said:

> A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.

In *Turner* v. *American Baptist Missionary Union,* 5 McLean, 344, 347, Circuit Judge McLean in passing on an Indian Treaty in 1852, said:

> A treaty under the Federal Constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties, *where the treaty-making power, without the aid of Congress, can carry it into effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect.* It is not operative, in the sense of the Constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government can be regarded as a law until it shall have all the sanctions required by the Constitution to make it such. As well might it be contended that an ordinary act of Congress, without the signature of the President, was a law, as that a treaty which engages to pay a sum of money is in itself a law. And in such a case, the representatives of the people and the states exercise their own judgments in granting or withholding the money. They act upon their own responsibility, and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required.

It is true that Congress has acted in compliance with this executory agreement, but it is not important that it acted because of the treaty rather than upon the same considerations that were influential in causing the passage of the similar act of 1913. The act of Congress, in either case, depends for its validity upon the power of Congress under the Constitution. The executory provisions of the treaty

add nothing to this power. In other words, the power of Congress, with or without the executory provisions of the treaty, is precisely the same.

The Constitution does not say that an agreement of the United States contained in a treaty, to pass laws in the future, as it may deem appropriate, shall be the supreme law of the land, nor does it say that an act of Congress passed in response to such an agreement shall be of greater force than any other act of Congress which depends for its validity upon the existence of proper constitutional power.

Respectfully submitted,

RICHARD J. HOPKINS, *Attorney General,*
and
SAMUEL W. MOORE, *amici curiae,* and in behalf of the State of Kansas.