SUBJECT INDEX.

CASES CITED.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 609.

THE STATE OF MISSOURI, Appellant,
vs.
RAY P. HOLLAND, United States Game Warden.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF OF APPELLANT.

STATEMENT.

This suit involves the constitutionality of the "Migratory Bird Treaty Act" and is an endeavor upon the part of the State of Missouri, appellant, to preserve intact its sovereignty and to retain unimpaired the powers reserved to it by the tenth amendment to the Federal Constitution.

The bill (Printed Abstract, pp. 2 to 4, inclusive) alleges the arrest and prosecution of citizens of Missouri and the threatened arrest and prosecution of other citizens by the United States Game Warden, for violations of the Migratory Bird Treaty Act, and seeks, on account of the unconstitutionality of such act, to enjoin such arrests and prosecutions and the enforcement of the act in any wise, upon the following grounds:

(a) That the arrests and prosecutions and threatened arrests and prosecutions by the Game Warden constitute an invasion of the sovereignty of the state of Missouri and a violation of the laws of Missouri upon the subject.

(b) That the enforcement of the Federal act constitutes an interference with the property right of the people, held in trust by the State, to the wild game within its borders.

(c) That the arrest and prosecution of citizens of Missouri for the exercise of lawful privileges conferred by the state prevented the discharge of the duty of the State to protect its citizens in the enjoyment of such privileges.

(d) That the destruction of the revenues of the State derived from hunters' licenses was threatened by the enforcement of the Federal act.

United States Game Warden Holland, by Mr. Francis M. Wilson, United States District Attorney, moved to dismiss for want of equity in the bill, which said motion (Printed Abstract, pp. 5 and 6) was sustained; and thereupon, complainant declining to plead further, judgment and decree dismissing the bill was entered.

The cause involving the construction and application of the Constitution of the United States and the constitutionality of a law of the United States and the validity and construction of a treaty made under the authority of the United States being drawn in question, appellant prosecutes its appeal from said judgment to this Court.

Subsequent to the enactment by Congress of the above Migratory Bird Treaty Act, to-wit: on the 31st day of July, 1918, the President of the United States issued his proclamation approving and proclaiming certain regulations made by the Secretary of Agriculture pursuant to the provisions of said above Migratory Bird Treaty Act. Under said regulations the open season in Missouri for waterfowl (except wood duck, eider ducks, and swans), coot, gallinules, and Wilson snipe and jacksnipe, *is fixed as from September 16th to December 31st.* (Post. page 16.)

The state of Missouri, by virtue of its trust right as sovereign and in the exercise of its reserved powers of police, has, in fact, since at least the year 1874 (Laws of Missouri,

1874, page 108), continuously asserted and exercised the absolute control of wild game within her own borders. Article II of Chapter 49, Revised Statutes of Missouri, 1909, and an act for the preservation of fish and game, approved March 24, 1915, Laws of Missouri, 1915, pages 289 to 296, inclusive, prohibits the taking of wild game, including the aforesaid waterfowls specified in said proclamation of the President of the United States, except by persons who have been granted permission or license for such purpose, and the taking of said wild game is prohibited during certain seasons of the year. Under the provisions aforesaid the taking, killing and using of the aforesaid waterfowls is permitted and *is lawful between the 15th day of September of each year and the 30th day of April of the following year.* (Post. page 13.)

It thus appears that the provisions of the federal law and the provisions of the laws of the state of Missouri, relating to the taking, killing and use of migratory game birds, are in direct conflict.

Appellant contended below, and contends here, that the authority of the state over wild game within its borders is paramount under either of two views:

First.—The *trust right* of the state, which in its sovereign capacity as the representative of and for the use and benefit of all its people in common, holds the title to all wild game within its borders, the ownership of such wild game being that of its people in their united sovereignty.

Second.—The police power of the state.

This contention of the power of the state over wild game within its borders necessarily draws in question the validity and construction of a treaty relating to migratory game birds, made between the United States of America and Great Britain on the 16th day of August, 1916, and proclaimed December 8th, 1916. (Post. page 5.)

It involves also the construction and application of the Constitution of the United States, particularly Article X of the amendments thereto, and the constitutionality of a law of the United States known as the "Migratory Bird Treaty Act," approved July 3rd, 1918, U. S. Compiled Statutes, 1918, page 1795. (Post. page 9.)

This is true because the treaty between the United States of America and Great Britain, and the Migratory Bird Treaty Act of Congress upon their face apparently assume and assert the paramount authority and power of the Federal Government over migratory game birds within the borders of any state of the United States of America; consequently, by necessary implication, they deny to the state of Missouri and to each of the several states of the Union the right of sovereignty and the possession of reserved power, in so far as such sovereignty and reserved power affect the taking, killing and use of wild game within the borders of such states.

The Honorable Arba S. Van Valkenburgh, Judge of the District Court, in his opinion filed in this case, said that the issues tendered by the pleadings present two questions:

(1) the validity of the law (Migratory Bird Treaty Act) standing by itself, as affecting the relative power of the Federal Government and of the states;

(2) the other, the status of the treaty (between the United States of America and Great Britain), to give effect to which the so-called Migratory Bird Treaty Act, was passed. (Printed abstract of record, page 8).

In this opinion the District Court held:

First, that upon authority and principle the Migratory Bird Treaty Act, in the absence of treaty, would be unconstitutional and invalid.

Second, that the Migratory Bird Treaty Act, being in aid of the treaty between the United States of America and Great Britain, became, by virtue of such treaty, constitutional and valid.

The latter holding, as applied to the internal affairs of a state, we believe involves a fundamental contradiction. Under the facts of the instant case, the appellant contends that, in its ultimate analysis, such holding leads directly to the elimination of all reserved and unsurrendered powers belonging to the several states of the Union. It annuls the tenth amendment to the Constitution of the United States and annihilates the idea that the Constitution reserves to the states any powers which the Federal Government under the guise of a treaty may not usurp.

The treaty between the United States of America and Great Britain, relating to migratory game birds, formal parts omitted, is as follows:

CONVENTION BETWEEN UNITED STATES OF AMERICA AND GREAT BRITAIN.

"ARTICLE I.

The High Contracting Powers declare that the migratory birds included in the terms of this convention shall be as follows:

1. Migratory game birds:

(a) Anatidae, or waterfowl, including brant, wild ducks, geese and swans.

(b) Gruidae, or cranes, including little brown, sandhill, and whooping cranes.

(c) Rallidae, or rails, including coots, gallinules, and sora, and other rails.

(d) Limicolae, or shore birds, including avocets, curlew, dowitchers, godwits, knots, oyster catchers, pharlaropes, plovers, sandpipers, snipe, stilts, surf birds, turnstones, willet, woodcock and yellowlegs.

(e) Columbidae, or pigeons, including doves and wild pigeons.

2. Migratory insectivorous birds: Bobolinks, catbirds, chickadees, cuckoos, flickers, flycatchers, grossbeaks, humming birds, kinglets, martins, meadowlarks, nighthawks or bullbats, nuthatches, orioles, robins, shrikes, swifts, tanagers, titmice, thrushes, vireos, swallows, warblers, waxwings, whippoorwills, woodpeckers, and wrens, and all other perching birds which feed entirely or chiefly on insects.

3. Other migratory nongame birds: Auks, auklets, bitterns, fulmars, gannets, grebes, guillemots, gulls, herons, jaegers, loons, murres, petrels, puffins, shearwaters and terns.

ARTICLE II.

The High Contracting Powers agree that, as an effective means of preserving migratory birds, there

shall be established the following close seasons during which no hunting shall be done except for scientific or propagation purposes under permits issued by proper authorities.

1. The close season on migratory game birds shall be between March 10 and September 1, except that the close season on the Limicolae, or shore birds, in the maritime Provinces of Canada and in those States of the United States bordering on the Atlantic Ocean which are situated wholly or in part north of Chesapeake Bay shall be between February 1 and August 15, and that Indians may take at any time scoters for food but not for sale. 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.

2. The close season on migratory insectivorous birds shall continue throughout the year.

3. The close season on other migratory non-game birds shall continue throughout the year, except that Eskimos and Indians may take at any season auks, auklets, guillemots, murres, and puffins, and their eggs, for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.

ARTICLE III.

The High Contracting Powers agree that during the period of 10 years next following the going into effect of this convention there shall be a continuous close season on the following migratory game birds, to wit:

Band-tailed pigeons; little brown, sandhill and whooping cranes, swans, curlew and all shorebirds (except the black-breasted and golden plover, Wilson or jacksnipe, woodcock, and the greater and lesser yellowlegs); provided, that during such 10 years the close seasons on cranes, swans, and curlew in the Province of British Columbia shall be made by the

proper authorities of that Province within the general dates and limitations elsewhere prescribed in this convention for the respective groups to which these birds belong.

ARTICLE IV.

The High Contracting Powers agree that special protection shall be given the wood duck and the eider duck, either (1) by a close season extending over a period of at least five years, or (2) by the establishment of refuges, or (3) by such other reegu lations as may be deemed appropriate.

ARTICLE V.

The taking of nests or eggs of migratory game or insectivorous or nongame birds shall be prohibited except for scientific or propagating purposes, under such laws or regulations as the High Contracting Powers may severally deem appropriate.

ARTICLE VI.

The High Contracting Powers agree that the shipment or export of migratory birds or their eggs from any State or Province, during the continuance of the close season in such State or Province, shall be prohibited except for scientific or propagating purposes, and the international traffic in any birds or eggs at such time captured, killed, taken, or shipped at any time contrary to the laws of the State or Province in which the same were captured, killed, taken, or shipped shall be likewise prohibited. Every package containing migratory birds or any parts thereof or any eggs of migratory birds transported, or offered for transportation from the Dominion of Canada into the United States or from the United States into the Dominion of Canada, shall have the name and address of the shipper and an accurate statement of the contents clearly marked on the outside of such package.

ARTICLE VII.

Permits to kill any of the above-named birds which, under extraordinary conditions, may become seriously injurious to the agricultural or other interests in any particular community may be issued. by the proper authorities of the High Contracting Powers under suitable regulations prescribed therefor by them respectively, but such permits shall lapse, or may be canceled, at any time when, in the opinion of said authorities, the particular exigency has passed, and no birds killed under this article shall be shipped, sold, or offered for sale.

ARTICLE VIII.

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.

ARTICLE IX.

The present convention shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty. The ratifications shall be exchanged at Washington as soon as possible and the convention shall take effect on the date of the exchange of the ratifications. It shall remain in force for 15 years, and in the event of neither of the High Contracting Powers having giving notification, 12 months before the expiration of said period of 15 years, of its intention of terminating its operation, the convedtiod shall continue tu remain in force for one year and so on from year to year.

The Migratory Bird Treaty Act above referred to, approved July 3rd, 1918, U. S. Compiled Statutes of 1918, p. 1795, is as follows:

MIGRATORY BIRD TREATY ACT.

"AN ACT To give effect to the convention between the Uhited States and Great Britain for the protection of migratory birds concluded at Washington, August sixteenth, nineteen hundred and sixteen, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be known by the short title of the 'Migratory Bird Treaty Act.'

Sec. 2. That unless and except as permitted by regulations made as hereinafter provided, it shall be unlawful to hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, cell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation transport, cause to be transported, carry or cause to be carried by any means whatever, receive for shipment transportation or carriage, or export, at any time or in any manner, any migratory bird, included in the terms of the convention between the United States and Great Britain for the protecton of migratory birds concluded August sixteenth, nineteen hundred and sixteen, or any part, nest, or egg of any such birds.

Sec. 3. That subject to the provisions and in order to carry out the purposes of the convention, the Secretary of Agriculture is authorized and directed from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the convention to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, tradsportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regula-

tions permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.

Sec. 4. That it shall be unlawful to ship, transport, or carry, by any means whatever, from one State, Territory, or District to or through another State, Territory, or District, or to or through a foreign country, any bird, or any part, nest, or egg thereof, captured, killed, taken, shipped, traansported, or carried at and time contrary to the laws of the State, Territory, or District in which it was captured, killed, or taken, or from which it was shipped, transported, or carried. It shall be unlawful to import any bird, or any part, nest or egg thereof, captured, killed, taken, shipped, transported, or carried contrary to the laws of any Province of the Dominion of Canada in which the same was captured, killed, or taken, or from which it was shipped, transported, or carried.

Sec. 5. That any employee of the Department of Agriculture authorized by the Secretary of Agriculture to enforce the provisions of this act shall have power, without warrant to arrest any person committing a violation of this act in his presence or view and to take such person immediately for examination or trial before an officer or court of competent jurisdiction; shall have power to execute any warrant or other process issued by an officer or court of competent jurisdiction for the enforcement of the provisions of this act; and shall have authority, with a search warrant, to search any place. The several judges of the courts established under the laws of the United States, and United States Commissioners may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue warrants in all such cases. All birds, or parts, nests, or eggs thereof, captured, killed, taken, shipped, transported, carried or possessed

contrary to the provisions of this act or of any regulations made pursuant thereto shall, when found, be seized by any such employee, or by any marshal or deputy marshal, and upon conviction of the offender or upon judgment of a court of the United States that the same were captured, killed, taken, shipped, transported, carried, or possessed contrary to the provisions of this act, or of any regulation made pursuant thereto, shall be forfeited to the United States and disposed of as directed by the court having jurisdiction.

Sec. 6. That any person, association, partnership, or corporation who shall violate any of the provisions of said convention or of this act, or who shall violate or fail to comply with any regulation made pursuant to this act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or be imprisoned not more than six months, or both.

Sec. 7. That nothing in this act shall be construed to prevent the several States and Territories from making or enforcing laws or regulations not inconsistent with the provisions of said convention or of this act, or from making or enforcing laws or regulations which shall give further protection to migratory birds, their nests, and eggs, if such laws or regulations do not extend the open season for such birds beyond the dates approved by the President in accordance with section three of this act.

Sec. 8. That until the adoption and approval, pursuant to section three of this act, of regulations dealing with migratory birds and their nests and eggs, such migratory birds and their nests and eggs as are intended and used exclusively for scientific or propagating purposes may be taken, captured, killed, possessed, sold, purchased, shipped, and transported for such scientific or propagating purposes if and to the extent not in conflict with the laws of the State, Territory, or District in which they are taken

captured, killed, possessed, sold, or purchased or in or from which they are shipped or transported if the packages containing the dead bodies or the nests or eggs of such birds when shipped and transported shall be marked on the outside thereof so as accurately and clearly to show the name and address of the shipper and the contents of the package.

Sec. 9. That the unexpended balances of any sums appropriated by the agricultural appropriation acts for the fiscal years nineteen hundred and seventeen and nineteen hundred and eighteen, for enforcing the provisions of the act approved March fourth, nineteen hundred and thirteen, relating to the protection of migratory game and insectivorous birds, are hereby reappropriated and made available until expended for the expenses of carrying into effect the provisions of this act and regulations made pursuant thereto, including the payment of such rent, and the employment of such persons and means, as the Secretary of Agriculture may deem necessary, in the District of Columbia and elsewhere, co-operation with local authorities in the protection of migratory birds, and necessary investigations connected therewith: *Provided*, That no person who is subject to the draft for service in the Army or Navy shall be exempted or excused from such service by reason of his employment under this act.

Sec. 10. That if any clause, sentence, paragraph, or part of this act shall for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Sec. 11. That all acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

Sec. 12. Nothing in this act shall be construed to prevent the breeding of migratory game birds on farms and preserves and the sale of birds so bred under proper regulations for the purpose of increasing the food supply.

Sec. 13. That this act shall become effective immediately upon its passage and approval."

MISSOURI LAWS.

The particular section of the game law of Missouri which is in direct conflict with the federal act and regulation, is as follows:

> "No person shall take, capture or kill, by any means whatever, any game birds except the following named game birds between the following dates (both inclusive): Wild turkey—November 1st to December 31st of each year. Quail (bobwhite, partridge) and woodcock—November 10th to December 31st of each year. Ducks, geese, brant, snipe, black breasted and golden plover, greater and lesser yellowlegs, rails, coots and gallinules—*Jnauary 1st to April 30th and September 15th to December* 31*st of each year.* Doves—August 1st to November 10th of each year. Anyone who shall violate any of the provisions of this section shall, upon conviction thereof, be punished by a fine of not less that twenty-five dollars ($25.00) nor more than fifty dollars ($50.00) for each offense, and an additional fine of five dollars ($5.00) for each bird injured, killed or possessed."
>
> Sec. 6516, p. 290, Laws of 1915.

The following sections are taken from Chapter 49, Revised Statutes of Missouri, 1909, creating a fish and game commission and providing for the preservation of fish and game:

> "The ownership of 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, and no fish, birds or game shall be caught, taken or killed in any manner or at any time, or had in possession, except the person so catching, taking, killing or having in possession shall consent that the title of said birds, fish and game shall be and remain in the state of Missouri, for the purpose of regulating and controlling the use and disposition of the same after such catching, taking or killing. The catching, taking, killing or having in possession of birds, fish or game at any time, or in any manner, by any person, shall be deemed a consent of said person that the title of the state shall be and remain in the state, for the purpose of regulating the use and disposition of the same, and said possession shall be consent to such title in the state."

Section 6508.

"Upon the payment of two dollars, unless otherwise provided, to the state game and fish commissioner, he is authorized to issue permits according to the provisions of this article."

Section 6572.

"It shall be unlawful for any person, after the passage of this article, to hunt in this state without first obtaining a license permitting him or her to do so. Such license shall be dated when issued, and shall authorize the person named therein to hunt during the calendar year of issue, and then subject only to the regulations and restrictions provided by law."

Section 6574.

"Any person who shall hunt in this state without being at the time of such hunting in possession of a license, as herein provided, duly issued to him (or her), which license shall cover the period in which he (or she) shall be hunting, or who shall furnish to another person a license issued to him (or her), shall be fined not less than twenty-five dollars nor

more than one hundred dollars and costs of prosecution."

Section 6581.

"All moneys sent to the state treasurer in payment of hunting licenses, other licenses, penalties and forfeitures shall be set aside by the state treasurer and shall constitute a fund known as the 'game protection fund,' for the payment of salary of the state game and fish commissioner and his necessary expenses; for the payment of deputy game and fish commissioners and their necessary expenses; also, the buying, shipping, keeping, propagating and preserving of game. . . . . ."

Section 6585.

REGULATIONS—MIGRATORY BIRD TREATY ACT.

To show the conflict between the regulations of the Migratory Bird Treaty Act as proclaimed by the President on July 31st, 1918, and the law of the state of Missouri relating to migratory birds, we quote the following taken from said proclamation:

"REGULATION 4.—OPEN SEASONS ON AND POSSESSION OF CERTAIN MIGRATORY GAME BIRDS.

"For the purpose of this regulation, each period of time herein prescribed as an open season shall be construed to include the first and last days thereof.

"Waterfowl (except wood duck, eider ducks, and swans), rails, coot, gallinules, black-bellied and golden plovers, greater and lesser yellowlegs, woodcock, Wilson snipe or jacksnipe, and mourning and white-winged doves may be taken each day from half an hour before sunrise to sunset during the open seasons prescribed therefor in this regulation, by the means and in the numbers permitted by Regulations 3 and 5 hereof, respectively, and when so taken, each species may be possessed any day during the respective open seasons herein prescribed therefor

and for an additional period of 10 days next succeeding said open season.

"*Waterfowl (except wood duck, eider ducks, and swans), coot, gallinules, and Wilson snipe or jack snipe.*—The open seasons for waterfowl (except wood duck, eider ducks, and swans), coot, gallinules and Wilson snipe or jacksnipe shall be as follows:

"In Maine, New Hampshire, Vermont, Massachusetts, New York (except Long Island), Pennsylvania, Ohio, West Virginia, Kentucky, Indiana, Michigan, Wisconsin, Illinois, Minnesota, Iowa, *Missouri*, North Dakota, South Dakota, Nebraska, Kansas, Colorado, Wyoming, Montana, Idaho, Nevada, and that portion of Oregon and Washington lying east of the summit of the Cascade Mountains the open season shall be from September 16 to December 31;

* * * * * * * * *

(All italics in this brief may be treated by the court as ours.)

SPECIFICATION OF ERRORS.

(1) The court erred in holding that there was a want of equity in the bill of complaint, and in dismissing such bill of complaint.

(2) The court erred in holding the statute of the United States, described as the "Migratory Bird Treaty Act," approved July 3rd, 1918, constitutional.

(3) The court erred in holding that the convention between the United States and Great Britain, proclaimed to be effective December 8th, 1916, pursuant to which said Migratory Bird Treaty Act was enacted, did not invade powers and property rights reserved to the state of Missouri by the Constitution of the United States.

ARGUMENT.

FOREWORD.

Involving as this case does the right of the state of Missouri to maintain inviolate a trust which it holds for the benefit of all its people, and to maintain the right to exercise the power of police, an incident of state sovereignty and reserved to the States by the Constitution, it calls for a review of the form and the fundamentals of the Government designed by the Constitution of the United States.

Instinctively in a matter of this character we turn to "authorities." Original or novel arguments, were they possible, have little place in the determination of the constitutional powers of State and Federal governments at this late day.

We wish, not to create, but to revive an atmosphere: the atmosphere breathed by those who framed and those who ratified and first amended the Constitution of the United States. If the act of Congress now in question would have been unconstitutional then, it is unconstitutional now. The Constitution itself does not change.

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

understood when made, are still within them, and those things not within them remain still excluded. As said by Mr. Chief Justice Taney in Dred Scott v. Sandford, 19 How. 393, 426:

" '*It is not only the same in words, but the same in meaning, and delegates the same powers to the Government and reserves and secures the same rights and privileges to the citizens;* and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.' "

South Carolina v. United States, 199 U. S. 447, 448, 50 L. Ed. 261.

I.

If an executive officer, federal or state, is committing, or is about to commit, acts unauthorized by or in violation of law, to the irreparable injury of the property rights of another, such action or threatened action is good ground for injunctive relief against such officer.

Philadelphia Company v. Stimpson, 223 U. S. 605, 619, 620;

Magruder v. Bell Fourche, 219 Fed. 72, 79;
Noble v. Railroad, 147 U. S. 165, 172;
School Magnetic Healing v. McAnnulty, 187 U. S. 94;
Dobbins v. Los Angeles, 195 U. S. 241;
Truax v. Raich, 239 U. S. 37;
Lane v. Watts, 234 U. S. 525, 540;
Davis v. Los Angeles, 189 U. S. 217;
Ex Parte Young, 209 U. S. 162;
United States v. Lee, 106 U. S. 196.

In a suit of the character of the one at bar, mere property rights and loss of revenue, however, are not the chief consideration. Rights are involved which may not be valued in money, but the infraction of which the state may insist shall be stopped. An adequate remedy can only be had in a suit by the state to enjoin such infraction.

State of Georgia v. Copper Co., 206 U. S. 230, 237; State of Missouri v. State of Illinois, 180 U. S. 208; State of Kansas v. State of Colorado, 185 U. S. 125; Glenwood Light & Water Co. v. Power Co., 239 U. S. 121.

"Some peculiarities necessarily mark a suit of this kind. If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice, it may insist that an infraction of them shall be stopped."

State of Georgia v. Copper Co., 206 U. S. 230.

"Beyond its property rights it has an interest as a state in this large tract of land bordering on the Arkansas river. Its prosperity affects the general welfare of the state. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint. Georgia v. Tennessee Copper Co. 206 U. S. 230, 51 L. ed. 1038, 27 Sup. Ct. Rep. 618."

State of Kansas v. State of Colorado, 185 U. S. 125.

"An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the state of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state. But it must surely be conceded that, if the health

> and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. * * * * * *
>
> "That suits brought by individuals, each for personal injuries threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."
>
> State of Missouri v. State of Illinois, 180 U. S. 208.

In the Court below it was urged that the application for injunction could not be maintained against the Federal Game Warden, because it was in effect a suit against the United States. We incline to the opinion that the Government will abandon such contention. The cases of Hamilton, Collector of Internal Revenue, appellant, vs. Kentucky Distilleries & Warehouse Company, Dryfoos, et al., appellants, vs. Edwards, Collector of Internal Revenue, and Ruppert vs. Caffey, United States Attorney and McElligott, Acting and Deputy Collector of Internal Revenue, involving the constitutionality of the War Time Prohibition Act, and recently decided by this Court, were all applications for injunctions against Federal officers. That this was a proper method to test the constitutionality of the statutes involved in those cases is evidenced by the fact that no discussion of the proposition appears in the opinion.

When the sovereign power of the State of Missouri is invaded it seems to us self-evident that the State in its own name is pre-eminently the party to preserve and defend that sovereignty. Can it be that in the circumstances the State of Missouri is impotent and must depend for the protection of its sovereign rights and powers upon the submission to arrest and prosecution by some private individual for a violation of the Migratory Bird Law? The time worn maxim that equity does not suffer a wrong to be without a remedy is applicable here. If the State of Missouri may not itself restrain an invasion of its sovereignty by the Federal Government, there exists no way in which it can defend—an unthinkable situation. To so protect itself it cannot go to war. Surely, it will be permitted to come to Court.

II.

Our government had no prototype in history. The Federal Government and the States are separate and distinct sovereignties. The one, within the sphere of its delegated powers is supreme; the other, within the sphere of its undelegated and reserved powers, is no less supreme. It was never intended that the states should be shorn of their sovereignty in interna affairs.

Declaration of Independence, last par.;
Articles of Confederation, Art. II;
Constitution of the United States, Arts. IX and X, Secs. 3 and 4;
Collector v. Day, 11 Wlal. 113-124, 20 L. Ed. 122;
Lane County v. Oregon, 7 Wall. 71-76, 19 L Ed. 101;
Gordon v. United States, 117 U. S. 697-705;
Martin v. Hunter, 1 Wheat. 325.
Turner v. Williams, 194 U. S. 279-295, 48 L. Ed. 979;
McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579;
Willoughby, Constitution, Vol. I, p. 66;
South Carolina v. United States, 199 U. S. 447.

".....", that these United Colonies are, and of right ought to be, FREE AND INDEPENDENT STATES; that they are absolved from all allegiance to the British crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved; and that, as FREE AND INDEPENDENT STATES, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which INDEPENDENT STATES may of right do."

Declaration of Independence, last par.

"Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is

not by this Confederation expressly delegated to the United States in Congress assembled."

Articles of Confederation, Art. II.

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

Constitution of the United States, Amendment IX.

"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."

Constitution of the United States, Amendment X.

"We pass, therefore, to the vital question in .this case, and it is one of far-reaching significance. We have in this Republic a dual system of government, National and State, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absol5te control and no action of the State can interfere therewith, and *there are others in which the State is supreme, and in respect to them the National Government is powerless.* To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, pre-eminently of this—a duty oftentimes of great delicacy and difficulty."

South Carolina v. United States, 199 U. S. 447, 448, 50 L. Ed. 261.

"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. . . . The gov-

ernment 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."

Collector v. Day, 11 Wall, 113, 124; 20 L. Ed. 122.

"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

McCulloch v. Maryland, 4 Wheat. 316, 405; 4 L. Ed. 579.

"The latter doctrine, upon the contrary, would derive federal authority not from powers expressly granted, but from an abstraction, and would, at a stroke, equip the Federal Government with every power possessed by any other sovereign State.

"There can be no question as to the constitutional unsoundness, as well as of the revolutionary character, of the theory thus advanced. To accept it would be at once to overturn the long line of decisions that have held the United States Government to be one of limited, enumerated powers."

Willoughby on the Constitution, Vol. I, p. 66.

"By the Tenth Amendment the powers not delegated to the United States nor prohibited by it to the States, are re-

served to the States respectively or to the people. The reservation to the States respectively *can only mean the reservation of the rights of sovereignty which they respectively possessed before the adoption of the Constitution of the United States, and which they had not parted from by that instrument.* And any legislation by Congress beyond the limits of the power delegated, would be trespassing upon the rights of the States or the people, and would not be the supreme law of the land, but null and void; and it would be the duty of the courts to declare it so."

Gordon v. United States, 117 U. S. 697, 705.

"Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the *necessary existence of the States and, within their proper spheres, the independent authority of the States, is distinctly recognized.* To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the National Government are reserved."

Lane County v. Oregon, 7 Wall. 71, 76; 19 L. Ed. 101.

"While undoubtedly the United States as a nation has all the powers which inhere in any nation, Congress is not authorized in all things to act for the nation, and too little effect has been given to the Tenth Article of the Amendments to the Constitution, . . . The powers the people have given to the General Government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the people and can be exercised only by them, or upon further grant from them."

Turner v. Williams, 194 U. S. 279, 295-296; 48 L. Ed. 979.

". . . . ., it is perfectly clear 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.

"These deductions do not rest upon general reasoning, plain and obvious as they seem to be. *They have been positively recognized by one of the articles in amendment of the Constitution*, which declares, that 'powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the *States* respectively, or *to the people.*'

"The government, then, of the United States, 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."

Martin v. Hunter, 1 Wheat. 304, 325-326.

". . . . . : for since the protection of the health, morals, etc., of a people is one of the essential duties of the State, it can neither by contract nor concession of any kind, whether for value or without, divest itself of this obligation. To do so would be to abdicate; to part with it would be State suicide; impossible under the decision in Texas v. White (7 Wall. 700; 19 L. Ed. 227) that declares our government to be '*an indestructible union composed of indestructible States;*' and which was reaffirmed in Collector v. Day (11 Wall. 125, 20 L. Ed. 122). 'Without them (the States), the general government itself would disappear from the family of nations.' "

Tucker, Limitations on the Treaty-making Power,

p. 297.

". . . . : and further, that being an original and reserved power, and the judicial officers appointed under it being a means of instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government, stand upon as solid ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in Dobbins v. The Commissioners of Erie from taxation by the State; *for in this respect,*

that is, in respect to the reserved powers, the State is as sovereign and independent as the general government."

Collector v. Day, 11 Wall. 125, 126; 20 L. Ed. 122.

III.

Under the ancient law, feudal law, and the common law in England the absolute control of wild game was an attribute of government and a necessary incident of sovereignty. When, therefore, the United Colonies became "FREE AND INDEPENDENT STATES" with full power to do all "acts and things which INDEPENDENT STATES may of right do," the power to control the taking of wild game passed to the States.

Geer v. Connecticut, 161 U. S. 519, l. c. 523-530;
Ward v. Race Horse, 163 U. S. 504.

"The practice of the government of England from the earliest time to the present has put into execution the authority to control and regulate the taking of game.

"Undoubtedly this attribute of government to control the taking of animals *ferae naturae*, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the states with the separation from the mother country."

Geer v. Connecticut, *supra*, l. c. 527-8.

"The power of a state to control and regulate the taking of game cannot be questioned."

Ward v. Race Horse, 163 U. S. 504, l. c. 507.

"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 subject to 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."

Ward v. Race Horse, 163 U. S. 504, l. c. 510.

It would seem that if the states are to be shorn of their control over wild game within their respective borders, they are to be *less* than was intended by the Constitution when ratified by the people. *If it had even been suggested* that, although Congress had no power to control the taking of wild game within the borders of any state, yet indirectly by means of a treaty with some foreign power it could acquire the power and by this means its long arm could reach into the states and take food from the tables of their people, who can for one moment believe that such a Constitution would have been ratified?

Wild game and the right of the people thereto has always been a "touchy" subject with all English speaking people. It was of sufficient importance to be a part of the *Magna Charta* and the "Charter of the Forests." (See Parker v. People, 111 Ill., 581, l. c. 647.)

IV.

Missouri, upon her admission to the Union, became entitled to and possessed of *all the rights and dominion and sovereignty* which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. Equality of constitutional right and power is the condition of all the states of the Union, old and new.

Escanaba v. Chicago, 107 U. S. 678, 688;
Ward v. Race Horse, 163 U. S. 504, 513;
Cardwell v. Bridge Co., 113 U. S. 205, 212;
Willamette, Oregon, v. Hatch, 125 U. S. 1;
Pollard v. Hagan, 3 How. 212;
Withers v. Buckley, 61 U. S. 84, 92;
Permoli v. Municipality, 44 U. S. 589.

"The power of all the states to regulate the killing of game within their border *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. Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other states of the Union, *a power resulting from the fact of statehood and incident to its plenary existence.*"

Ward v. Race Horse, 163 U. S. 504, l. c. 514.

"On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is 'on an equal footing with the original States *in all respects whatever.*' 3 Stat. 536. Equality of constitutional right and power is the condition of all the States of the Union, old and new."

Escanaba v. Chicago, 107 U. S. 678, 688.

"When Alabama was admitted into the Union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cecession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; *because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted.*

Pollard's Lessee v. Hagan, 3 How. 212, 223.

V.

This power of the state over wild game within its borders, which "cannot be questioned" and "will not be gainsaid," is derived from the peculiar nature of such property and its common ownership by all the citizens of the state in their collective sovereign capacity. The state in its sovereign capacity is the representative of the people in their common ownership of the wild game within the borders of the state, and *holds the same in trust for the benefit of all its people.*

Geer v. Connecticut, 161 U. S. 519, l. c. 529, 530;
McCready v. Virginia, 94 U. S. 391;
Martin v. Waddell, 16 Pet. 410;
United States v. Shauver, 214 Fed. 154;
United States v. M'Cullagh, 221 Fed. 288, 294;
Rupert v. United States, 181 Fed. 87, 90;
Magner v. People, 97 Ill. 320, 333;
Gentile v. State, 29 Ind. 409, 417;
Ex Parte Maier, 103 Cal. 476, 483;
Chambers v. Church, 14 R. I. 398, 400;
Manchester v. Massachusets, 139 U. S. 240;
Patsone v. Pennsylvania, 232 U. S. 138;
Abby Dodge v. United States, 223 U. S. 166;
Smith v. Maryland, 18 How. 71, 15 L. Ed. 270;
Carey v. South Dakota, U. S. Sup. Ct. 346, May Term, 1919;
Silz v. Hesterberg, 211 U. S. 31;
In re Deininger, 108 Fed. 623;
Heim v. McCall, 239 U. S. 175.

"Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised like all other powers of government as a trust for the benefit of the people.

. . . .

" . . . . . The proposition that the state may not forbid carrying it beyond her limits involves, therefore, the contention that a state cannot *allow its own people the enjoyment of the benefits of the property belonging to them in common*, without at the same time permitting the citizens of other states to participate in that *which they do not own*. . . . . In view of the authority of the State to affix conditions to the killing and sale of game, predicated as is this power on the peculiar nature of such property and its common ownership by all the citizens of the state, it may well be doubted whether commerce is created by an authority given by a state to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the state. *The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose.* . . . . ."

Geer v. Connecticut, 161 U. S. 519, l. c. 529-530.

"In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its People, and the ownership is that of the People in their united sovereignty. Martin v. Waddell, 16 Pet., 410. . . . . Such an appropriation is, in effect, nothing more than a regulation of the use by the People of their common property. The right which the People of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. *It is, in fact, a property right*, and not a mere privilege or immunity of citizenship."

McCready v. Virginia, 94 U. S. 391, l. c. 394; 24 L. Ed. 248.

"Are migratory birds, when in a state on their usual migration, the property of the United States or of the states where they are found? If they are the property of the nation the states would have no power to regulate, control or prohibit the hunting or killing of them. But the rule of law which all the American Courts have recognized is that animals *ferae*

naturae, denominated as game, are owned by the states, not as proprietors, but in their sovereign capacity as the representatives and for the benefit of all their people id common. This principle has not only been maintained by all the highest courts of the states in which the question has arisen, but has had the approval of the Supreme Court of the United States in every case which has come before it."

United States v. Shauver, 214 Fed. 156, 157.

"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.*

Patsone v. Pennsylvania, 232 U. S. 138, l. c. 145, 146; 58 L. Ed. 544.

"While it is true that it would be possible to interpret the statute as applying to sponges taken in local waters, it is equally certain that it is susceptible of being confined to sponges taken outside of such waters. In view of the clear distinction between state and national power on the subject, long settled as the time the act was passed, and the rule of construction just stated, we are of opinion that *its provisions must be construed as alone applicable to the subject within the authority of Congress to regulate*, and, therefore, be held not to embrace *that which was not within such power.*"

The Abby Dodge v. United States, 223 U. S. 166, l. c. 175; 56 L. Ed. 393.

The fact that the State holds the wild game *in trust* for its people would seem to put it beyond the reach of Congress whether it (Congress) acted alone and directly or in conjunction with some foreign power and *indirectly*. If Congress alone cannot take over such *trust* from the State, how can it exercise such trust by means of a convention with some foreign power? If this trust may be destroyed by the treaty-making power, is there any trust which is inviolate?

VI.

But the power of the state over wild game within its borders is not dependent solely upon the authority which

the state derives from common ownership and the trust for the benefit of the people; the power of the state to control wild game is a necessary incident of the power of police. The power of police is an attribute of state sovereignty.

Geer v. Connecticut, 161 U. S. 519, 534;
City v. Miln, 11 Peters, 102, 132-133;
Pierce v. State, 13 N. H. 536, 576 et seq.;
Cutler v. Dibble, 21 How. 366;
Federalist, No. XLV (Hallowell, 1852), pp. 215-216;
Compagnie v. Board, 186 U. S. 380;
Groves v. Slaughter, 15 Pet. 449, 511;
Prigg v. Commonwealth, 15 Pet. 539, 625;
Commonwealth v. Alger, 7 Cush. 53, 84;
Thorpe v. Rutland, 27 Vt. 140, 149;
Beer v. Massachusetts, 97 U. S. 25, 33;
Rupert v. U. S., 181 Fed. 87, 90;
Cook v. Marshall, 196 U. S. 261;
In re Rahrer, 140 U. S. 545;
House v. Mayes, 219 U. S. 270, 281, 282;
Broadnax v. Missouri, 219 U. S. 292, 293;
People v. Becker, 241 U. S. 556;
Cantini v. Tillman, 54 Fed. 969;
Plumley v. Massachusetts, 155 U. S. 461, 473.

"In the American Constitution system, the power to establish the ordinary regulations of police has been left with the individual states, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress."

Cooley, Constitutional Limitations (7 Ed.), p. 831.

"The law of each state 'is the source of all of those relative obligations and duties enforceable by law, the observance of which the State undertakes to enforce as its public policy. And it was in contemplation of the continued existence of this separate system of law in each State that the Constitution of the United States was framed and ordained with such legislative powers as are therein granted expressly or by reasonable implications.' "

Smith v. Alabama, 124 U. S. 476.

"State power to promote public health, good order and prosperity 'is a power originally and always belonging to the states, not surrendered by them to the General Government nor directly restrained by the Constitution of the United States, *and essentially exclusive.*' "

In re Rahrer, 140 U. S. 554.

"But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people."

Escanaba v. Chicago, 107 U. S. 678, 683, quoted in Ward v. Race Horse, 163 U. S. 504, l. c. 513.

"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.*"

State v. Heger, 194 Mo. 707.

"The power of the state police, so far as it relates to those matters which have been the subjects of foreign commerce, or of commerce among the states, acts upon them generally after the transit has been accomplished. When the particular trade between another nation and this country, or between different states, is ended, and the property which formed the subject of it, from being property in one government, and then *in transitu*, has, by that commerce and change of place become part and parcel of the mass of property in a particular state, released from the charges of the national government, and from its superintendence, that property can claim no exemption from the operation of the laws of the state where it is situate, regulating its safe-keeping, sale and use—those laws being general laws, affecting other property of a like character in a similar manner; and being in good faith, but parts of the internal police of the state where it is situated,

and not, in effect, regulations of the commerce which brought it there. The fact that the article had been transported from another nation, or state, and that it had before that time been the subject-matter of commerce between two countries, or states, cannot, after such change is perfected, confer upon it, in respect to the operation of state police, any character different from that possessed by other component parts of the general mass of property there."

Pierce v. State, 13 N. H. 536, l. c. 579.

" . . . . Police, relates only to the internal concerns of one state, and commerce, within it, is purely a matter of internal regulation, when confined to those articles which have become so distributed as to form items in the common mass of property. It follows, that any regulation which affects the commercial intercourse between any two or more states, referring solely thereto, is within the powers granted exclusively to Congress; and that those regulations which affect only the commerce carried on within one state, or *which refer only to subjects of internal police, are within the powers reserved.*"

Groves v. Slaughter, 15 Peters, 449, 511.

"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.

"In the judgment which established the broad power of Congress over interstate commerce, Chief Justice Marshall said (9 Wheat. 203, 6 L. Ed. 23):

" 'They (inspection laws) act upon the subject, before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government; all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass.'

* * * * * * * * *

". . . . . The maintenance of the authority of the states *over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the federal Constitution.*

"In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101. The power of the states to regulate their purely internal affairs by such laws as seem wise to local authority is inherent and has never been surrendered to the general government. *New York v. Miln*, 11 Pet. 102, 139, 9 L. Ed. 648; Slaughter House cases, 16 Wall. 36, 63, 21 L. Ed. 394; *Kidd v. Pearson, supra.*"

Hammer v. Dagenhart, 247 U. S. 251 (38 Sup. Ct. Rep. 529.)

"As a police regulation, relating exclusively to the internal trade of the states, it can only have effect where the legislative authority of Congress excludes, territorially, all state legis-

lation, as, for example, in the District of Columbia. *Within state limits, it can have no constitutional operation.* This 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 (License cases, 5 How. 504; Passenger cases, 7 How. 283); License Tav. cases, 5 Wall. 47 (720 U. S. XVIII, 500, and the cases cited) that we think it unnecessary to enter again upon the discussion."

U. S. v. Dewitt, 9 Wall. 41 (19 L. Ed. 593.)

'Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

Beer Co. v. Massachusetts, 97 U. S. 32, 33; 24 L. Ed. 989.

"All the rights and powers which the states possessed before the adoption of that constitution, they still retain, and may exercise, unless they are taken away, limited, or modified by it. The language of the tenth article of the amendments is express: 'The powers not delegated to the United States by the constitution, not prohibited by it to the states, are reserved to the states respectively, or to the people.' *It is very clear that the power of regulating the internal trade, and matters of police, of the several states, is not granted to the United States, nor prohibited to the states.*"

Pierce v. The State, 13 N. H. 536, l. c. 572.

". . . . . the police power, power vested in the legislature by the Constitution, to make, or ordain or establish

all manner of wholesome and reasonable laws, statutes and ordiances, either with penalties, or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same.

"It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise."

Commonwealth v. Alger, 7 Cushing 85.

"There is also the general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State, *of the perfect right, in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.*"

Thorpe v. Rutland, 27 Vt. 140.

"But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: *That a State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the Constitution of the United States.* That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. *That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authirity of a state is complete, unqualified and exclusive.*

City of New York v. Miln, 11 Peters, 139, 9 L. Ed. 648.

"The police power belonging to the States in virtue of their general sovereignty, 'extends over all subjects within the territorial limits of the States; and has never been conceded to the United States.' "

Prigg v. Pennsylvania, 16 Peters, 625, 10 L. Ed. 1060.

"They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government: *all which can be most advantageously exercised by the States themselves.* Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.

No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation."

Gibbons v. Ogden, 9 Wheat, 1, 203, 6 L. Ed. 23.

"Whenever internal police is the object, the power is excepted from every grant, and reserved to the States."

Holmes v. Jennison, 14 Pet. 614, 619; 10 L. Ed. 579.

"It has been frequently decided by this Court, 'that the powers which relate to merely municipal regulations, or what may more properly be called internal police, *are not surrendered by the States, or restrained by the Constitution of the United States; and that consequently, in relation to these, the authority of a State is complete, unqualified, and conclusive.*' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of the public peace, health and morals, must come within this category."

License Cases, 5 How. 504, 631, 12 L. Ed. 256.

"For if the people of the several States of this Union reserved to themselves (as he elsewhere holds they did) 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.*"

Passenger Cases, 7 How. 466, 12 L. Ed. 779.

"The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, *is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States*, and *essentially exclusive.*"

In re Rahrer, 140 U. S. 554, 35 L. Ed. 572; 11 S. C. 65.

"The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded; and, in extreme cases, it may be thrown into the sea. This comes in direct conflict with the regulations of commerce; and yet no one doubts the local power. It is a power essential to self-preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity. He may resist that which does him harm, whether he is assailed by an assassin, or approached by poison."

Thurlow v. The Commonwealth of Massachusetts, 5 How. 504, 589; 12 L. Ed. 256.

". . . . .; That such 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 so 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; . . . . ."

House v. Mayes, 219 U. S. 282, 55 L. Ed. 213.

"As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as, for example, in the District of Columbia. *Within State limits, it can have no constitutional operation.* This 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."

United States v. DeWitt, 9 Wall. 41; 19 L. Ed. 593.

If a source of food supply is not within the exclusive control of a state under its power of police, is there anything which is within the exclusive control of the police power of a state? If Congress by means of a treaty can tell the people of a state when and under what conditions they may eat wild game *which they own* in their collective sovereign capacity, and in and over which, while within the borders of the state, neither Congress nor any foreign nation can have, either under national or international law (see Behring Sea Arbitration, 32 Amer. Law Reg. 901), any property rights nor any power of control, then the Xth Amendment with its powers "reserved" to the states respectively or to the people, is a delusion, and they are states *in name only*, and our government a *very different government from that presupposed and intended by the people who ratified the Constitution.*

"If this extraordinary proposition can be taken as universally or as generally true, . . . the Constitution of the United States, with all its limitations on Federal power, and as it has been heretofore generally understood to be a special delegation of power, is a falsehood or an absurdity. It must be viewed as the creation of a power transcending that which called it into existence; a power single, universal, engrossing,

absolute. *Everything in the nature of civil or political rights is thus engulfed in federal legislation, and in the power of negotiating treaties.*"

Passenger Cases, 7 Howard, p. 474; 12 L. Ed. 702.

VII.

Upon the authority and principles of the cases hereinbefore cited it has been held that a prior act of Congress, approved March 4, 1913—which act is similar to the one now in question, save that it was not made in aid of any treaty—was unconstitutional and void.

United States v. Shauver, 214 Fed. 154;
United States v. McCullagh, 221 Fed. 288.

"The act challenged is believed to be the single instance in the entire legislative or judicial history of this nation, or the composing states, in which a contrary view has been expressed. Unless a departure, as radical in theory as it is important in its effects, is to be made from fundamental principles long established by our laws, and long acquiesced in by our people, the act in question must be held incapable of support by any provision of the organic law of our country. If the act in question shall, on any ground, or for any reason, be upheld and enforced, it must surely follow that many laws of the separate states of this Union must hereafter be held inoperative, for there can be no divided authority of the nation and the several states over the single subject-matter in issue, with either safety to the nation or security to the citizen."

United States v. McCullagh, 221 Fed. 288, l. c. 294-295.

".....If Congress has not the power, the duty of the court is to declare the act void. *The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game when in a state*, and is therefore forced to the conclusion that the act is unconstitutional."

United States v. Shauver, 214 Fed. 154, 160.

VIII.

The fact that the present Act of Congress purports to give effect to a treaty between the United States and Great Britain cannot validate such Act of Congress when its effect is not only to accomplish that which under the Constitution Congress has no power to do, but also to do that which is forbidden to the entire Federal Government in all or any of its departments under the terms of the Constitution. Any and every treaty must be presumed to be made subject to the rightful powers of the governments concerned, and neither the treaty-making power alone, nor the treaty-making power in conjunction with any or all other departments of the Government, can bind the Government to do that which the Constitution forbids.

The Federalist, pp. 144-145, 215-216;
Works of Calhoun, Vol. I, 203-204, pp. 249-250, 252-253;
Geofroy v. Riggs, 133 U. S. 258, 267;
People v. Gerke, 5 Cal. 381, 382 et seq.;
Tucker on the Constitution, Vol. II, pp. 725, 726;
George v. Pierce, 148 N. Y. Supp. 230, 237;
Compagnie v. Board, 51 La. Ann. 645, 662; 186 U. S. 380;
Cantini v. Tillman, 54 Fed. 969;
Butler, Treaty Making Power, Vol. I, p. 64;
Loan Association v. Topeka, 20 Wall. 655, 662-663;
Story, Commentaries on the Constitution, Sec. 1508;
Duer, Lectures on the Constitutional Jurisprudence of the United States (2 Ed.), p. 228;
Colley, Principles of Constitutional Law, p. 117;
Von Holst, Constitutional Law of the United States, p. 202;
Thayer, Cases on Constitutional Law, Vol. I, p. 373;
59th Congress, 41 Congressional Record, Part I, p. 299;

William Archer Cocke's "Constitutional History of the United States," p. 235;
Jefferson, Manual of Parliamentary Practice, p. 110, note 3;
Elliot's Debates, Vol. III, pp. 504, 507;
Cherokee Tobacco Case, 11 Wall. 616, 20 L. Ed. 227;
Siemessen v. Bofer, 6 Cal. Rep., p. 250;
The People v. Naglee, 1 Cal. 246, 247;
8 Opinions of Attorney-Generals, 411-415;
Constitution of United States, Amendment X;
Kansas v. Colorado, 206 U. S. l. c. 80;
Murphy v. Ramsay, 114 U. S. 15, 44;
Head Money Cases, 112 U. S. 580;
Jones v. Meehan, 175 U. S. 132;
Fong Yue Ting, 149 U. S. 698;
Butler on Treaties, Vol. II, pp. 350, 352;
Seneca Nation v. Christie, 126 N. Y. 122;
Fort Leavenworth v. Lowe, 114 U. S. 525;
Pierce v. State, 13 N. H. 576;
Cooley, Constitutional Limitations (7 Ed.), p. 11;
Martin v. Hunter's Lessee, 1 Wheat. 304, 326;
Mormon Church v. United States, 136 U. S. 1;.

"A treaty cannot be made which alters the Constitution of the country, or which infringes any express exceptions to the power of the Constitution of the United States."

Hamilton's Works, Vol. IV, p. 342.

"If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government; which is only another word for political power ans supremacy. But it will not follow from this doctrine, that acts of the larger

society, which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These *will be merely acts of usurpation, and will deserve to be treated as such.*"

Alexander Hamilton, The Federalist, p. 145.

"It is sufficient, in reply, to state, that the clause is declaratory; that it vests no new power whatever in the government, or in any of its departments. Without it, the constitution and the laws made in pursuance of it, and the treaties made under its authority, would have been the supreme law of the land, as fully and perfectly as they now are; and the judges in every State would have been bound thereby, anything in the constitution or laws of a state to the contrary notwithstanding. Their supremacy results from the nature of the relation between the federal government, and those of the several States, and their respective constitutions and laws. Where two or more States form a common constitution and government, the authority of these, within the limits of the delegated powers, must, of necessity, be supreme, in reference to their respective separate constitutions and governments. Without this, there would be neither a common constitution and government, nor even a confederacy. The whole would be, in fact, a mere nullity. *But this supremacy is not an absolute supremacy. It is limited in extent and degree. It does not extend beyond the delegated powers;—all others being reserved to the states and the people of the States. Beyond these the Constitution is as destitute of authority, and as powerless as a blank piece of paper; and the measures of the government mere acts of assumption.* And, hence, the supremacy of laws and treaties is expressly restricted to such as are made in pursuance of the Constitution, or under the authority of the United States; which, can, in no case, extend beyond the delegated powers. There is, indeed, no power of the government without restriction; not even that which is called the discretionary power of Congress. I refer to the grant which authorizes it to pass laws to carry into effect the powers expressly vested in it,— or in the government of the United States,—or in any of its departments, or officers. This power,

comprehensive as it is, is, nevertheless, subject to two important restrictions; one, that the law must be necessary,—and the other, that it must be proper."

Works of Calhoun, pp. 252-253.

"The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced construction of its authority, (which indeed cannot easily be imagined), the federal legislature should attempt to vary the law of descent in any state; would it not be evident, that in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the state? Suppose, again, that upon the pretense of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authority of a state; would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which the Constitution plainly supposes to exist in the state governments? If there ever should be a doubt on this head, the credit of it will be entirely due to those reasoners, who in the impudent zeal of their animosity to the plan of the convention, have labored to envelope it in a cloud, calculated to obscure the plainest and simplest truths."

Alexander Hamilton, The Federalist, pp. 144-145.

"The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments, are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the state."

Mr. Madison, The Federalist, pp. 215-216.

"That her object was to guard against the abuse of construction, the act itself, on its face, and the discussions in her

convention, abundantly prove. It was done effectually, as far as it depended on words. It declares that all powers granted by the Constitution, are derived from the people of the United States; and may be *resumed* by them when *perverted* to their injury or oppression; and, that every power *not granted*, remains with them, and at their will; and that no right of any description can be canceled, abridged, restrained or modified by Congress, the Senate, the House of Representatives, the President, or any department, or officer of the United States. Language cannot be stronger. It guards the reserved powers against the government as a whole, and against all its departments and officers and in every mode by which they might be impaired; showing, clearly, that the intention was to place the reserved powers beyond the possible interference and control of the government of the United States." Works of Calhoun, pp. 249-250.

"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 department, 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."

Geofroy v. Riggs, 133 U. S. 258, 267.

"The language which grants the power to make treaties, contains no words of limitation; it does not follow that the power is unlimited. It must be subject to the general rule, that an instrument is to be construed so as to reconcile and give meaning and effect to all its parts. If it were otherwise, the most important limitation upon the powers of the Federal Government would be ineffectual, and *the reserved rights of the state would be subverted.* This principle of construction as applied, not only in reference to the Constitution of the United States, but particularly in the relation of all the rest of it to the treaty making grant, was recognized both by Mr. Jefferson and John Adams,—two leaders of opposite schools

of construction. Jefferson's Works, Vol. 3, page 135; Vol. 6, page 560."

People v. Gerke, 5 Cal. 381, 382 et seq.

"A treaty, therefore, cannot take away essential liberties secured by the Constitution to the people. A treaty cannot bind the United States to do what their Constitition forbids them to do.

Tucker on the Constitution, Vol. II, p. 726.

"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 Onondago 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*. 126 N. Y. 122-143, 27 N. E. 275."

George v. Pierce, 148 N. Y. Supp. 230, 237.

"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."

Campagnie v. Board, 51 La. Ann., 645, 662, Affirmed; 186 U. S. 380.

"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."

Cantini v. Tillman, 54 Fed. 969.

"Undoubtedly, as the Supreme Court asserted in Murphy v. Ramsey, 114 U. S. 15, complete and unlimited power is repugnant to our institutions, but it is also declared in Mormon Church v. U. S. 136 U. S. 1, that those limitations in many instances are found, not in the Constitution, but in the fundamental principles upon which our Government is established."

Butler, Treaty Making Power, Vol. I, p. 64.

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Loan Association v. Topeka, 20 Wall. 655, 662-663.

"The power 'to make treaties' is by the Constitution general; and of course it embraces all sorts of treaties, for peace or war; for commerce or territory; for alliances or succors; for indemnity for injuries or payment of debts; for the recognition and enforcement of principles of public law; and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other. *But though the power is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the state.* A power given by the Constitution can not be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and *cannot supersede or interfere with any other of its fundamental provisions.* Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other. A treaty to change the organization of the Government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers, would be void; because it would

destroy what it was designed merely to fulfill, the will of the people."

Story, Commentaries on the Constitution, Sec. 1508.

"And although the President and Senate are thus invested with this high and exclusive control over all those subjects of negotiation with foreign powers, which, in their consequence, may affect important domestic interests, yet it would have been impossible to have defined a power of this nature, and, therefore, general terms only were used. These general expressions, however, ought strictly to be confined to their legitimate signification; and in order to ascertain whether the execution of the treaty-making power can be supported in any given case, those principles of the Constitution, from which the power proceeds, should carefully be applied to it. The power must, indeed, be construed in subordination to the Constitution; and however, in its operation, it may qualify, it cannot supersede or interfere with any other of its fundamental provisions, nor can it ever be so interpretated as to destroy other powers granted by that instrument. A treaty to change the organization of the Government, or annihilate its sovereignty, or overturn its republican form, or to deprive it of any of its constitutional powers, would be void; because it would defeat the will of the people, which it was designed to fulfill."

Duer, Lectures on the Constitutional Jurisprudence of the United States (2nd Ed.), p. 228.

"The Constitution imposes no restrictions upon this power (treaty-making power), but it is subject to the implied restriction that nothing can be done under it which changes the Constitution of the country, or robs a department of the government or any of the states of its constitutional authority."

Cooley, Principles of Constitutional Law, p. 117.

"As to the extent of the treaty-power the Constitution says nothing, but it evidently cannot be unlimited. The power exists only under the Constitution, and every treaty

stipulation inconsistent with a provision of the constitution is therefore inadmissible and according to the constitutional law *ipso facto* null and void."

Von Holst, Constitutional Law of the United States, p. 202.

"It is certain that no authority granted by the constitution to any of the factors of government can be withdrawn from it by treaty. For that would be a change of the constitution and, as such, unconstitutional."

Von Holst, Constitutional Law of the United States, p. 202.

"A treaty, therefore, cannot take away essential liberties secured by the Constitution to the people. A treaty cannot bind the United States to do what their Constitution forbids them to do. We suggest a further limitation: A treaty cannot compel any department of the Government to do what the Constitution submits to its exclusive and absolute will. On these questions the true canon of construction, that the treaty-making power, in its seeming absoluteness and unconditional extent, is confronted with equally absolute and unconditioned authority vested in the judiciary."

Tucker, Constitution, Vol. II, p. 725.

"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. Fort Leavenworth Railroad Co. v. Lowe, 114 U. S. 525, 541."

Thayer, Cases on Constitutional Law, Vol. I, p. 373.

"I plant myself firmly and unalterably upon the proposition that we can make no treaty that violates any of the provisions of the Constitution of the United States, that the treaty-making power in the sixth Article must be construed *in pari materia* with all the other provisions contained in the Constitution, and if the treaty comes in conflict with any of the limitations of the instrument the treaty must yield and the Constitution prevail.

"As a corollary of this proposition I plant myself upon the doctrine that any treaty that violates Article X of the Constitution and infringes upon the reserved rights of the States which have not been delegated to the General Government, and embraces subjects that belong to the States, and that are not necessary to carry out the purposes of the Government as defined in the Constitution, is *ultra vires* and not within the capacity of the Government to make."

Senator Rayner, 59th Congress, 41 Congressional Record, Part 1, p. 299.

"I do not say that there is no check or restriction upon the functions of the Government, for there is this limit, that it cannot be exercised in the destruction of or in opposition to any known Constitutional right or power, and must be subordinate to every other right recognized."

William Archer Cocke's "Constitutional History of the United States," p. 235.

"*It must have meant to except out of these the rights reserved to the states*, for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way."

Jefferson, Manual of Parliamentary Practice, p. 110, note 3.

"The honorable gentleman says that, if you place treaties on the same footing here as they are in England, he will consent to the power, because the king is restrained in making treaties. Will not the President and Senate be restrained? Being creatures of that Constitution, can they destroy it? Can

any particular body, instituted for a particular purpose, destroy the existence of the society for whose benefit it is created? It is said there is no limitation of treaties. I defy the wisdom of that gentleman to show how they ought to be limited. When the Constitution marks out the powers to be exercised by particular departments, I say no innovation can take place. An honorable gentleman says that this is the Great Charter of America. If so, will not the last clause of the 4th Article of the Constitution secure against dismembership? It provides that 'nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.' And if this did not constitute security, it follows, from the nature of civil association, that no particular part shall sacrifice the whole.

Governor Randolph in Virginia Convention.
Elliott's Debates, Vol. III, p. 504.

"The worthy Member says that they can make a treaty relinquishing our rights and inflicting punishments; because all the treaties are declared paramount to the constitutions and laws of the States. An attentive consideration of this will show the committee that they can do no such thing. 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 the particular states."

George Nicholas in Virginia Convention.
Elliott's Debates, Vol. III, p. 507.

"It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instru-

ment. This results from the nature and fundamental principles of our government."

Cherokee Tobacco Case, 11 Wall. 616, 20 L. Ed. 227.

"In my opinion, the treaty-making power can only be coeval with the express grant of power to the Federal Government, and can never be extended, by implication, to the reserved powers of the States, or matters which belong to State sovereignty, or the right which appertains to each State to govern her own domestic concerns, and establish her own police regulations; neither can the exercise of this power, on the part of the President and Senate, be extended to matters which are the proper subject of congressional legislation; 'for it would,' as Mr. Jefferson truly remarks in his letter to Mr. Monroe, in 1796, upon the subject of the British treaty, 'be virtually transferring the powers of legislation from the President, Senate and House of Representatives to the President, Senate and Piamingo, and any other Indian, Algerine or other chief.' "

Siemssen v. Bofer, 6 Cal. Rep., p. 250.

"But even if the provisions of the statute did clash with the stipulations of that, or of any other treaty, the conclusion is not deducible that the treaty must, therefore, stand, and the state law give way. The question in such case would not be solely what is provided for by the treaty, but whe ther the state retained the power to enact the contested law, or had given up that powef to the general government. *If the state retains the power, then the president and senate cannot take it away by a treaty.* A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty-making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that body, it cannot supersede a state law which enforces or exercises any power of the state not granted away by the constitution. To hold any other doctrine than this

would, if carried out into its ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective states, or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the states to a foreign nation.....

"It is not within the scope of a constitutional treaty to interfere with the reserved powers of taxation and of control over foreigners, which we have above discussed. No treaty, within our knowledge, has attempted to do it; and if such attempt should be made, the stipulation would, we apprehend, be neither recognized nor enforced by the supreme tribunal of the nation....."

The people v. Naglee, 1 Cal. 246, pp. 246, 247.

In the consideration of the questions involving the powers of the Federal and State governments there exists the mental temptation to lodge all sovereign or governmental power in either the United States or the States. This disposition is evidenced by the frequent statement that there exists in this country *dual* sovereignties. All who reason thus, it seems to us, fall into error.

Judge Treiber of the District Court of Arkansas, in upholding the constitutionality of the Migratory Bird Law, in the case of United States vs. Thompson, quoted from an opinion of Attorney-General Cushing (8 Opinions of Attorney-Generals, 411-415), as follows:

> "The power which the Constitution bestows on the President, with the advice and consent of the Senate, to make treaties is not only general in terms, and without any express limitations, but it is accompanied with absolute prohibition of the exercise of the treaty power by the states—that is, in the matter of foreign negotiation the states have conferred the whole of their power, in other words, all the treaty powers of sovereignty, on the United States. Thus, in the present case, if the power of negotiation be not in the United States, then it exists nowhere, and

> one great field of international relation of negotiation and of ordinary public and private interest is closed up, as well against the United States as each and every one of the states. That is not a supposition to be accepted, unless it be forced upon us by considerations of overpowering cogency. Nay, it involves political impossibility. For, if one of the proper functions of sovereignty be thus utterly lost to us, then the people of the United States are but incompletely sovereign—not sovereign—nor in coequality of right with other admitted sovereignties of Europe and America."

The foregoing is a fair sample of the erroneous logic of those who contend that the Constitution creates an unlimited treaty-making power. Sovereign power is absolute, unrestricted power. There is nothing a sovereign may not do. The *people* of the United States are a sovereign people, but in a strict sense the United States is not a sovereign government, nor do the states possess sovereign powers. There exist sovereign powers which are not delegated to Federal authority, but the exercise of which likewise is prohibited to the states.

By the Tenth Amendment to the Constitution there is distinctly created *three* repositories of power. With more propriety it can be said that there exists in this Nation a *triple* sovereignty, than to say that there exists a *dual* sovereignty. It requires but cursory scrutiny of the Tenth Amendment to demonstrate the conclusive truth of the assertion that our Constitution creates three repositories of power. Amendment Ten reads:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

In so many words this provision recognizes that there are powers not delegated to the United States, but the exercise of which is prohibited to the States. The people of the United States possess sovereign power. Some of that power

has been delegated to the Federal Government. Some has been delegated or reserved to the States; there remains undisposed of power which is reserved "to the people" by the express terms of the Tenth Amendment. That up to this time the people have not created an agency by which to exercise a power which may not now be exercised by either the Federal or the State governments, does not militate against the soundness of our contention.

Mr. Justice Brewer, in the case of *Kansas vs. Colorado*, 206 U. S., recognized the existence of the three repositories of power in the following language (l. c. 90):

> "But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the 10th Amendment. This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to-wit, 'the people.' Its principal

> purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it,—'we, the people of the United States,' not the people of one, state, but the people of all the states; and Article X reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the Constitution, 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. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning."

It may be conceded that it is an attribute of complete sovereignty to make a Migratory Bird Treaty, but it is a power reserved "to the people" and not delegated to the United States.

Recent events of the gravest importance furnish illustrations of the correctness of our position. That a full sovereign nation could enter into a treaty obligating itself to send troops on the call of an association of powers cannot be questioned, and yet, it is conceded by the most distinguished advocates of the League of Nations covenant that Article X imposes no *legal* obligation upon the United States to send

troops in such a situation, because such course would be an impingement upon the Constitutional prerogatives of the Congress. The power to make such a treaty, therefore, legally binding is reserved "to the people."

The possession of sovereign power by the United States would no doubt enable it to make a treaty with Japan relative to the admission of Japanese children in the schools of California. The recent controversy with Japan over that question may be summarized thus: Japan said to America that she would like to make a treaty admitting Japanese children to the schools of California. The United States replied, "That is a matter beyond national jurisdiction. The State of California alone controls its schools." Whereupon, Japan replied, "We will then make a treaty with California." To this our Government answered, "The Constitution of the United States prohibits California from making any treaty."

Where is a sovereign power of this kind lodged? The answer is, "In the people."

Applying the foregoing principle to the subject matter of the case at bar we find that the power to control migratory birds is lodged in the states. Many former decisions of this Court are to that plain effect. This is an exclusion of the exercise of any such power by the Federal Government. As the States may not make a treaty with respect to the matter, it follows that the power to make such a treaty is reserved not to the Federal Government, but "to the people," and only by amendment to the Constitution can such "reserved powers be taken from the people and lodged in the Federal Government.

IX.

The Federal Government is a government not only of enumerated powers, but it is also a government to which certain powers are denied. Powers denied are not to be implied: they are to be obtained, if obtained at all, from, and in the manner provided by, those who originally granted

the enumerated powers, but who at the same time denied other powers—the people.

Amendments to the Constitution, Arts. I to X, inclusive;
Barron v. Baltimore, 7 Pet. 243, 247;
Kansas v. Colorado, 206 U. S. 46, 89-90;
United States v. Shauver, 214 Fed. 154, 156;
Holden v. Joy, 17 Wallace, 243;
United States v. Rhodes, 1 Abb. U. S. Rep. 43; Fed. Cases, 16151;
Fairbank v. United States, 181 U. S. 283, 288.

"But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the 10th amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act."

Kansas v. Colorado, 206 U. S. 46, 89-90.

"We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations impose by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly

granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that, where prohibition is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed."

Fairbank v. United States, 181 U. S. 283, 288.

"The constitution was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think, *necessarily applicable to the government created by the instrument.* They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes."

Barron v. Baltimore, 32 U. S. 243, 247.

"That the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, is not inconsistent with the nature of our government and *the relation between the States and the United States.*"

Holden v. Joy, 17 Wallace, 243, 21 L. Ed. 523.

"What is unwarranted or forbidden by the Constitution can no more bedone in one way that in another. The authority of the national government is limited, though supreme in the sphere of its operation. As compared with the State governments, the subjects upon which it operates are few in number. Its objects are all national. It is one wholly of delegated powers. The States possess all which they have not surrendered; the government of the Union only such as the Constitution has given to it, expressly or incidentally, and by reasonable intendment. Whenever an act of that government is challenged a grant of power must be shown, or the act is void."

United States v. Rhodes, 1 Abb. U. S. Rep. 43, 44; Fed. Cases 16151.

"It is also claimed that it is one of those implied attributes of sovereignty in which the national government has concurrent jurisdiction with the states; that it is a dormant right in the national government; and, where the state is clearly incompetent to save itself, the national government has the right to aid. To sustain the latter proposition stress is laid on the fact that it is impossible for any state to enact laws for the protection of migratory wild game, and only the national government can do it with any fair degree of success; consequently the power must be national and vested in the Congress of the United States. A similar argument was presented to the court in Kansas v. Colorado, 206 U. S. 46, 89, 27 Sup. Ct. 655, 664 (51 L. Ed. 956), but held untenable.'"

United States v. Shauver, 214 Fed. 154, 156-157.

"4th. No legislation can be proper which is inconsistent with the letter and spirit of the Constitution; hence the trial and conviction of Milligan to death by court-martial, though claimed to be a means for the preservation of the Union, was held unconstitutional, because such trial and conviction were forbidden by the Constitution; and where, taking the whole Constitution in its distribution of powers between the departments of government, and the relation it establishes between the granted powers to the Federal government and the re-

served powers to the States, the act is not in accord with the whole scheme, but inconsistent with it—it is unconstitutional.

"5th. If Congressional legislation be inconsistent with the reserved rights of the States and their autonomy, it is unconstitutional.

"6th. If legislation be contrary to the trust nature of the power of Congress—that is, to the duty which Congress owes in respect to the subject-matter of the legislation to all the States, or to any of them—it would be contrary to the letter and spirit of the Constitution."

Tucker on the Constitution, Vol. I, pp. 371-373.

". . . . . *The right of local self-government as known to our system as a constitutional franchise* belongs, under the Constitution, *to the States and to the people thereof*, by whom that Constitution was ordained and to whom, by its terms, all power not conferred by it upon the Government of the United States *was expressly reserved.*"

Murphy v. Ramsey, 114 U. S. 15, 44.

If Congress, without an amendment to the Constitution, can take away from the states their control over wild game by means of a treaty, why cannot it in the same manner take away from the states their control over intoxicating liquors? Why amend the Constitution to have National prohibition instead of making a treaty to that end with Turkey or some other foreign power? Now that there is a prohibition amendment to the Constitution, why not disregard it and by means of a treaty with England—whom rumor says is not overly pleased with our aridity—provide for the sale of intoxicants in each and every state of the Union?

Why resort to the expensive and time-taking method of amendment to the Constitution in any instance if the assent of the people is not necessary in those things which affect so intimately their private lives, but may be taken from them by agreement with some foreign power? In the language of the Chief Justice of the United States:

"I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every department of the government of the United States to support and defend the Constitution."

Downes v. Bidwell, 182 U. S. 344, 45 L. Ed. 1088.

X.

Among those powers denied to the Federal Government until secured by amendment are those which are "reserved" to the states respectively or to the people. These reserved powers include those purely internal affairs which "concern the lives, liberties and properties of the people and the internal order, improvement and prosperity of the state." Without exception wild game has been held to be a part of this mass which is within the exclusive and absolute power of the state. When the power of the states over their purely internal affairs is destroyed, the system of government devised by the Constitution is destroyed.

Downes v. Bidwell, 182 U. S. 244, 312-313, 369-370;
Pierce v. State, 13 N. H. 536, 576, 578;
Hammer v. Dagenhart, 247 U. S. 251;
South Carolina v. United States, 199 U. S. 447, 451;
Collector v. Day, 11 Wall. 125, 127;
Tucker, Limitations on Treaty-making Power, 92, 93, 129-130;
Geofroy v. Riggs, 133 U. S. 258, 267;
George v. Pierce, 148 N. Y. 230, 237;
Tucker on the Constitution, Vol. II, pp. 726, 727;
Federalist, p. 145;
People v. Gerke, 5 Cal. 381, 382, et seq.

"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 department, and those arising from the nature of the Government itself and *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."

Geofroy v. Riggs, 133 U. S. 258, 267.

"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 . . . . . 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."

Downes v. Bidwell, 182 U. S. 244, 312, 313.

The above was written by Mr. Justice White, now Mr. Chief Justice. Mr. Chief Justice Fuller did not agree with the conclusion reached in that case, and wrote a dissenting opinion; but in this dissenting opinion he expresses his agreement with Mr. Justice White upon this particular point as follows:

> "The grant by Spain could not enlarge the powers of Congress, nor did it purport to secure from the United States a guaranty of civil or political privileges.
>
> "*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. 616, 620."

Downes v. Bidwell, 182 U. S. 244, 369-370.

"In our view the necessary effect of this Act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states, a purely state authority. Thus the Act in a two-fold sense is repugnant to the Constitution. *It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend.* The far-reaching result of upholding the Act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the *power of states over local matters may be eliminated, and thus our system of government be practically destroyed.*"

Hammer v. Dagenhart, 247 U. S. 251 (38 Sup. Ct. Rep. 529.)

"As a police regulation, relating exclusively to the internal trade of the states, it can only have effect where the legislative authority of Congress excludes, territorially all state, legislation, as, for example, in the District of Columbia. *Within state limits, it can have no constitutional operation.* This 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 (License cases, 5 How. 504; Passenger cases, 7 How. 283; License tax cases, 5 Wall. 470 (72 U. S. XVIII, 500,) and the cases cited) that we think it unnecessary to enter again upon the discussion.

U. S. v. DeWitt, 9 Wall. 41, 45 (19 L. Ed. 593.)

"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."

Heim v. McCall, 239 U. S. 175, 194.

"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."

Truax v. Raich, 239 U. S. 33.

". . . . . a sovereign state, *a necessary incident of whose authority was the complete power to regulate the killing of game within its borders.*"

Ward v. Race Horse, 163 U. S. 504, l. c. 510.

"Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other states of the Union, *a power resulting from the fact of statehood and incident to its plenary existence.*"

Ward v. Race Horse, 163 U. S. 504, l. c. 514.

". . . . . The proposition that the State may not forbid carrying it beyond her limits involves, therefore, the contention that a State cannot allow its own people the en-

joyment of the benefits *of the property belonging to them* in common, without at the same time permitting the citizens of other States to participate in that *which they do not own. . . . . The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose. . . .*"

Geer v. Connecticut, 161 U. S. 519, l. c. 529-530.

"The several states, as has been seen, possess the most absolute and plenary power of control over the subject-matter of wild animal and wild bird life with their territorial domains it is possible to either conceive or to grant."

United States v. McCullagh, 221 U. S. 288, 295, 296.

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. *The legislature cannot, by any contract, divest itself of the power to provide for these objects.* They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. *That discretion can no more be bargained away than the power itself.*"

Beer Co. v. Massachusetts, 97 U. S. 32, 33; 24 L. Ed. 989.

"*In re* Rahrer, 140 U. S. 554, the Supreme Court of the United States, speaking through Chief Justice Fuller, made use of the following language: 'The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive.

" 'And this court has uniformly recognized State legislation, legitimately, for police purposes, as not in the sense of the Constititution infringing upon any right which has been confided, expressly or by implication, to the general government. . . .'

"*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."

Compagnie v. Board, 51 La. Ann. 645, 660-662. Affirmed: 186 U. S. 380.

"In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual States, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. *Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the States.*"

Cooley, Constitutional Limitations (7 Ed.), p. 831.

"Call them by whatever name, if they are necessary to the well-being and independence of all communities, *they remain among the reserved rights of the States,* no express grant of them to the general government having been either proper, or apparently embraced in the Constitution."

License Cases, 5 How. 627; 12 L. Ed. 312.

"We cannot doubt that the police power of the State was applicable and adequate to give an effectual remedy. *That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now.* It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases."

The Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659; 24 L. Ed. 1036.

"On the other hand, the power to regulate the internal police of the state, which is lodged in, and guaranteed to the state authority, has for its objects, the inhabitants and residents of the state, considered as such (notwithstanding they at the same time owe duties to the United States, and are under obligations as citizens of that government), and all the property within its limits which may fairly be regarded as a part of the mass of property in the state."

Pierce v. State, 13 N. H. 536, l. c. 578.

"The power then of New York to pass this law having undeniably existed at the formation of the Constitution, the simple inquiry is, whether by that instrument it was taken from the states, and granted to Congress; for if it were not, it yet remains with them.

"If, as we think, it be a regulation, not of commerce, but police; then *it is not taken from the states.*"

City of New York v. Miln, 11 Peters 102, 132-133.

" 'This police power of the State,' says another eminent judge, 'extends to thjprotection of the lives, health, comfort, and quiet of all persons, and the protection of all property within the State. . . . . .' (By this) 'general police power of the State, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State; of the perfect right in the legislature to do which, no question ever was, or, upon the acknowledged general principles, ever can be made, so far as natural persons are concerned.' Thorpe v. Rutland, 27 Vt. 140, 149. *And neither the power itself, nor the discretion to exercise it as need may require, can be bargained away by the State.* Beer Company v. Massachusetts, 97 U. S. 25, 33."

Cooley's Constitutional Limitations, 7 Ed., pp. 830-831.

"Among those matters which are implied, though not expressed, is that *the Nation may not,* in the exercise of its

powers, *prevent a State from discharging the ordinary function of government*, just as it follows from the second clause of Article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it."

South Carolina v. United States, 199 U. S. 447, 451; 50 L. Ed. 261.

". . . . .; for, *in this respect*, that is, in respect to the reserved powers, the *State is as sovereign and independent as the general government.*"

Collector v. Day, 11 Wall. 125, 127; 20 L. Ed. 122.

"It is a plain case of a subordinate overruling his superior, of the creature being superior to the creator. Every reputable commentator upon the Constitution from Story down to the present day, has held that the legislative powers of Congress lie in grant and are limited by such grant. This statement in effect declared that when a treaty that may need legislation to carry it into effect, has embraced a subject which Congress cannot legislate upon, because not granted the power under the Constitution, that the *treaty power may come to its own assistance and grant such right to Congress, though the Constitution, the creator of both, has denied it.* Such interpretation would clothe Congress with powers beyond the limits of the Constitution, with no limitations except the uncontrolled greed or ambition of an unlimited power."

Tucker, Limitations Treaty-making Power, pp. 129, 130.

"If we are to accept, therefore, the literal meaning of the words in Article VI, as applied to treaties, and give to them the supremacy which it is claimed the letter of the Constitution accords them, what is the result? In the first place, every power delegated to the Congress of the United States for its execution may be surrendered to the treaty power. The, purpose which the framers of the Constitution had that the imposition of taxes, the regulation of commerce, the establishment of postoffices and post-roads, the coining of

money, the naturalization of foreigners, and the like, should be accomplished only through the action of representatives elected by the people of the States, and the Senators representing the States, is abandoned and the powers are surrendered to the President and the Senate in the making of treaties with foreign countries; in the second place, after providing, as was their intention, for a republican form of Government, it must be presumed they deliberately inserted Article VI to change that form to the government of an oligarchy; and, thirdly, that after they had determined in their wisdom to concede to Congress powers of legislation in certain particulars, and that all else was to be left with the States or to the people, who were supposed to know better than anyone else, what was best for them in their respective localities, they deliberately reversed their action and inserted this article, which might exclude their representatives in Congress from a voice in any legislation, and give to the President and the Senate the power to uproot and destroy what had already been conceded to Congress and the States. And all this results, it is claimed, because the word 'Treaty' may embrace any subject that pertains to the people as citizens of the Stat ore Nation.

"St. George Tucker, Story, Rawle, Willoughby, Pomeroy, and Cooley, and every reputable writer upon the Constitution, declare that the treaty-power can do nothing which tends to destroy the Constitution itself. *Can it be doubted that the power to take away the right of Congress to legislate, or the right of the people of the States to regulate their own local affairs is the power to destroy the basic principles of the Constitution of our country?*"

Tucker, Limitations on Treaty-making Power, pp. 92, 93.

If the Federal authorities, by means of a treaty with some foreign government, could acquire and exercise the powers reserved to the states and denied to Federal authorities under the Constitution, the logical and inevitable result would be anomalous. The President and Senate could by treaty with some foreign power control the laws of a state relating to in-

spection, quarantine, health and internal trade; they could prescribe the times and modes of elections, and force the introduction and sale of opium, intoxicating liquors or any other substance, however injurious to the health and well-being of a state; they could cede to a foreign power a state or any part of its territory, and destroy the securities of liberty and property as effectually as the most despotic government ever formed.

But this is not all. If the treaty-making power is not within the constitutional limitations relating to the powers reserved to the states, it is not limited by any restriction of the Constitution. The Federal Government itself, as well as the several states, would be at the mercy of the President and the Senate. They could regulate foreign commerce in spite of the fact that Congress is expressly authorized to control the same. They could provide for duty rates upon articles imported from foreign nations, or admit them free of duty, although Congress has express authority to lay and collect taxes and duties. They could appropriate directly from the public treasury the public moneys in the face of the express power of Congress to originate all such appropriations. They could dispose of any part of the territory of the United States, or any of their property, without the consent of Congress, which alone has power to dispose of and make rules and regulations of the property of the United States. *In short, the Federal Government would be a government of men, and not of laws.* The question is not whether or not they will do these things but whether or not, under our form of government, they have the power.

XI.

Those who maintain that the reserved powers of the states are subject to treaties and may be taken from the states respectively, or the people, by means of a convention with some foreign power, rest their position upon the assertion that "a treaty is *the supreme law of the land.*" If a treaty be the supreme law of the land, it has become so by *construction*, for the Constitution as ratified by the people made the supreme law of the land to consist of three things:

1st—The Constitution; 2nd—the laws of the United States which shall be made in pursuance thereof; 3rd—all treaties made or which shall be made *under the authority of the United States.* **The Constitution is the God-head of this trinity. It yields to neither law nor treaty, nor anything else save and alone the sovereign will of its creator—the people. The powers reserved to the states respectively or to the people are, under this Constitution as sacred as the power to make treaties. Are they not even more so since they are the object of** *specific reservation* **and necessarily limit or restrict the** *general grant* **of power made to the treaty-making department of the government?**

Hamilton's Works, Vol. IV, p. 342;
Cooley, The Forum, June, 1893, p. 397;
Von Holst, Const. Law of United States, p. 202;
Duer, Lectures on the Constitution Jurisprudence of the United States, (2 Ed.) p. 228.
Tucker, Limitations, Treaty-making Power, pp. 128-129, 135-136, 139, 93-94, 86-87;
Judge Shackleford Miller, quoted in Tucker, Limitations, Treaty-making Power, pp. 21, 22;
The People v. Naglee, 1 Cal. 246, 247;
59th Congress, 41 Congressional Record, Part 1, p. 299;
William Archer Cocke, Constitutional History of the United States, p. 235;
Mr. Marcy, Moore's Int. Law Dig., Vol. V, p. 168;
Compagnie v. Board, 51 La. Ann. 645; 186 U. S. 380; affirmed: 186 U. S. 380.
Butler Treaty-Making Power, Vo. I, p. 63, Sec. 37, and note.
Benjamin Harrison, North American Review, January, 1901, p. 110;
Story's Commentaries on the Constitution, 5 Ed., pp. 217-220;
Thorp, Constitutional History, Vol. 2, Chap. 6, p. 199;
Loan Association v. Topeka, 20 Wall. 655, 662-663;

Jefferson, Manual of Parliamentary Practice, p. 110, note 3.
4 Elliott's Debates, p. 464;
Geofroy v. Riggs, 133 U. S. 266, 267.

"A treaty cannot be made which alters the Constitution of the country, or *which infringes any express exceptions to the power of the Constitution of the United States.*"

Hamilton's Works, Vol. IV, p. 342.

"When a treaty is said to be the supreme law, it is nevertheless to be understood that the Constitution, which is the highest expression of sovereign will and the authoritative representative of sovereign power in the nation, in fixing limitations upon the exercise of authority under it in regard to the subjects above indicated and many others, *restrains the treaty-making power quite as much as any other.* If it did not, and any treaty entered into in due form was in itself necessarily supreme law, a State might possibly by the force of it be set off from the Union to another nation, or the government might gradually and imperceptibly be overturned through a line of precedents constituting what at the time were perhaps not seen to be encroachments."

Cooley, the Forum, June 1893, p. 397.

"If, therefore, the supremacy of a treaty depends upon this Article, we have the right to conclude that since the supremacy accorded treaties made under the authority of the United States is the same as that accorded the laws of Congress, no greater supremacy should be accorded the one than the other, for the grant of supremacy to each is exactly the same, and if the one (the law of Congress) must conform to the Constitution, surely the other must do likewise. If the one cannot legislate on local affairs within the States because it would be unconstitutional, the other cannot barter or trade them in agreements with foreign countries for the same reason."

Tucker, Lim. Treaty-Making Power, p. 139.

"In defense of the claim of unlimited power to make treaties on all subjects by the United States with other countries, it is often recorded with pride that no treaty ever entered into by the United States has been set aside and declared null and void by the Supreme Court of the United States. This, if true, is indeed a subject upon which we have a right to congratulate ourselves and the country; for while we do not impugn the patriotism of the President, or the wisdom of the Senate, nor indeed the desire of each in the discharge of their duties under the treaty-making power, to conform to the restrictions of the Constitution, *the possession of an unlimited supreme power in any person or any body of men is not consistent with a republican form of government*, and its possession by them is a constant menace to the liberties of the people.

"Chief Justice Taney has powerfully expressed his views on this subject:

" 'It will hardly be said, that such a power was granted to the general government in the confidence that it would not be abused. The statesmen of that day were too wise and too well read in the lessons of history and of their own times, to confer unnecessary authority under any such delusion.'

"In the same case, page 516, Justice Daniel says:

" 'If this extraordinary proposition can be taken as universally or as generally true, . . . the Constitution of the United States with all its limitations on Federal power, and as it has been heretofore generally understood to be a special delegation of power, is a falsehood or an absurdity. It must be viewed as the creation of a power transcending that which called it into existence; a power single, universal, engrossing, absolute. Everything in the nature of civil or political right is thus engulfed in federal legislation, and in the power of negotiating treaties.' "

Tucker, Lim. Treaty-Making Power, pp. 128-129.

" 'The Federal Government' is often carelessly spoken of as having its existence independent of and without relation to the States. Many fail to observe not only the close con-

nection which the States have with the Federal Government, but the fact that *the States are integral parts of the Federal Government, without which the latter could not exist.* In one sense they are the underpinning, in another they are the piles upon which the structure rests, and neither can be withdrawn without damage to the structure they support.

"An examination of the Constitution shows this very plainly. Article I, sec. 2, shows that the House of Representatives is dependent upon the States for its existence. Article I, sec. 3, (now the 17th Amendment) shows that the Senate is dependent for its existence upon the States. Article II shows that the office of President is dependent upon the States. The judicial power of the United States, as set forth in Article III, recognizes the States as integral parts of the Federal Government; and when we look at the distribution of powers under the Constitution, giving to different departments specific powers, it is difficult to understand, if this was necessary to prevent the absorption of unlimited power in any one hand, *how this power as now claimed found its way into the Constitution, supreme over all others and acknowledging its inferiority not even to the Constitution itself;* with no guide but its own will; with no restraint but its own ambition; with no limits but its own greed."

Tucker, Lim. Treaty-Making Power, pp. 135-136.

"On still another side this question of the direct relation between the treaty-power and the legislative power makes it difficult to fix the limits of the treaty power. *It is certain that no authority granted by the constitution to any of the factors of government can be withdrawn from it by treaty.* For that would be a change of the constitution and, as such, unconstitutional."

Von Holst, Constitutional Law of the United States, p. 202.

". . . . ; and in order to ascertain whether the execution of the treaty-making powers can be supported in any given case, those principles of the Constitution from which the power proceeds should carefully be applied to it. The power must,

indeed, be construed in subordination to the Constitution; and, however in its operation it may qualify, it cannot supersede or interfere with any other of its fundamental provisions, nor can it ever be so interpreted as to destroy other powers granted by that instrument. A treaty to change the organization of the Government, or annihilate its sovereignty, or overturn its republican form, or to deprive it of any of its constitutional powers, would be void; *because it would defeat the will of the people, which it* was designed to fulfill.'

Duer, Lectures on the Constitutional Jurisprudence of the United States, (2 Ed.) p. 228.

"I have followed this historical treatment of the treaty-making power from the Constitutional Convention of 1787, to the present time; purposely omitting any direct mention of the decisions in order that we might see what effect those decisions had from time to time upon the definitions and descriptions of the power as given by subsequent writers. The result is interesting and peculiar. In 1802 Tucker, the first author, cited no authority except the text of the Constitution; thirty years later Story cited Tucker, Rawle and Jefferson; while in 1880 Cooley cites Tucker and Story, as herein quoted, in support of his text. The reason for this is plain, since the judicial decisions have been only so many applications of the general rule to specific statements of fact. For it is readily seen that while many of the decisions contain broad general statements to the effect that treaties are the supreme law of the land, there is always the accompanying qualification that it must be a constitutional treaty in order to be so considered."

Judge Shackelford Miller, quoted in Tucker, Lim. Treaty-making Power, pp. 21, 22.

"But even if the provisions of the statute did clash with the stipulations of that, or of any other treaty, the conclusion is not deducible that the treaty must, therefore, stand, and the state law give way. The question in such case would not be solely what is provided for by the treaty, but whether the state retained the power to enact the contested law, or had

given up that power to the general government. If the state retains the power, then the president and senate cannot take it away by a treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty-making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that body, *it cannot supersede a state law which enforces or exercises any power of the state not granted away by the constitution.* To hold any other doctrine than this, would, if carried out into its ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective states, or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the states to a foreign nation. . . .

"It is not within the scope of a constitutional treaty to interfere with the reserved powers of taxation and of control over foreigners, which we have above discussed. No treaty, within our knowledge, has attempted to do it; and if such attempt should be made, the stipulation would, we apprehend, be neither recognized nor enforced by the supreme tribunal of the nation. . . ."

The People v. Naglee, 1 Cal. 246, 247.

"The second school stand upon the doctrine that the treaty-making power exists for the purpose of carrying out the purposes and objects of this Government as prescribed and defined by the Constitution, and that no treaty is valid that violates the Constitution, or *that under its provisions surrenders the rights reserved and belonging to the states.*"

Senator Rayner, 59th Congress, 41 Congressional Record, Part 1, p. 299.

"What limits does it place upon the treaty-making power? None whatever. There is no limit to the exercise of this power when reduced to any particular case, but it is to the form of executing the power which is a simple concurrence of two-

thirds of the Senate. I do not say that there is no check or restriction upon the functions of the Government, for there is this limit, that *it cannot be exercised in the destruction of or in opposition to any known Constitutional right or power, and must be subordinate to every other right recognized.*"

William Archer Cocke, Constitutional History of the United States, p. 235.

"It is not, as you will perceive by examining Mr. Drouyn de L'Huys's dispatch to the Count de Sartiges, the application of the 'principle' to the particular case of M. Dillon, which is to be disavowed, but the broad and general proposition that the Constitution is paramount in authority to any treaty or convention made by this government. This principle, the President directs me to say, he can not disavow, nor would it be candid in him to withhold an expression of his belief that if a case should arise presenting a direct conflict between the Constitution of the United States and a treaty made by authority thereof, and be brought before our highest tribunal for adjudication, the court would act upon the principle that the Constitution was the paramount law."

Mr. Marcy, Moore's Int. Law Dig., Vol. V, p. 168.

"In re Rahrer, 140 U. S. 554, the Supreme Court of the United States, speaking through Chief Justice Fuller, made use of the following language: 'The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized State legislation, legitimately for police purposes, as not, in the sense of the Constitution, infringing upon any right which has been confided, expressly or by implication, to the general government. . . . .'

"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 said of the protection and preservation of the public health within their respective borders."

Compagnie v. Board, 51 La. Ann. 645; Affirmed 186 U. S. 380.

"The claim asserted for the treaty-making power that it may embrace all rights and all subjects because the word 'Treaty' may embrace such, cannot be maintained for another reason. The principle must be accepted as established, that where in any instrument a *general* grant is made, which is followed in the same instrument by a *specific* grant, that the 'general' is limited by the 'specific' grant. This is undoubtedly true of wills and deeds. A testator who devises *all* of his real estate to his wife and in a subsequent portion of his will devises his home place to his son, is considered to have limited the devise of *all* of his real estate to his wife by the *specific* devise of the home place to his son. The same principle will apply to a deed of real estate.

"This principle applies peculiarly to the case of the treaty power. Article II, sec. 2, grants to the President and Senate the power, without any limitation, to make treaties; since treaties may embrace all rights of person and property, some of which may be included in the powers granted in the same Constitution, to the President, to the Congress, the Judiciary, and some also, which by the same instrument, are reserved to the States, this would seem to be a sweeping and unlimited general grant to the treaty-making power; but when we find the same instrument, which has made this unqualified *general* grant to the treaty power, has granted to the President, to the Congress, to the Judiciary, certain specific powers, and reserved to the States certain *specific* powers and rights, the *general* grant to the treaty-making power is limited by the *specific* grants mentioned. This is the well-established rule of construction, and to hold otherwise would be to hold that the Convention, after carefully constructing a constitutional government, granted to one of the branches of the government the power to destroy it all."

Tucker, Limitations, Treaty-making Powers, pp. 93-94.

"It would be to convict the framers of the Constitution of a lack of foresight, which cannot properly be imputed to them, to suppose they intended to give to this treaty-making power unlimited scope to absorb every right of the people of the States, against which they had so carefully guarded in the enumeration of the powers of Congress and by the reservations in the Tenth Amendment. The powers of Congress, the Executive, and the Judiciary were enumerated in detail. And all powers not granted were, under the Tenth Amendment, reserved to the States or to the people respectively. Of what avail it it to know that the Framers of the Constitution securely preserved to the people their sacred local rights from the grasp of Congress, the President, or the Judiciary if they can be absorbed under the treaty-making power? If the Federal Government can take them, it matters little what department may claim the right."

Tucker, Limitations, Treaty-making Power, pp. 86-87.

"For themselves our fathers were not content with an assurance of these great rights that rested wholly upon the sense of justice and benevolence of the Congress. The man whose protection from wrongs rests wholly upon the benevolence of another man or of a congress, is a slave, a man without rights. Our fathers took security of the governing departments they organized, and that notwithstanding the fact that the choice of all public officers rested with the people. They were not content with general and unwritten limitations, but forced into the Constitution written limitations as to the exercise of sovereignty by the ruling power."

Butler, Treaty-making Power. Vol. I, p. 63, Sec. 37, and note.

See Benjamin Harrison in North American Review, January, 1901, p. 110.

"The theory of fundamental principles had its inception as early as the framing of the Constitution. To many the adoption of the first ten amendments, commonly known as the Bill of Rights, was wholly unnecessary. There were

members of the Constitutional Convention who considered that the enumeration of certain fundamental rights would be dangerous, as it might result in the exclusion and to the derogation of other rights equally fundamental, but which might possibly be omitted in the enumeration. The first ten amendments, however, were added in order to satisfy the wishes of those who felt that the personal rights of feedom and liberty therein enumerated should be specifically preserved to the people."

See 1 Story's Commentaries on the Constitution, 5 Ed., pp. 217-220;
Thorp, Constitutional History, Vol. 2, Chap. 6, p. 199.

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Loan Association v. Topeka, 20 Wall. 655, 662-663.

Those who hold that a treaty is the supreme law of the land say that "If the framers of the Constitution had intended to correlate the treaty-making power of the United States with the law-making power of Congress, or to otherwise limit its scope, they would have so expressed themselves, and then instead of appearing as it does, this article would have probably been written as follows: This Constitution and the laws of the United States, and all treaties made or which shall be made in pursuance thereof, shall be the supreme law of the land."

This argument overlooks the fact that the United States existed under the Articles of Confederation and the purpose was to include treaties made under that authority as well as

those which should be made under the Constitution. The "*Authority of the United States*" under the Articles of Confederation and under the Constitution was an authority derived from enumerated powers accompanied by specific reservations, and under both the Articles of Confederation and the Constitution certain rights of the states respectively and the people were jealously guarded by express exceptions. There was and could be no "authority of the United States" outside of and beyond that given by the Articles of Confederation and the Constitution.

That a treaty stands upon an equal footing with law of the United States is settled (Cherokee Tobacco, 11 Wall. 616; Ward v. Race Horse, 163 U. S. 504). Supremacy is to be predicated of neither; each takes its place *under the Constitution*, and only when in harmony with the powers therein granted or excepted is of any binding effect whatever. In the language of Mr. Madison:

> "It must have meant to except out of these the rights reserved to the States, for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way." Jefferson, Manual of Parliamentary Practice, p. 110, note 3.

The term "treaty" as herein used must undoubtedly be given a broad meaning, and generally speaking, it may be said that by this clause there is conferred the power to make treaties on those matters ordinarily the subject of treaties between sovereign powers. But in the very nature of things, there must be placed a limit on the treaty-making power, else that power would destroy many of the other provisions of the Constitution. One of the canons of construction is that a meaning must be placed on one part of the Constitution that will not interfere with the meaning of the other parts thereof, in order that effect may be given to the whole.

Can the power of Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water" be taken away by treaty, and conferred upon other authority?

Can the power of Congress "to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures" be taken away by treaty, and conferred upon other authority?

The powers of the states as set forth in the Constitution are upon an absolutely equal footing with the powers of the United States. Can, therefore, a power by the Constitution reserved to the states be taken away by the treaty-making power?

No one, it seems to us, would have the temerity to maintain that the treaty-making power would have authority to make any treaty divesting the Congress, or the United States, of any of its constitutional powers, and the conclusion, therefore, is inescapable that the power to make a treaty, or to make treaties, is not an unrestricted power.

The only difficulty with respect to the subject is, Where shall the line of restriction be drawn? We submit the following rule:

The treaty-making power is unrestricted, except that no treaty shall violate any of the provisions of the Constitution, and shall not violate any of the powers of the United States, or any of the powers reserved to the states. The power to by treaty violate the present powers of the United States, or the powers now reserved to the states, is reserved "to the people," and when the necessity arises the people will create by appropriate amendment to the Constitution an instrumentality through which to make such a treaty.

Distinguished authority exists for such a rule. John C. Calhoun (4 Elliott's Debates, p. 464), in discussing the limitations on the treaty-making power, said:

> "Whatever requires the consent of another nation belongs to the treaty power—can only be regulated by it; and it is competent to regulate all such subjects, provided—and here are its true limits—such regulations are not inconsistent with the Constitution. If so, they are void. No treaty can alter the fabric of our Government; nor can it do that which the Constitution has expressly forbidden to be done; nor can it do that differently which is di-

rected to be done in a given mode, and all other modes prohibited."

Differing in verbiage only, Mr. Justice Field, in *Geofroy vs. Riggs*, 133 U. S. 266-7, laid down a similar rule:

> "That the treaty power of the United States extends to all proper subjects of negotiation between our Government and the government of other nations is clear. 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 that territory of the latter, without its consent. *Railroad Co. vs. Lowe*, 114 U. S. 523, 541. But with these exceptions, it it not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

XII.

The cases usually cited by those who advocate the supremacy of a treaty do not in any instance hold that the reserved powers of a state or a trust which the state holds for the benefit of all its people are subject to and may be annulled by a treaty having for its subject the regulation of a matter which is reserved to the states respectively or to the people by the Tenth Amendment.

The case most often cited and quoted by those who claim that a treaty is the supreme law of the land is Ware v. Hylton, 3 Dallas 199. Five judges sat in the case, but only four took any part in its decision. Each rendered a separate opinion. There was no opinion by the court. Three of the

four judges "held either that the state law was invalid, or, if valid, that it did not actually attempt to confiscate debt." In either case there could have been no conflict between the law and the treaty, according to the majority of the court, since either there was no law, because invalid, or it did not attempt to do anything contrary to the terms of the treaty. Mr. Justice Chase did hold that Virginia had a right to confiscate debts, and by the law of 1777 did confiscate debts, but this was no defense in the face of the Treaty of Peace. This was not the opinion of the court, nor the opinion of a majority of those who decided the case. (See Tucker, Limitations on Treaty-making Power, Chap. 7, p. 173 et seq.)

The case of Chirac v. Chirac, 2 Wheat. 259, and the case of Geofroy v. Riggs, 133 U. S. 266, do not hold that the treaty annuls the laws of inheritance passed by the states, but that the badge of alienage which prevented their taking under the laws of the states, was removed. The laws of the state were in full force and effect, but only the Federal Government could declare who was an alien. Mr. Justice Field, who wrote the opinion in Geofroy v. Riggs, wrote the opinion in Fox v. United States, 94 U. S. 320, in which he said:

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

If it be held that Geofroy v. Riggs holds that a state law relating to inheritance is annulled by the treaty, it is in direct conflict with the case of Fox v. United States. The cases should be held to harmonize rather than to conflict, particularly as both were written by the same judge and no reference is made in the former to the latter.

The cases of Orr v. Hodgson, 4 Wheat. 453, and Fairfax v. Hunter, 7 Cranch 603, were both decided by Justice Storey upon the same principle; namely, that the badge of alienage was removed and the law of the state remained intact, and all who inherited in the state took under the terms of that law.

The principle of the above cases is thus stated in the case of People v. Gerke, 5 Cal. 381, 384:

> "One of the arguments at bar against the extent of this power of treaty is that it permits the Federal Government to control the internal policy of the states, and in the present case, to alter materially the statute of distribution.
>
> "I think, however, that no such consequence follows as is insisted. The statutes of distribution are not altered or affected. Alienage is the subject of the treaty. This disability results from political reasons which arose at an early period of the history of civilization, and which the enlightened advancement of modern time and changes in the political and social condition of nations have rendered without force or consequence. The disability to succeed to property is alone removed. *The character of the person is made politically to undergo a change, and then the statute of distribution is left to its full effect unaltered and unimpaired in word or sense.*"

> "If my conclusions about these cases be not correct, this anomaly is presented that the Supreme Court from Ware v. Hylton to Geofroy v. Riggs has decided uniformly that a treaty annulled state laws in conflict with it and yet has recently decided the cases of Compagnie Francaise v. The Board of Health, Rocca v. Thompson, Patsone v. Pennsylvania, and Heim v. McCall, sustaining the laws of States which conflicted with existing treaties between the United States and foreign countries. To adopt such a conclusion is to hold that the Supreme Court has reversed its position on this question. This I do not believe, but more rationally these later

> decisions serve to interpret the earlier ones, making the action of the Court throughout its history consistent and uniform."
>
> Henry St. George Tucker, Address before Georgia Bar Association, June 2nd, 1917, p. 23.
>
> See also Tucker, Limitations on Treaty-making Power, Chap. 6, p. 143 et seq.

The case of Haunenstein v. Lynham, 100 U. S. 483, involves a treaty and a state law of Virginia. The Virginia law provided that an alien who, by treaty, had a right to sell real property in that state, might do so within the time prescribed by such treaty. No time was prescribed in the treaty, and the Virginia court held that the land escheated to the state. The Supreme Court of the United States held that a reasonable time was presumed, though no time was specified in the treaty. This does not present a case of conflict in any sense.

The lower court, in deciding this case at bar and in holding that the treaty-making power could annul a trust held by the State for the benefit of all its people, and its reserved powers, cites the case of Hoke v. United States, 227 U. S. 321-322. That case in no manner involves a treaty and is a discussion of the powers of Congress over interstate commerce. Instead of being an authority in support of the contention of the lower court, its "foreshadowing" is in our favor to this extent:

> "It may be that Congress could not prohibit the manufacture of the article in a state. It may be that Congress could not prohibit in all of its conditions its sale within a state."
>
> Hoke v. United States, 227 U. S. l. c. 322.

The real basis of the opinion of the lower court holding that while the law would be unconstitutional if it stood alone, but was constitutional in that it was made in aid of a treaty, seems to be an opinion of a former Attorney-General of the United States, Mr. John W. Griggs (Vol. 22, Opinions of Attorney-General, p. 215 et seq.).

We do not doubt the power of the United States to make a treaty with Great Britain concerning regulations for the taking of fish or seals within waters or territory over which Great Britain and the United States under their Constitutions have power to make such regulations. That is a very different proposition from the one here involved; namely, the power of Congress to acquire by treaty the right to make rules and regulations for the taking of wild game within territory within which, under our Constitution, Congress has no right to regulate the taking of such game. In the language of United States v. DeWitt, 9 Wall. 41:

> "As a police regulation, relating exclusively to the internal trade of the states, it can only have effect where the legislative authority of Congress excludes, territorially, all state legislation, as, for example, in the District of Columbia. Within state limits, it can have no constitutional operation."

When the Federal Government acts through its power to control commerce, its action is limited by the extent of its power under the Constitution. When the Federal Government acts under its treaty-making power, the binding effect of the things which it agrees to do is limited by its power under the Constitution to do those things. The power of the Federal Government to make treaties is exclusive and plenary, *but the things which it can bind itself to do under a treaty are limited by the powers which it possesses under the Constitution and by any and all exceptions to its power specified in the Constitution.* There is a difference between exclusive and full power to make treaties and the power to insert in the treaty terms and conditions which shall bind the United States to do any and every thing. The Government of the United States is one government, but that government does not possess the power to do any and every thing. There are some things which remain at the pleasure and will of the source of all power—the people. There are some things which the people never intended that the Federal Government should have the power to do. To give the Federal Government the power to do those things, by treaty, is to enlarge the jurisdiction of

the United States by construction, defeat the will of the people, and effectually change the form of government designed by the Constitution. It means the establishment of a principle which, followed to its ultimate and logical conclusion, means that nothing is reserved to the states or to the people. In the language of Mr. Justice Daniel in the Passenger cases: "Every thing in the nature of civil or political rights is thus engulfed in Federal legislation, and in the power of negotiating treaties."

The power of the Federal Government and the government of Great Britain to provide, by treaty, the terms upon which the citizens of one may take game within the territory of the other, or to agree by treaty that they will fix the time when and the methods by which fish and game may be taken *within the territory over which the respective governments have power to prescribe such times and methods,* **is one thing, but it is another and very different thing for such governments, in such treaty,** *to provide the Federal Government with the power* **to prevent its own citizens from taking wild game within the limits of their respective states,** *when, under the Constitution, the Federal Government possesses no such power.*

The learned District Judge who delivered the opinion below seems to have been largely influenced in his decision by the advantages to be obtained through the treaty in question. He says (Printed Abstract, p. 13):

> "The people of both countries, of our entire union and of all the states, benefit by the mutual and reciprocal advantages which accrue from this arrangement. If this be so, then the subject matter comes properly within the treaty-making power."

We do not believe that, under the Constitution and the general grant of power to make treaties, it was ever intended that the Federal Government had the power to do *anything and everything which it might deem to the advantage of the people.* Such power, in effect, would be unlimited power, because it would embrace within its scope anything and everything.

To this argument we reply in the language of General George Washington:

> "If, in the opinion of the people, the distribution of Constitutional powers be in any particular wrong, let it be corrected in the way which the Constitution designates. But let there be no change by usurpation, for this, though it be in one instance be the instrument of good, is the ordinary weapon by which free governments are destroyed."

And in the language of Abraham Lincoln:

> "It is my duty and my oath to maintain inviolate the right of the states to order and control, under the Constitution, their own affairs, by their own judgment exclusively. Such maintenance is essential for the preservation of that balance of power on which our institutions rest."

And in the language of Mr. Chief Justice Fuller, in United States v. Knight, 156 U. S. 13:

> "Acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

XIII.

In its ultimate analysis the adoption of the Treaty-Supremacy theory means that the Federal Government, through the treaty-making department of the government, has a *general negative* upon all state laws passed by the States in the exercise of their reserved powers. In the making of the Constitution a negative, in any form, upon laws passed by the States in the exercise of their reserved powers, was defeated though persistently urged, in some form, by some of the ablest men in the Constitutional Convention. It was universally admitted that under the Constitution as it stood the Federal Government had no such power, and by the first ten amendments the people undertook to forestall any attempt on the part of the Federal Government to obtain such power by construction.

The history of the making of the Constitution of the United States shows beyond question that the most liberal constructionists of the Constitution saw, and frankly admitted, the fundamental limitations of the Federal Government which were inherent in the very nature and character of the Government itself. Recognizing the fundamental limitations of the Federal Government and the extent of the powers reserved to the several states under the Constitution as written, they endeavored and labored to their utmost to insert into the Federal Constitution some provision which would give Congress a negative upon the laws passed by the several states in the exercise of their reserved powers. Mr. Randolph, Mr. Pinckney, Mr. Patterson and Hamilton all proposed provisions of this nature, but in vain. Mr. Calhoun, speaking of this struggle to subject the reserved powers of the state to a federal negative, says:

> "It is not deemed necessary to trace, through the journals of the convention, the history and the fate of these various propositions. It is sufficient to say,—that they were all made, and not one adopted, although perseveringly urged by some of the most talented and influential members of the body, as indispensable to protect the government of the United States, against the apprehended encroachments of the governments of the several states. The fact that they were proposed and so urged proves, conclusively, that it was believed, even by the most distinguished members of the national party, that the former had no right to enforce its measures against the latter, where they disagreed as to the extent of their respective powers,—without some express provision to that effect; while the refusal of the convention to adopt any such provision, under such circumstances, proves, equally conclusively, that it was opposed to the delegation of such powers to the government, or any of its departments, legislative, executive, or judicial, in any form whatever.
>
> "But, if it be possible for doubt still to remain, the ratification of the Constitution by the convention

> of Virginia, and the 10th amended article, furnish proofs in confirming so strong that the most skeptical will find it difficult to resist them." Works of Calhoun, pp. 266-247.

Although these attempts to give the Federal Government some negative upon the reserved powers of the states failed, and although the Nationalists openly recognized the fundamental limitations of the Constitution inherent from the nature and character of the instrument itself, some of the states were not willing to ratify the Constitution until that instrument itself expressly set forth certain limitations and restrictions upon its own power. In other words, they were unwilling to rest their reserved powers upon the fundamental limitations which arose from the nature and character of the Federal Government, but they insisted upon writing into the Constitution itself express limitations and restrictions upon the power of the Federal Government in relation to the reserved powers of the several states. As a result, some of the states, particularly Virginia, Massachusetts, New Hampshire, South Carolina and New York, deeply concerned about the reserved powers of the states and fearful lest some construction might be put upon the Constitution which would impair, if not destroy, those reserved powers, insisted upon, and put into their ratification of the Constitution, the express conditions later embodied in the original amendments. The Nationalists in vain insisted that such amendments were unnecessary, because they were secured by the fundamental limitations inherent in the nature and character of the Government. The states took no chances. They believed in the fundamental limitations arising out of the nature of the Federal Government, but they insisted that the Constitution should contain express limitations which future construction could not override. Mr. John C. Calhoun, speaking of Virginia's ratificaratification, said:

> "That her object was to guard against the abuse of construction, the act itself, on its face, and the discussions in her convention abundantly prove. It was done effectually, as far as it depended on