IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1903.

No. 561.

UNITED STATES ex rel. JOHN TURNER

vs.

WILLIAM WILLIAMS, Commissioner, etc.

BRIEF AND ARGUMENT OF APPELLANT.

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RECAPITULATION OF FACTS.

In the brief heretofore filed in support of the motions to admit the appellant to bail and to advance the hearing of this cause a statement of the case was made. For ready reference, however, it is deemed a convenience to the court to recapitulate the essential features of that statement.

On March 3rd, 1903, Congress passed an act entitled "An Act to Regulate the Immigration of Aliens into the United States." (See U. S. Compiled Statutes Supplement 1903, p. 170.)

The second section of this act provides that idiots, insane persons, epileptics, and persons who have been

insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with a loathsome or with a dangerous contagious disease; persons who have been convicted of felony or other crime or misdemeanor involving moral turpitude; polygamists, anarchists, or persons who believe in or advocate the overthrow by force or violence of the government of the United States or of all government or of all forms of law, or the assassination of public officials; and prostitutes, shall be excluded from admission into the United States. A proviso of this section withdraws from the inhibitory portion of the section those persons who have been convicted of offenses purely political not involving moral turpitude; and also provides that skilled labor may be imported, if labor unemployed of like kind cannot be found in this country. Another proviso excludes from the operation of the act professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants.

The next succeeding portions of the act relate to the administration of the law. But to instance the slovenliness with which the act was drawn, it may not be improper to call the attention of the court to the fact that section 34 forbids the sale of intoxicating liquors within the limits of the capitol building. While section 38 recurs to the subject treated in section 2 and designates a distinct class of persons who shall be excluded from admission to the United States.

Section 38 is the one under which the appellant was ordered to be deported. The Secretary of Commerce and Labor, in dismissing the appeal which was taken by Turner from the decision of the Board of Immigration, said that Turner came within the provisions of section 38. This section is, so far as pertinent, as follows:

> "That no person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity or propriety of the unlawful assault or killing of any officer or officers, either of specific individuals or of officers generally of the government of the United States, or of any other organized government, because of his or their official character, shall be permitted to enter the United States or any territory or place subject to the jurisdiction thereof. This section shall be enforced by the Secretary of the Treasury under such rules and regulations as he shall prescribe."

Section 38 also provides that any person who knowingly aids or assists any person designated in this section to enter the United States or any territory or place subject to the jurisdiction thereof, or connives or conspires with any person or persons to allow, procure, or permit any such person to enter therein except pursuant to such rules and regulations made by the Secretary of the Treasury, shall be fined not more than $5,000 or imprisoned for not less than one

year, nor more than five years, or both. Further references to this act are made in an "Historical View of the Immigration Acts" *post.*

The appellant, John Turner, is a subject of Great Britain who, for the last five years, as this record shows, has been engaged as an organizer for the Amalgamated Union of Shop Assistants and Warehousemen and Clerks of Great Britain. He came to the state of New York in the early part of October, 1903, for the purpose of delivering lectures in most of the large cities of the United States, and also to gather material and write articles on trade conditions in the United States for a publication known as "Grocer", published in the City of London, England. It is a fair inference from the record that Turner had delivered no lectures before the evening of October 23rd, 1903. But on October 19th, 1903, the Secretary of Commerce and Labor issued his warrant, which was number 41,324, and directed to certain inspectors at New York, commanding them to arrest John Turner and deport him to the country from whence he came. On the evening of October 23rd, 1903, Turner addressed a mass meeting at the Murray Hill Lyceum, 160-164 East 34th street, New York City, on the subject of Trade Unionism and the General Strike. At the conclusion of the lecture Turner was arrested, pursuant to the warrant already referred to, and was searched by the officer who arrested him, with the result that a publication called "Free Society" and a card announcing a mass meeting for November 9th, at which Turner was billed to speak, a pamphlet entitled "Down with the Anarchists" were taken from his person. A book entitled "Modern Science and Anarchism" by the well known Prince Kropotkin was found at the meeting where Turner was arrested, and was produced before the Immigration Board.

It appears that at this meeting of October 23, 1903, the Immigration Board, or the Department of Commerce and Labor had persons present who reduced to shorthand all or portions of Turner's speech. At any rate extracts of his speech were offered in evidence before the Immigration Board. Notwithstanding the fact that the warrant for Turner's arrest was issued four days before he was arrested, and that the warrant specified that Turner had come fom England to the United States contrary to the prohibition of the Act of Congress approved March 3rd, 1903, and that he was an anarchist, nothing was produced against him on the alleged trial before the Immigration Board, other than these extracts from Turner's speech, and the cards and papers taken from his person and the book of Prince Kropotkin found and taken from where the Turner meeting was held.

On the next day at noon a Board of Special Inquiry, or Immigration Board, was convened, and the officer who had executed the warrant by arresting Turner was a member of this board. He abdicated his position upon the board to testify against Turner, and resumed his position upon the board for the purpose of voting the order of deportation. At this alleged trial Turner had no witnesses to testify in his behalf, and had no means or opportunity of procuring any witnesses. He had no counsel in his behalf, and the immigration act makes no provision for counsel. His trial was secret, as provided by the act. He was not asked to define the word "anarchy". No definition of

the word anarchy was submitted to him. He was not questioned as to his specific theory about government; nor did the fact that he was in the United States for the purpose of delivering lectures seem to weigh aught against the bald accusation that he was an anarchist —that is, that he disbelieved in government. There is no pretense made upon this record that Turner at any time ever advocated the assassination of any of the officials of this or any other government; or that he believed in or advocated the overthrow by force or violence of the government of the United States, or of all government, or of all forms of law. The whole fact in the case is that Turner himself, or his friends had, emphasized in the literature which was circulated advertising his lecture, the information that Turner had refused to accept the candidacy to parliament because of his anarchistic principles and his disinclination to participate in the aggression of government. These facts and Turner's declaration of his philosophy at the meeting in question constituted the body of the government's case.

An appeal having been taken to the Secretary of Commerce and Labor from the order of deportation of the Board of Special Inquiry, the Secretary of Commerce and Labor in dismissing the appeal said that Turner had admitted that he is "an anarchist and an advocate of anarchistic principles which bring him within the class defined by Section 38, of the act approved March 3rd, 1903." The dismissing of this appeal resulted in the suing out of a writ of habeas corpus in the Circuit Court of the United States for the Southern District of New York, where the Act of March 3rd, 1903, was held constitutional, and Turner

was remanded to the custody of the immigration officers. An appeal to this court from the Circuit Court raises the constitutionality of that act.

For the convenience of the court it has been deemed proper to insert the following historical reference to the various immigration acts passed since the beginning of the government.

HISTORICAL VIEW OF IMMIGRATION ACTS.

Scope of Acts:—The growth of the alien act in this country is interesting in two respects, first the enlargement of the act in its general scope and intendment and its increased restrictive and prohibitive features. Secondly, the gradual growth of the Immigration Department and its assumption of judicial power.

Discussing the first proposition, we find that passing the Alien and Sedition Act the first attempt at the regulation of immigration by Congress was the Act of June 18, 1798, and this act was entitled "An Act to Establish a Uniform Rule on Naturalization and to Repeal the Act Heretofore Passed on that Subject." The original act referred to, and which was repealed by this act, was the act of January 29th, 1795. The act of January 29th, 1795, was known as the "Naturalization Act" and contained no provisions in regard to aliens, other than their right to become naturalized citizens of the United States after a residence of sufficient length of time in this country. (U. S. Stat. at Large, Vol. 1, p. 414.) The act of June 18, 1798, was broader in its scope, and provided that aliens coming into this country should register and report to the Clerk of the District Court in the district in which

said alien entered this country, and in the absence of any District Clerk within a radius of ten miles from said port of entry then said alien was to report to the Collector of said port or place, or some other person nearest thereto, authorized by the President of the United States to register aliens. (U. S. Stat. at Large, Vol. 1, p. 566.) It was also provided that the clerk or officer receiving the report of the said alien should keep a book showing such registry. And a further provision was made by the act that each alien who registered should pay 50 cents to the clerk, or person, making the registration. There was no limitation in this act in regard to qualifications of entry and no classes were eliminated or prohibited from entering under and by virtue of this act.

[Act of 1799] On February 25, 1799, Congress passed its first quarantine and health act. This act contained nothing relating to the admission of aliens other than the right of the government to quarantine and inspect vessels and passengers and hold them in quarantine until such time as they might be permitted to land, or to prevent landing entirely if it seemed proper to the proper officials. (U. S. Stat. at Large, Vol. 1, p. 619.)

[Act of 1864] On the 4th of July, 1864, Congress passed another act appointing a commissioner of immigration, to be subject to the control of the *Department of State.* This act contained a provision that any alien coming into this country should be admitted regardless of the fact that said alien was under contract of labor to some person in this country, provided that such contract for services and labor did not exceed a period

of 12 months, and provided that all such contracts should be valid and binding. (U. S. Stat. at Large, Vol. 13, p. 385.) This act was subsequently repealed by the act of February 26, 1885, which provided that no alien should be allowed to come into this country who was under contract to perform labor or render service in this country.

[Act of 1875] On March 5, 1875, an act supplementary to the acts in relation to immigration, was passed to prevent the importation of women into the United States for the purpose of prostitution. This act provided that it should be unlawful for aliens undergoing sentence for conviction in their own country of felonious crimes, other than political, or growing out of or the result of such political offenses, or whose sentence had been remitted on condition of their emigration and women imported for the purpose of prostitution, to enter the United States. (Com. Stat. 1901, p. 1286.)

[Act of 1882] On the 3rd of August, 1882, Congress passed an act which provided that the proper officers whose duty it was to examine into the condition of passengers arriving at the ports, had the right to go on board and examine vessels, and if, on such examination, there should be found among such passengers, any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge, they should report the same in writing to the collector of such port, and such person should not be permitted to land. This act provided further that all foreign convicts, except those convicted of political offenses, should be sent back to the nations to which they be-

longed and from whence they came. (Comp. Stat. 1901, p. 1288 *et seq.*)

[Act of 1885] On February 26th, 1885, Congress passed the act already referred to providing that all persons bringing or importing aliens into this country under contracts for their services in labor should be guilty of a misdemeanor, excepting persons brought as private secretaries, or domestics, or skilled labor for purposes that could not be otherwise obtained; nor actors, artists, lecturers or singers, etc., are not to be included within the meaning of this act, and that any such contract shall be utterly void. And the act provided further that any person, or master, or owner, who knowingly permits an alien under such contract to land, shall be liable to a fine and imprisonment. This act, however, does not contain any provision prohibiting the alien himself from landing, but is in effect that any person procuring his coming shall be liable criminally and that the contract shall be void. (Comp. Stat. 1901, p. 1290.)

[Act of 1887] On February 23, 1887, an amendment to this act was passed by Congress, which went further and provided that any person found upon the passenger list of any vessel entering any port of this country, who had come to this country under and by virtue of any contract of employment, should not be permitted to land. This amendment was evidently passed for the purpose of preventing the admission of aliens under contract of labor.

[Act of 1891] On March 3rd, 1891, Congress passed an act in the nature of an amendment to the various acts relating to immigration, which provided that the following

classes of aliens should be excluded from admission to the United States in accordance with existing acts relating to immigration, other than those concerning Chinese laborers, viz.: All idiots, insane persons, paupers, or persons likely to become a public charge, persons suffering from loathsome or dangerous contagious diseases, persons who have been convicted of a felony, or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another, or who is assisted to come, unless it should appear that such person does not belong to the excluded classes. A proviso in this act also states that nothing in this act shall be construed to apply to or exclude persons convicted of political offenses. Said political offenses may be designated as felony, crime, infamous crime or misdemeanor involving moral turpitude by the laws of the land from whence said person came, or by the court convicting. This act was an enlargement of the previous acts in that the class of aliens to be rejected included persons suffering from a loathsome or dangerous contagious disease and polygamists. The proviso in the act was evidently passed for the purpose of showing how strongly Congress felt against prohibiting persons from landing on account of their political beliefs, by going to the extent of expressly providing in the act that such persons should not be excluded notwithstanding they had been found guilty of a crime designated as a crime involving moral turpitude by the laws of the land whence they had come, provided such act was really an act of a political character. (Comp. Stat. 1901, p. 1224.)

[Act of 1893] In 1893, March 3rd, an act was passed to facilitate the enforcement of the immigration and contract labor laws of the United States. This act provides for the manner in which immigrants shall be listed for the purpose of facilitating the work of inspection and of the Immigrant Commissioners at the ports of landing. (Comp. Stat. 1901, p. 1300, *et seq.*)

[Act of 1903] March 3rd, 1903, Congress passed another act which is the final and last act on the immigration question in this country, and under section 2 of this act it is provided that the following classes of aliens shall be excluded from admission into the United States, viz.: All idiots, insane persons, epileptics, any person who has been insane within 5 years previous, persons who have had two or more attacks of insanity at any time previously, paupers, persons likely to become a public charge, professional beggars, persons afflicted with a loathsome or contagious dangerous disease, persons who have been convicted of felony or other crime or misdemeanor involving moral turpitude, polygamists, anarchists, or persons who believe in or advocate the overthrow by force or violence of the government of the United States or other governments, or of all forms of law, or the assassination of public officers, prostitutes and persons who procured or attempted to bring in women for the purpose of prostitution; those who have been within one year from the date of the application for admission to the United States deported as being under offers, solicitations, promises or agreements to perform labor or services of some kind therein, and also any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless

it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes; provided that nothing in this act shall exclude persons convicted of an offense purely political not involving moral turpitude. (Comp. Stat. Large, 1903, p. 166, *et seq.*)

There are some further provisos in this act showing the class of persons that can be brought into this country under contracts of labor.

It is interesting to note the increased number of classes in this act who are excluded from admission to the United States. The new classes are epileptics, persons who have been insane within five years previous, persons who have had two or more attacks of insanity at any time previously, professional beggars, anarchists, persons who believe in or advocate the overthrow by violence or force of the government of the United States, or of all governments, or of all forms of law, or the assassination of public officials; or of those persons who within one year from date of application for admission to the United States were deported as being under offers, or agreements to perform labor or services of some kind thereon.

It is also interesting to note that the proviso in this act is not nearly as strong in setting forth the fact that persons should not be excluded because of offenses purely political as was the proviso of Congress in the act of March 3, 1893.

Growth of Judicial Power.—The second feature of the attitude of this country towards aliens and the development of the alien act, is the gradual growth

of the Immigration Department and its assumption of judicial power.

[Act of 1798] In the original act of Congress passed June 18, 1798, no provision was made for an immigration department, but that act provided that all aliens, foreign ministers, etc., excepted, who should arrive at any port within the territory of the United States, should report to the Clerk of the District Court of that district, if living within ten miles of the port, otherwise to the Collector of such port or place or some other person nearest thereto authorized by the President of the United States, to register aliens. Such report was to be made within five months after passing of this act, or within 48 hours after the first arrival or coming into the territory of the United States of the alien. And this report should state the sex, place of birth, condition or occupation and place of intended residence within the United States, and by whom the report was made. It was also provided that aliens refusing to make such report should forfeit the sum of $2, which could be collected by any person upon complaint before a Justice of the Peace, or proper officer.

This act hereinabove set forth, contained other sections in regard to the naturalization of persons who had been admitted to the United States. This act was supplanted by the act of April 14, 1802, which act, however, related entirely to the naturalization of aliens and contained no provision regarding their entry and their duty upon entering this country, so that there is considerable question as to whether the act of 1802 repealed sections of the act of 1798 relating

to the registration of aliens before the Clerk of the District Court or other officer.

[Act of 1864] On July 4, 1864, Congress passed an act authorizing the President of the United States, with the consent of the Senate, to appoint a commissioner of immigration, which said commissioner of immigration was subject to the direction and control of the *Department of State*. This commissioner also had the power to appoint not more than three clerks, who were also subject to the Department of State, and the act further provided that a superintendent of immigration should be appointed, who should be stationed at New York, and should be known as the Superintendent of Immigration of New York, and who should also be under the control and direction of the department.

[Act of 1875] On March 3rd, 1875, Congress passed an act which provided that every vessel arriving in the United States may be inspected under the direction of the Collector of the Port at which it arrives if he shall have reason to believe that any such obnoxious persons (as enumerated in the act) shall be on board, and that it was unlawful for any aliens to land in the United States *except in obedience to judicial process issued pursuant to law*. The act further provides that if any person should feel aggrieved by the certificate of such inspecting officer stating that he was among the class forbidden to land, then he should apply for release or other remedy to *any proper court or judge*, and that it would be the duty of the collector of the port to detain the vessel until a hearing and determination of the matter was had.

[Act of 1882] Upon the 3rd of August, 1882, an act was passed providing that each alien coming into this country should pay to the Collector of Customs of the port 50 cents per head and the money thus paid should be turned over to the United States Treasury, which should constitute a fund to defray the expense of regulating immigration.

Section 2 of the act provides that *the Secretary of the Treasury* shall be charged with the duty of executing the duties and provisions of the act and with supervision over the business of immigration to the United States, and for that purpose had the power to enter into contracts with such state commission, board or officers as might be designated by the governor of said state to take charge of the local affairs of immigration within the ports of the state. And such officers or commissioners were authorized to go on board or through any vessel or ship, and to refuse to permit persons to land provided they were excepted by the laws of the United States.

The act further provided that the Secretary of the Treasury should establish regulations and rules not inconsistent with law, for the purpose of carrying out the provisions of the act. This act eventually divested the Department of State of its power to regulate immigration and placed the power in the Department of the Secretary of the Treasury, where it has remained under the various acts of Congress since then with, however, increased power in the Department of the Secretary of the Treasury.

[Act of 1887] On the 23rd of February, 1887, another act was passed by Congress in the nature of an amendatory

act to the act approved February 26, 1885, which we have not commented upon, in that no provision was made in that act as to who should have charge of the emigrants under that act, and the amendatory act evidently was passed to supply this deficiency. This amendment provides that the *Secretary of the Treasury* should be charged with the duty of executing the provisions of the act, and should have power to enter into contracts with such state commission, board or officers as might be designated for that purpose by the governor of such state, who should take charge of the local affairs of immigration in the ports within said state. And it further provided that the Secretary of the Treasury should establish rules and regulations, etc.

[Act of 1891] On March 3rd, 1891, Congress passed an act in amendment to all acts relative to immigration, and section 7 thereof established the office of superintendent of immigration and granted to the President by and with the consent and advice of the Senate, the power to appoint such officer. The said superintendent of immigration to be an officer in the *Treasury Department* under the control and supervision of the Secretary of the Treasury to whom he should make annual reports. He to have a chief clerk and two first-class clerks. The inspection officers and their assistants to have the power to administer oaths and take and consider testimony touching the right of such aliens to enter the United States, *all of which should be entered of record.* All decisions made by inspection officers or their assistants touching the right of any alien to land when adverse to such right to be final, unless an appeal be taken to the Superin-

tendent of Immigration whose action shall be subject to the review of the Secretary of the Treasury.

Section 9 of this act provides that for the preservation of the peace, and in order that arrests may be made for crimes under the laws of the state where the immigration stations were located, officers in charge of such stations as occasion may require, should admit therein the proper state and municipal officers charged with the enforcement of such laws, and for the purposes of this section *the jurisdiction of such officers and of the local courts shall extend over such stations.*

Section 13, provided that the Circuit Court and District Courts of the United States were invested with full and concurrent jurisdiction of all causes civil and criminal arising under any of the provisions of this act.

[Act of 1893] The act of March 3rd, 1893, provided that it should be the duty of every inspector of arriving immigrants to detain for further inquiry, every person who may not appear to him to be *clearly and beyond doubt entitled to admission.* All special inquiries to be conducted by not less than four officers acting as inspectors, to be designated in writing by the *Secretary of the Treasury,* or the Superintendent of Immigration. No immigrant to be admitted except after favorable decision made by at least three of said inspectors, and any decision subject to appeal by any dissenting inspector whose action shall be subject to review by the Secretary of the Treasury.

It will be observed that in the beginning no restrictions were placed upon the entrance of aliens to this

country and only a formal registration required of them at the office of the Clerk of the District Court. That thereupon side by side with the restriction of immigration into this country the department that has grown up first commenced in the *Department of State* providing for certain inspectors and officials, and then under the department of the *Secretary of the Treasury* the inspection became more rigid, until in the act of 1893 we find that no person should be entitled to admission to this country unless he is able to show clearly and beyond doubt that he is entitled to admission, and does not belong to any of the classes restricted by the Immigration Laws of this country. We also find courts of special inquiry growing up in this department whose decisions are final and from whom appeal can be taken only to the Superintendent of Immigration and from him to the Secretary of the Treasury. In order to clothe this department with more power and pomp on the 2nd of March, 1895, Congress passed an act providing that the Superintendent of Immigration should thereafter be designated as *Commissioner General of Immigration.*

[Act of 1903] On the 3rd of March, 1903, Congress passed its last act relating to immigration of aliens into the United States. This act provides a penalty which may be sued for and recovered by the United States, or any person in their name, against persons bringing women into the country for the purposes of prostitution, or aliens under contracts for services of labor, and providing that it should be the duty of the District Attorney of the proper district to prosecute every such suit when brought by the United States. And pro-

viding further that persons guilty of the offense shall be subject to fine and imprisonment.

Section 10 of this act provides that the decision of the Board of Special Inquiry (hereinafter provided for) based upon the certificate of the examining medical officer shall be final as to the rejection of aliens afflicted with contagious diseases or mental or physical disability.

The act further provides that the sailing master shall furnish a list stating the name of the aliens, the age and sex, etc., whether a polygamist, and whether an anarchist, etc., and upon failure is liable to pay $10 to the Clerk of the Port upon arrival.

Section 16 provides that upon receipt of this list by the immigration officers it shall be their duty to go or send assistants to the vessel and inspect all aliens, or may order a temporary removal of such aliens to the place designated for examination. Such removal not to be considered a landing.

The act further provides, Section 19, that all aliens brought into this country in violation of law shall immediately be sent back to the countries from whence they came on the vessel bringing them if practicable; it is provided the Commissioner General of Immigration with full approval of the Secretary of the Treasury may suspend the deportation of any alien if their testimony is necessary on behalf of the United States government in the prosecution of offenders.

Section 21 provides that the Secretary of the Treasury may within a period of *three years* after landing or entry of *an alien,* take him into custody and return

him to the country whence he came, if he is found to have landed in violation of this act; and provides further that the Commissioner General, in addition to such other duties as may by law be assigned to him, shall under the direction of the Secretary of the Treasury have charge of the administration of all laws relating to the immigration of aliens, and shall have the control and direction of all officers, clerks appointed thereunder, and shall establish rules and regulations and prescribe such forms of bonds and other papers not inconsistent with law, as he may deem best calculated to carry out this act.

Section 23 provided that the duties of the Commissioner of Immigration shall be of an administrative character, to be prescribed in detail by regulations prepared under the direction and with the approval of the Secretary of the Treasury.

In this connection it would seem that the duties of the Commissioner General would appear to be more of a judicial than of an administrative character, or that they have at least stretched the administrative power so as to infringe upon the powers of the judiciary of the United States.

The immigration officers also have power under this act to administer oaths and take and consider testimony touching the right of any alien to enter the United States, and where such occasion may be necessary, to make a written record of such testimony. The decision of any officer favorable to the admission of any alien shall be subject to challenge by any other immigration officer, and such challenge shall operate to take the alien so challenged before the Board of

Special Inquiry for its investigation. And every alien who does not appear to the examining inspector at the port of arrival to be *clearly and beyond doubt* entitled to land shall be detained for examination by the Special Board of Inquiry.

Said board shall consist of three members selected from the immigration officials. Such board has authority to determine whether an alien shall be allowed to land *and all hearings before said board to be kept separate and apart from the public.* Said board to keep a complete permanent record of their proceedings, and all testimony produced before them. The decision of any two members of the board to be final, but either the alien or any dissenting member may appeal to the Secretary of the Treasury, whose decision shall then be final.

Section 26 of this act provides that *no bond or guarantee written or oral* that any alien shall not be a public charge shall be received unless authority shall be given by the Commissioner General, with the written approval of the Secretary of State.

Section 29 provides that the Circuit Court and the District Courts of the United States are invested with full and concurrent jurisdiction of all causes civil and criminal arising under any of the provisions of this act.

Section 31 provides that state officers may arrest for crimes under the laws of the state, upon admission by the officers in charge of the station.

And also provides that any person who shall assist any prohibited alien to enter the territory of the United States, or who connives or conspires with any

person to allow or permit any such person to enter, shall be fined not more than $5,000 or imprisoned for not less than one nor more than five years, or both.

The act of 1903 has built up a court under the direction of the Secretary of the Treasury and head of the Commissioner General of Immigration, which seems to have all the power within its jurisdiction of any court of record in the United States rightfully upon any judicial act, with the power to exclude where it does not appear clear and beyond a reasonable doubt that any alien is entitled to admission, setting the burden on the aliens without the aid of a jury trial, and extending the immigration law so as to make any person attempting to help any friend become a citizen of this country liable to an enormous fine or imprisonment in the penitentiary, to the extent of five years.

SPECIFICATION OF ERRORS.

Sixteen assignments of error have been made upon this record. Consolidating these into fundamental subjects as they bear upon the alleged conflict between the Constitution and the law of March 3rd, 1903, they may be outlined as follows:

First: Section 38 of the act of March 3rd, 1903, abridges the freedom of speech and of the press, in that it excludes from admission to the United States any person who disbelieves in or who is opposed to all organized government, and is unconstitutional and void because in contravention of the first amendment to the Constitution which declares that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Second: Sections 10, 19, 21, 22, 24, 25 are unconstitutional and void because they transfer judicial power to the executive branch of the federal government, whereas Section 1 of Article III of the Constitution declares that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

Third: The same sections are unconstitutional and void upon the additional grounds that they are repugnant to those provisions of the Constitution which declare that no person shall be deprived of liberty

without due process of law; "that in all criminal prosecutions the accused shall enjoy the right to a public trial by an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, to have the assistance of counsel for his defense," that "no warrants shall issue but upon probable cause, supported by oath or affirmation;" and that no one in any criminal case shall be compelled to be a witness against himself.

Fourth: No power whatever is delegated by the Constitution to the general government over alien friends with reference to their admission into the United States, or otherwise, or over the beliefs of citizens, denizens, sojourners or alien immigrants, or over the freedom of speech or of the press, whilst the tenth amendment to the Constitution expressly declares that "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."

ARGUMENT.

I.

Section 38 of the Act of March 3rd, 1903, abridges the freedom of speech and of the press in that it excludes from admission to the United States any person who disbelieves in or who is opposed to all organized Government, and is unconstitutional and void because in contravention of the First Amendment of the Constitution which declares that "Congress shall make no law respecting the establishment of religion or prohibit a free expression thereof, or abridge the freedom of speech or the press."

Under section 38 "no person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government * * * shall be permitted to enter the United States or any territory or place subject to the jurisdiction thereof." (U. S. Compiled Statutes Sup. 1903, p. 186.)

The words "no person" means, of course, all persons, whether immigrants, or those who seek to enter the United States for business or other reasons. As before mentioned the last clause of this section imposes a penalty of a heavy fine and long imprisonment upon any one who knowingly aids or assists or conspires with any person to induce any such proscribed person to enter the United States. If this enactment be law, and President Harper of the University of Chicago should again invite and procure Count Tolstoi to come to the United States to deliver lectures at the University, the former would be subject to fine and imprisonment and the latter would be amenable to the United States constabulary and its orders of deportation. Prince Kropotkin, one of the sovereign intellects of this age, Emile Réclus, the distinguished geographer, and many others are debarred from these shores. Turks, Greeks, Italians, Russians, the abject spawn of centuries of oppression, if free from disease and possessed of but one wife or none, are free to flock to these shores. These believe in government. Nay, to them government is a mystical necessity without whose existence life would be impossible. But of self-government few of them have any idea. The stupidity of the law cannot be better understood than by thus contrasting what it permits with what it prohibits.

When the present act was before the Senate, one of the clauses relating to the classes of persons to be excluded read as follows:

> "Polygamists, anarchists, or persons who believe in or advocate the overthrow by force or violence *of any government,* of the government of the United States, or of all government." (See Cong. Rec., Vol. 36, Pt. 1, p. 143.)

Upon this clause Mr. Hoar said:

MR. HOAR: "If the Senator will allow me to

call his attention to it, he certainly, I think, on reflection will not wish to retain the words 'of any government' because there are governments in the world that ought to be overthrown by force or violence. What does the senator say as to the government of the Moros at this moment?"

MR. MCCOMAS: "I think that that remote insular proposition need not be interpolated in a definition of the propagandist of anarchy by violence."

MR. HOAR: "I do not know that I as a member of the Senate of the United States want to particularize all the governments; we may be on very friendly relations with them; *but there are governments in this world that I, for one, would overthrow by force and violence very quickly if I could.*"

Cong. Rec., Vol. 36, Pt. 1, p. 144.

These remarks of Mr. Hoar were unmistakably suggested by the Declaration of Independence as a document of revolution and the history of the Anglo-Saxon races, which has been marked by repeated revolutions.

Hence the act, as passed, dropped from the excluded classes those "who believe in or *advocated the overthrow by force of violence of any government.*" And as Section 2 now reads (Sup. 1903, p. 172) those are excluded who "believe in or advocate the overthrow by force or violence of the government of the United States or of all government, or of all forms of law." But if Senator Hoar's dictum be true might not all governments be rightfully overthrown by force and violence if all were of the kind which he had in

mind. In this view the only difference between Senator Hoar and the persons proscribed by this law would be a difference of opinion as to whether all or some only of the governments of the world belonged to the class which he would overthrow by force and violence if he could. This philosophy does not necessarily imply the erection of new governments in place of the old. Progress might dictate anarchism; and this would be not less revolutionary than the step from despotism to democracy. Section 2, therefore, excludes two divisions of people (1) those who entertain a given belief touching the government of the United States in the concrete, or who advocate this belief; and (2) those who entertain a given belief as to all governments or forms of law abstractly considered, or who advocate such belief. Section 38 goes a step further. It excludes those who disbelieve in, or are opposed to all organized government, whether they believe in the overthrow of all government by force or violence or not. Such people are debarred from these shores under Section 38 even if they disbelieve in all organized government. So even if the belief in or advocacy of the overthrow of all government by force is proscribed though they believe in or advocate the overthrow by force or violence of any particular government be permitted, why should the overthrow of all government by thought be proscribed. For governments may be overthrown by thought as well as by force. All organized government might be overthrown in the process of time by reason alone. And if so is any enactment law which prohibits the operation of such a revolution? So far as this is concerned the government of "The United

States of America" under the Articles of Confederation was dissolved without the shedding of a drop of blood. It is the boast of historians that Hamilton, Jay and Madison in the Articles which were afterwards published under the title of the "Federalists" persuaded the states under the confederation to withdraw therefrom and to adopt the present Constitution. A new government was thereby formed. The Declaration of Independence announces it as a self-evident truth that the people have the right to abolish old governments and to institute new ones. And yet this act of 1903 seeks to inhibit beliefs in or advocacies of the overthrow of the government of the United States. If it be a right to abolish old governments and to institute new ones; the means of such abolition cannot be absolutely wrong when the abolition itself may be justified. And hence the necessity for liberty of belief and speech upon this subject.

This is not the place to enter upon a discussion of the right of revolution or the subsidiary right of advocating revolution. But if revolution be right, as the Anglo-Saxon races have ever claimed it to be, and if that right may be attained by advocacy, the question is whether the abolition of a given government and the abolition of all government differ except in degree. Do not despotisms give way to constitutional monarchies, and these in turn to republics or democracies? And how have these changes come to pass? Mr. Lincoln used the following language in Congress, in 1848:

> "Any people anywhere, being inclined and having the power, have the right to rise up and shake

> off the existing government and form a new one that suits them better. Nor is this right confined to cases in which the whole people of an existing government may choose to exercise it. Any portion of such people that can, may revolutionize."

To call a given course of action a right but to make it depend for its rightfulness upon an efficient number of people favoring it is nothing less than a pure paradox. Was the American revolution less right at the beginning when its efforts were feeble and attended with failure than when they were powerful and crowned with success? Was there a gradual development of right proportionate to success? Or was the abolition of foreign rule right *per se* at the beginning? Was Magna Charta a valid charter because successfully wrested from King John, or was it a valid charter in and of itself which its successful rejection by King John would not have made invalid? In the social state the assertion of rights will frequently be resisted even to the shedding of blood. Perhaps this is the reason that Mr. Lincoln made the right of revolution depend essentially upon the sufficiency of the force to effectuate it.

It is evident that revolution is not right because attempted or wrong because repulsed. The further pursuit of the subject leads to remote philosophies which do not essentially touch the question in hand. As, for instance, whether the abolition of a government which is not destructive of liberty and the pursuit of happiness is a right; whether, again, a few might successfully destroy all government. We contend for no more than that these

subjects shall not be prejudged. For to prejudge them is to assume that what is now established, is the only right and that is the very thing to be proven which opponents ask shall be left open for debate. Force is force whether used by an army of conquest or by a band of desperate malcontents. The real issue is settled always in the forum of reason. Thinkers like Sir Thomas More, Shelley, Emerson, Spencer, Kropotkin and others will cling to reason as the most legitimate power of progress against reactionaries who slaughter in the name of popular symbols. They are willing to admit that the abolition of government is not right, simply because they advocate such abolition; but they insist that such abolition is not wrong because its advocacy is proscribed. So far as this is concerned anarchy would not be made right because, or even if all peoples acquiesced therein. The Century Dictionary defines anarchism as the "absence of government as a political ideal." Mr. Tucker, Proudhon's most competent exponent in America and the translator of Proudhon's "What is Property", defines anarchism "as the belief in the greatest amount of liberty compatible with equality of liberty, or in other words, as the belief in every liberty except the liberty to invade." Are these doctrines sound? If not, are they exploded by ringing the changes upon the "necessity for government," when anarchism raises the issue of government's necessity and asks leave to demonstrate that government is useless as well as wrong? The step from sovereignty inhering in a divine appointee to sovereignty inhering in the people is not greater than the step from sovereignty inhering in the people to sovereignty inhering in the individual.

The late distinguished and world-lamented Prof. Thomas H. Huxley, in his volume of essays entitled "Method and Results," published by D. J. Appleton & Co., New York, in 1896, in the essay on "Government: Anarchy or Regimentation," at page 391 gives the following definition of anarchy:

> "Anarchy, as a term of political philosophy, must be taken only in its proper sense, which has nothing to do with disorder or with crime, but denotes a state of society in which the rule of each individual by himself is the only government the legitimacy of which is recognized.
>
> Anarchy, thus defined, is the logical outcome of that form of political theory which for the last half century and more has been known under the name of individualism."

So then, if bad government may be abolished and good ones instituted, may not good ones be abolished and voluntary social relations established? Whether governments are bad or good, whether an ideal state of society is possible wherein there shall be no government, are not subjects to be closed by administrative processes and force. If such means are to be used to prevent their discussion, how puerile it is to object when force is used to make their discussion possible. They are poor readers of history who execrate the persecutions of the past, but do as their fathers did before them, under the belief that "the situation is different."

While no one is excluded under the law of 1903, who believes in or advocates the overthrow by force or violence of some particular government,—say that

of France, England or Russia, those are excluded who "believe in or advocate the overthrow by force or violence of the government of the United States." Can a single constitutional, not to say philosophic, reason be advanced why the United States are singled out as exempt from overthrow? Senator Hoar very plainly stated that there are governments which he for one would overthrow by force and violence if he could. He doubtless thought they deserved to be overthrown. But may not the United States deserve to be overthrown? Does not the inhibition upon advocating the overthrow by force and violence of the United States imply that they do not deserve to be overthrown? Their unimpeachable merits are settled by this act of Congress, in the very face of the Declaration of Independence which declares it to be the right of a people to alter or abolish old governments and "institute new governments, laying its foundation on such principles and organizing its powers in such form as shall seem most likely to effect their safety and happiness." The Declaration of Independence has been held by this court to be the spirit of the Constitution itself. The clause in question is none the less unconstitutional because directed against the advocacy of violent overthrow only while leaving peaceful overthrow undisturbed by its terms. The remarks of Mr. Lincoln upon the right of revolution contemplate force; and not only that, but force as the complement of right itself.

The Declaration of Independence was an advocacy of force against the British crown, then the lawfully established government of the land and against this our fathers pledged their lives and sacred honor. It

held the subjects of that crown "Enemies in War in Peace friends." Its promulgation was followed by force which resulted in the institution of a new government, organized upon principles which seemed to our fathers to be appropriate to their liberty; but which these same fathers foresaw might some time be outgrown. And so if persons may be admitted to these shores who "believe in or advocate the overthrow by force or violence" of the government of England, for instance, upon what constitutional or philosophic ground can those persons be excluded "who believe in or advocate the overthrow by force or violence of the government of the United States"? Upon what hypothesis is it held that the question of violent overthrow of the government of England or any other foreign government is debatable and not closed, that belief in or advocacy of such overthrow is tolerable; whilst the violent overthrow of the government of the United States is an evil beyond question and the results of such overthrow evils beyond question?

Passing from these prefatory remarks it may be doubted whether Section 2 applies to the appellant. It can only apply to him by considering the words "anarchists" therein as descriptive of a distinct class. But if the words which follow the word "anarchists" be viewed as describing that word then the section does not apply to the appellant and he would be entitled to his discharge under the ruling in *Gonzales* v. *Williams,* (24 S. C. Rep. Ad. sheets, Feb. 1, 1904):

> "And in the present case, as Gonzales did not come within the Act of 1891, the Commissioner

had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary; and she was not obliged to resort to the Superintendent or the Secretary."

Definitions of the word anarchist and anarchism have already been given. Section 2, though, says "anarchists or persons who believe in or advocate the overthrow by force or violence of the government of the United States, or of all governments or of all forms of law, or the assassination of public officials."

Anarchists are not distinguished by their beliefs in or advocacy of the overthrown by force or violence of the government of the United States or of all government or of the assassination of public officials.

Anarchists are distinguished by a definite creed and not by the *means* proposed to propagate the creed or render it paramount. If, though, the words after the disjunctive "or" are descriptive of the word "anarchists" then the appellant does not fall under Section 2. If the word "anarchist" is used in the sense defined by lexicographers then we are brought to a question of pure belief or mental condition such as is expressed in Section 38, which reads "that no person who disbelieves in or who is opposed to all organized government, etc., shall be permitted to enter the United States."

The first amendment to the Constitution prohibits Congress from passing any law abridging the freedom of speech or of the press. This amendment with nine others were proposed to the first Congress and went into effect November 3, 1791. These amendments constitute a Bill of Rights from which Hamilton originally dissented in the 84th number of the Federalist, as unnecessary because Congress could make no law except it be empowered to do so by a provision in the grant itself, that is the Constitution. But out of a zealous care for future safety, several of the states, when ratifying the Constitution, required these amendments to be made. There is not a line of the Constitution giving Congress power over the admission of alien friends; nor is there a line upon the subject of aliens except the power "to establish an uniform rule of naturalization", but the first amendment says that "Congress shall make *no* law respecting an establishment of religion or prohibiting the free exercise thereof, or the freedom of speech or of the press." This limitation upon Congress is absolute and complete. It does not say that Congress shall make no law upon these subjects as to the United States or their citizens as to particular territory or persons, or under particular circumstances. Congress was given no power under the Constitution anyway to pass such legislation. But this amendment puts it beyond the realm of reason to deduce from any incident of sovereignty granted an implied power to legislate upon the subject of religion or to abridge the freedom of speech or of the press in any manner whatever. There cannot be the slightest doubt about this in the mind of any one who can perceive an axiom.

The first amendment is on the same basis as certain prohibitory sections in the body of the constitution. "No bill of attainder or ex post facto law shall be passed." "No capitation or other direct tax shall be laid" except as specified. "No tax or duty shall be laid on articles exported from any state." "No

title of nobility shall be granted by the United States." In *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 427, this court held, speaking through Mr. Chief Justice Fuller, that a federal law taxing the rents of land and the income of bonds was invalid because Congress was powerless to levy capitation or other direct tax except in proportion to the enumerations provided in the constitution. In *Downes* v. *Bidwell*, 182 U. S. 244, the court, speaking through Mr. Justice Brown, said: "Thus when the constitution declares that 'no bill of attainder or *ex post facto* law shall be passed' and that no title of nobility shall be granted by the United States it goes to the competency of Congress to pass a bill of that description. Perhaps the same remark may apply to the first amendment that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, etc.'"

The question then is do Sections 2 and 38 of the law of 1903 prohibit the free exercise of religion or abridge the freedom of speech or of the press? If they do, it is unimportant that the prohibition and the abridgment affect aliens only. The *subject* of the prohibition or the abridgment is of no moment, if Congress be incompetent to pass *any* such law. If a certain class of people cannot be excluded from these shores except by prohibiting the free exercise of religion or abridging the freedom of speech or of the press, then they cannot be excluded at all. When no express power to Congress over the admission of aliens has been granted it partakes of the grotesque to urge a mode of regulating their admission which

flatly incurs a constitutional prohibition upon Congress to interfere with the free exercise of religion or to abridge the freedom of speech or of the press. It is a well known fact that Tolstoi and his followers are Christian anarchists. They refuse, as the appellant in this case refuses, to participate in what they call "the aggression of government." Government to them implies aggression, and they abstain from taking any part in it. The Dukobors and Menonites belong to the same school. They are off-shoots of the Quakers of an earlier day. These peoples may seem freakish and dangerous to the man who prides himself on his common sense. But the Puritans, the Quakers, the Methodists and other cults appeared not less freakish and dangerous to the first estate of their day. In 6 How. State Trials, 951, a report is given of the trial of William Penn on a charge of *"preaching and speaking."* Penn demanded to know upon what law he was tried, and the court said the trial was upon the common law:

> "PENN: Where is the common law?
>
> RECORDER: You must not think I am able to run up so many years and over so many adjudged cases, which we call common law to answer your curiosity.
>
> PENN: If it be common, it should not be so hard to produce."

The jury refused three times to return a verdict of guilty, although instructed by the court to do so. Upon being sent out the fourth time they found a verdict of not guilty, for which the court adjudged them in contempt. What then would be the funda-

mental difference between refusing to admit Christian anarchists into this country, and prosecuting them for preaching Christian anarchy after they arrived? Turn it whichever way one may the law of 1903 is a recrudescence of that sanguinary spirit of the past concerning whose machinations no one can read without astonishment and indignation. Puritanism and Quakerism are not live questions now. Does it prove that freedom of religion and of speech are secure because these doctrines may be preached? The world spirit is changing its form continually; the human mind is unfolding. New problems are arising. New theories are developing. We insist that the time has come when new "Utopias" may be written and expounded and that their authors shall not be hunted and caged like beasts. Congress has no power under the pretense of regulating immigration to lay the hand of oppression upon thought and expression. The spirits who deserve to rule this world, and who in spite of all reactions will ever rule it are those of Milton, More, Goethe, Kant, Locke, Spencer and their kindred.

But it may be said that the law of 1903 does not prohibit the free exercise of religion, or abridge the freedom of speech or of the press, because it only excludes those who disbelieve in organized government.

It may be said that Turner is to be deported not because he announced that he was an anarchist, not because it was desired to prevent his lecturing upon anarchy, but because he is in fact an anarchist. In other words, the law is not concerned with what Turner says. He may lecture as much as he pleases upon anarchy, because Congress cannot restrain his speech. Congress can pass "no law * * * abridging the freedom of speech or of the press." But Congress has the right to regulate Turner's beliefs upon the subject of government. The "United States are sovereign" and can prescribe what opinions people shall entertain; but one of the limitations on their sovereignty prevents Congress from abridging the freedom of speech, and therefore while opinions may be regulated speech may not. This must be the contention, for the law does proscribe a certain "disbelief." If the proscription of a disbelief is a different thing from proscribing or abridging speech then we can better appeal to the constitution as a whole than to the first amendment to the constitution. But if the proscription of a "disbelief" is the same thing as abridging the freedom of speech or of the press then this law is null and void. Mr. Herbert Spencer in his work on the "Principles of Ethics, Vol. II, p. 136, uses this language in demonstrating that freedom of belief is merely freedom of speech; and to this we appeal as one of the unanswerable proofs that freedom of belief and of speech are identical:

"If we interpret the meaning of words literally, to assert freedom of belief as a right is absurd; since by no external power can this be taken away. Indeed an assertion of it involves a double absurdity; for while belief cannot really be destroyed or changed by coercion from without, it cannot really be destroyed or changed by coercion from within. If it is determined by causes which lie beyond external control, and in large measure beyond internal control. What

is meant is, of course, the right freely to *profess* belief.

"That this is a corollary from the law of equal freedom scarcely needs saying. The profession of a belief by any one, does not of itself interfere with the professions of other beliefs by others; and others, if they impose on any one their professions of belief, manifestly assume more liberty of action than he assumes.

"In respect of these miscellaneous beliefs, which do not concern in any obvious way the maintenance of established institutions, freedom of belief is not called in question. Ignoring exceptions presented by some uncivilized societies, we may say that it is only those beliefs the profession of which seems at variance with the existing social order, which are interdicted. To be known as one who holds that the political system, or the social organization, is not what it ought to be, entails penalties in times and places where the militant type of organization is unqualified. But naturally, where fundamental rights are habitually disregarded, no regard for a right less conspicuously important is to be expected. The fact that the right of political dissent is denied where rights in general are denied, affords no reason for doubting that it is a direct deduction from the law of equal freedom.

* * *

"The subject matter of this chapter is scarcely separable from that of the last. As belief, considered in itself does not admit of being controlled by external power—as it is only the profession of belief which can be taken cognizance of by authority and permitted, or prevented, it follows that the assertion of the right to freedom of belief implies the right to

freedom of speech. Further, it implies the right to use speech for the propagation of belief; seeing that each of the propositions constituting an argument, or arguments, used to support or enforce a belief, being itself a belief, the right to express it is included with the right to express the belief to be justified."

"Of course the one right like the other is an immediate corollary from the law of equal freedom. By using speech, either for the expression of a belief or for the maintenance of a belief, no one prevents any other person from doing the like; unless, indeed by vociferation or persistence he prevents another from being heard, in which case he is habitually recognized as unfair, that is, as breaking the law of equal freedom."

* * *

"It is said that a government ought to guarantee its subjects 'security and a sense of security;' whence it is inferred that magistrates ought to keep ears open to the declamations of popular orators, and stop such as are calculated to create alarm. This inference, however, is met by the difficulty that since every considerable change, political or religious is, when first urged, dreaded by the majority, and thus diminishes their sense of security, the advocacy of it should be prevented. There were multitudes of people who suffered chronic alarm during the Reform Bill agitation; and had the prevention of that alarm been imperative, the implication is that the agitation ought to have been suppressed. So, too, great numbers who were moved by the terrible forecasts of The Standard and the melancholy wailings of The Herald, would fain have put down the free-trade propaganda; and

had it been requisite to maintain their sense of security they should have had their way. And similarly with removal of Catholic disabilities. Prophecies were rife of the return of papal persecutions with all their horrors. Hence the speaking and writing which brought about the change ought to have been forbidden, had the maintenance of a sense of security been held imperative.

"Evidently such proposals to limit the right of free speech, political or religious, can be defended only by making the tacit assumption that whatever political or religious beliefs are at the time established, are wholly true; and since this tacit assumption has throughout the past proved to be habitually erroneous, regard for experience may reasonably prevent us from assuming that the current beliefs are wholly true. We must recognize free speech as still being the agency by which error is to be dissipated, and cannot without papal assumption interdict it."

* * *

"By a parallel progress there has been established that right of free speech on political questions which in early days was denied. Among the Athenians in Solon's time death was inflicted for opposition to a certain established policy; and among the Romans the utterance of proscribed opinions was punished as treason. So, too, in England, centuries ago, political criticism, even of a moderate kind, brought severe penalties. Later times have witnessed, now greater liberty of speech and now greater control: the noticeable fact being that during the war-period brought on by the French Revolution, there was a retrograde

movement in respect of this right, as in respect of other rights. A judge, in 1808, declared that 'It was not to be permitted to any man to make the people dissatisfied with the government under which he lives.' But with the commencement of the long peace there began a decrease of the restraints on political speech, as of other restraints on freedom. Though Sir F. Burdett was imprisoned for condemning the inhuman acts of the troops, and Leigh Hunt for commenting on excessive flogging in the army; since that time there have practically disappeared all impediments to the public expression of political ideas. So long as he does not suggest the commission of crimes, each citizen is free to say what he pleases about any or all of our institutions: even to the advocacy of a form of government utterly different from that which exists, or the condemnation of all governments."

* * *

"And here, indeed, we see again how direct is the connection between international hostilities and the repression of individual freedom. For it is manifest that throughout civilization the repression of freedom of speech and freedom of publication, has been rigorous in proportion as militancy has been predominant; and that at the present time, in such contrasts as that between Russia and England, we still observe the relation."

The same principle is announced, though in different language, by Mr. Mill in his essay on "Liberty." He wrote:

"But there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion

of a person's life and conduct which affects only himself, or, if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly, and in the first instance: for whatever affects himself, may affect others THROUGH himself; and the object which may be grounded on this contingency, will receive consideration in the sequel. This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.

* * *

"No society in which these liberties are not on the whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist *absolute and unqualified.* The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily or mental, or spiritual. Mankind are greater gainers by suffering

each other to live as seems best to themselves than by compelling each to live as seems good to the rest."

* * *

Ernst Freund, professor of jurisprudence and public law in the University of Chicago, in his recent work on Police Power (Callaghan & Co.) touches upon the precise subject here, as follows:

"A proposition to forbid and punish the teaching or the propagation of the doctrine of anarchism, *i. e.,* the doctrine or belief that all established government is wrongful and pernicious and should be destroyed, is inconsistent with the freedom of speech and press, unless carefully confined to cases of solicitation of crime, which will be discussed presently. As the freedom of religion would have no meaning without the liberty of attacking all religion, so the freedom of political discussion is merely a phrase if it must stop short of questioning the fundamental ideas of politics, law and government. Otherwise every government is justified in drawing the line of free discussion at those principles or institutions, which it deems essential to its perpetuation,—a view to which the Russian government would subscribe. It is of the essence of political liberty that it may create disaffection or other inconvenience to the existing government, otherwise there would be no merit in tolerating it. This toleration, however, like all toleration, is based not upon generosity but on sound policy; on the consideration, namely, that ideas are not suppressed by suppressing their free and public discussion, and that such discussion alone can render them harmless and remove the cause for illegality by giving hope of their realization by lawful means." (P. 475.)

Congress could not pass a law providing that any alien who advocated the abolition of government should be exported. It could not do it, because the Constitution guarantees freedom of speech to citizen and alien alike. But while it must be admitted that Congress could not deport one for proclaiming a disbelief in government, it is contended that he can be deported because he disbelieves in it. There is no X-ray process for arriving at the convictions of the human mind, these convictions can only be ascertained by the utterance of the belief, to condemn the belief is really to condemn its utterance and can be nothing else. The Constitution says nothing about beliefs or disbeliefs, for it was assumed by the framers of the Constitution that freedom of speech comprehended freedom of belief. We depart into the fantastic when we say that a man can speak what he pleases, but cannot believe what he pleases. It amounts to saying that Congress cannot regulate speech, so that a person may speak what he believes, or if he be dishonest what he does not believe, but that the inner realm of the mind where beliefs or disbeliefs exist are subject to congressional regulations. For what benefit is it to the Wolseys and Lauds of this day if they cannot prevent the speaking of those beliefs which they may repress. To be able to repress beliefs but not to prevent their utterance is an empty power, and one which never could suit the sponsors of this law or any similar law. It results therefore that the proscription of belief is the proscription of speech. This is the thing aimed at. This is the constitutional right which is abridged when "beliefs" are regulated or proscribed.

Let us suppose that Congress should pass a law prohibiting all persons within the District of Columbia from "believing" in Christian Science, and a penalty should be affixed to such belief. If an attempt was made to give this law the appearance of conformity to the Constitution it might be provided that no one should be punished for expressing a belief in Christian Science or for advocating the doctrines of Christian Science. Now what would be the result? In the first place no one could be punished for the belief until the belief was expressed, because the belief could not be manifested except by expression. The administrators of the law would be driven into the hypocrisy of claiming that the punishment was for the belief and not for the speech. But then it would result that either the speech upon Christian Science would be silenced because such speech afforded evidence of the interdicted belief; or the speech would be carried on to the end that the interdicted belief would thrive. Did the framers of the Constitution intend that instrument to be the subject of such pitiable sophistry as this? But there can be no escape from such deductions if any attempt is made to detach free speech from free belief.

The fundamental basis of free opinion demands that convictions shall be freely spoken to the end that the truth shall be known. Upon this freedom all progress depends. Suppose that it had been possible during the last 1,500 years to regulate beliefs, what would have been the condition of the world to-day? To interdict absolutely a given belief is to interdict its expression. If the interdicting of the first be possible men will not furnish evidence of their disobe-

dience by expressing their opinions. Practically speaking the spirit of man leaps over such limitations upon his freedom. But the course of history shows in Spain, Germany, the Netherlands, France and England that whatever was prohibited as a belief was a *fortiori* prohibited as to speech. And if beliefs could have been regulated their dissemination were necessarily regulated. If men cannot believe or disbelieve they have no right to procure others to believe or disbelieve. The means of procuring others to believe or disbelieve (that is speaking and writing) are something more than the evidence of the belief or disbelief. They are the criminal instrumentalities by which others are brought to commit the crime of believing or disbelieving which is prohibited to them and to all.

The right generally of any nation to exclude aliens rests upon the doctrine of force. There is such a thing as world-citizenship, which carries with it the right under the law of freedom to go anywhere in the world. All treaties on the subject of passing to and fro in the countries of the contracting parties are a recognition of the right. The regulation by stronger powers of weaker powers of the entry of citizens of the former into the territory of the latter and the indemnity which is required if their citizens are injured in person or property is another recognition of the right. The exclusive right of any people to any given territory has no substantial basis except in despotism and ignorance. It is true that in the vindication of the law of equal freedom, or liberty, any people may prevent their own destruction in time of war which would be occasioned by the influx of vast numbers of armed men. But this would be an

attempt on the part of such invaders to assert their exclusive right to such invaded territory. In times of peace also the assertion of the law of liberty may require the exclusion of some persons. But though the legislative power be lodged in a constituent assembly the law of liberty must be observed. When sympathizers with the French Revolution were excluded by Great Britain during the progress of that momentous event what was it that caused Mr. Fox and others to decry the law of exclusion as "utterly irreconcilable with the principles of the Constitution"? There may not be to some minds any conceivable difference between an exclusion based upon the existence of disease in the subject and an exclusion based upon his belief. And yet it exists. Congress, which is not a constituent assembly, but which is a representative body bound down by the strictest grants of agency, has not only the general principle of liberty to consider in enacting exclusion laws but must see to it that those laws are conformable to the grants of power. It cannot be said that Congress may exclude any person for a good reason or for a bad reason. That which is not possible to Parliament, which is bound by the ethical law, cannot be possible to Congress, which is bound in spirit by the ethical law and in substance by express limitations. Instead of regulating the admission of immigrants suppose it were conceived desirable to mould others according to a preconceived idea or to make them the adherents of a dominant party. Congress may establish rules of naturalization. But could it be said that a law would be constitutional which denied the right of naturalization to one who "disbelieved" in the doctrine of

"free trade" or the doctrine of "implied powers"? Could Congress enact that all Russians who should be naturalized should submit to a capitation tax different from that allowable by the Constitution? Could Congress enact that all Germans who should be naturalized should waive the right of trial by jury? Could Congress enact that all Englishmen who should be naturalized should submit to attainder in case of treason? Could Congress enact that all Irishmen who should be naturalized should not have freedom of speech or of the press, or the right to assemble and petition the government for redress of grievances? Could Congress enact that all Chinese or negroes who should be naturalized should submit to such laws regarding involuntary servitude as any state in which they should become citizens might pass? In brief, does the mere power to exclude an alien or admit him upon some theory carry with it the power to overleap positive limitations upon Congress expressed in the body of the Constitution and in the Bill of Rights? If not, the law of 1903 cannot be said to be constitutional. For, if it be, the exclusion may be extended from anarchists to the adherents of any economic or governmental doctrine, or the adherents of any religious faith. No line can be drawn when the barriers are once broken down. If one class can be singled out at one time by the party in power, another class can be singled out at another time by a different party in power. Whatever class the paramount party proscribes must in such case be lawfully proscribed, if the doctrine be sound that aliens can be excluded for a good or for a bad reason. We know of no scheme that can be imagined by which ancient wrong or

intrenched power can better perpetuate themselves.

It is only a step from this power to the right to control citizens in their beliefs and speech. Some new sophistication of the Constitution will furnish the reason for reviving the terrors and persecutions of the middle ages. If men can be deported at any time within three years they can be deported within any time whatsoever, be it 20 years or 40 years. If the sovereign powers of the federal government warrant Congress in excluding an alien for a good reason or a bad reason and for deporting him at any time within three years, he can be deported whenever his proscribed principles, whatever they may be, are discovered by the federal constabulary. And thus by no stretch of imagination do we see the law develop into an engine of despotism to be used upon citizens of long residence in this country. And if these laws can be made valid against aliens then natural born American citizens can likewise be proscribed and outlawed as to every right or privilege coming under the power of the federal government. The prohibition against *ex post facto* laws will not hinder Congress under such an interpretation of the Constitution from attaching to the law of naturalization a provision to withdraw citizenship and to deport at any time whatsoever and whenever the proscribed principles of the unfortunate man are ascertained.

The law creating the Department of Commerce and Labor expresses more in its title than its body warrants. It is a Department of Commerce but not of labor. There is nothing in this law which is other than detrimental to labor. We see in the arrest of Turner an exemplification of this fact. A world-wide

conspiracy exists to-day among "masters" (as Adam Smith declared a conspiracy in some form is always in existence among masters) to dominate laborers.

> "Masters are always and everywhere in a sort of tacit but constant and united combination not to raise the wages of labor above their actual rate."—Wealth of Nations.

Laborers are to be struck down in the name of labor. The law creating the Department of Commerce and Labor is an elastic and ambiguous enactment. One of its unsuspected powers is the power to arrest labor agitators because of their beliefs on government and to place organized labor in the position of defending riot and bloodshed (supposed to be synoyms of anarchy) if it comes to their aid. It remains to be seen whether those great principles of free government secured at incalculable cost through the dark centuries that have passed will stand the strain which organized greed will bring to bear upon them. The economic struggle now going on is the same struggle that was made against feudalism. It is what Lord Tennyson called a "new-old revolution," having for its central force the aspirations of the masses for a better life and the determination of a few not to allow any change to be made. If this republic consecrated by the memories of some of the greatest disciples of liberty which the world has known, can solve this problem in its new aspect, it will stand more conspicuously in history than any country of the past. Any man in power or out of power who measureably contributes to the success of this struggle which

amounts to the lifting up of men, will place himself by the side of Milton and Jefferson.

II.

Sections 10, 19, 21, 22, 24 and 25 are unconstitutional and void because they transfer judicial power to the executive branch of the Federal Government; Whereas Section 1 of Article III declares that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

Section 10 of the Act of March 3rd, 1903, provides that the decision of the Board of Special Inquiry, hereinafter provided for, shall be final as to the rejection of aliens afflicted with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under Section 2 of the Act. As before shown, Section 2 of the Act specifies the classes of aliens which shall not be admitted to the United States. Whether a disbelief in organized government is a mental disability or not, it at least appears that to the Board of Special Inquiry is delegated the power of passing upon that question. Furthermore, by Section 10, the decision of this Board is made final.

Section 19 of the Act empowers the Secretary of the Treasury to suspend the operation of the exclusion law as to aliens who have come to this country under promise or agreement of labor or service of any kind.

Section 21 empowers the Secretary of the Treasury

to cause any alien to be taken into custody and returned to the country from whence he came, at any time within a period of three years after the landing or entry of such alien within the United States.

Section 22 empowers the Commissioner General of Immigration under the direction of the Secretary of the Treasury to have charge of the administration of laws relating to the immigration of aliens into the United States, and to have control, direction and supervision of all officers, clerks and employes appointed thereunder. He is further given power to make such rules and regulations, prescribe such forms of bonds, reports and entries and other papers, and to issue from time to time such instructions not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this act.

Section 24 provides that immigrant inspectors and other immigration officers, clerks, employes shall hereafter be appointed and their compensation fixed, and raised or decreased from time to time, by the Secretary of the Treasury, upon the recommendation of the Commissioner General of Immigration. This section further provides that immigration officers shall have the power to administer oaths, and to take and consider testimony touching the right of any alien to enter the United States, and where such action may be necessary, to make a written record of such testimony. And any person to whom such oath has been administered, under the provisions of this Act, who shall knowingly or wilfully give false testimony or swear to any false statements in any way affecting or in relation to the right of an alien to

admission to the United States, shall be deemed guilty of perjury and be punished as provided by Section 5392 of the United States Revised Statutes. This section further provides that the decision of any such officer if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer, and such challenge shall operate to take the alien, whose right to land is so challenged, before the Board of Special Inquiry for its investigation. It is further provided by this section that every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond all doubt entitled to land, shall be detained for examination in relation thereto by the Board of Special Inquiry.

Section 25 provides that Boards of Special Inquiry shall be appointed by the Commissioners of Immigration at the various ports of arrival for the prompt determination of the cases of all aliens detained at such ports under the provisions of the law.

Section 25 further provides that such Boards of Special Inquiry shall consist of three members, who shall be selected from such immigrant officers in the service as the Commissioner General of Immigration, with the approval of the Secretary of the Treasury, shall from time to time designate as qualified to serve on such boards.

Section 25 further provides that such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or be deported; that all hearings before boards shall be separate and apart from the public; but that such

board shall keep a complete and permanent record of their proceedings and of such testimony as shall be produced before them; that the decision of any two members of the board shall prevail and be final, but either the alien or any dissenting member of said board may appeal through the Commissioner of Immigration at the port of arrival and the Commissioner General of Immigration to the Secretary of the Treasury, whose decision shall then be final, and that the taking of such appeal shall operate to stay any action in regard to the final disposal of the alien whose case is so appealed until the receipt by the Commissioner of Immigration at the port of arrival of such decision.

The question which arises upon this branch of the argument is whether or not the Act of March 3rd, 1903, violates Section I of Article III of the Constitution, which declares that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. This question may be examined in the light of history, for it is well known that in the organization of the government of the United States the intent was to clearly divide the executive, legislative and judicial branches of the government in such a manner that none should encroach upon the jurisdiction and power of either of the others. The framers of the Constitution conceived this to be a safeguard of liberty. They held that if the executive branch of the government could usurp legislative or judicial functions the government to that extent would become absolute in its character. They sought to so divide the powers of the government and so to oppose them to each other that no

department should become sufficiently energetic to be a menace to the rights of the people.

This is the history of the division of power in the general government as given by Mr. Bryce in his American Commonwealth, Vol. I, p. 282:

> "When the famous treatise on the spirit of laws appeared in 1748, the treatise belonging to the small class of books which permanently turned the course of human thought, and which, unlike St. Augustine's city of God turned it immediately, instead of having to wait for centuries, until the hour of its power arrived, dwelt on the expression of the legislative, executive and judicial power in the British constitution as the most remarkable feature of that system. Accustomed to see the two former powers, and to some extent the third also exercised by or under the direct control of the French monarch, Montesquieu attributed English freedom to their expression. The king of Great Britain then possessed a larger prerogative than he has now, and as even then it seemed on paper much larger than it really was, it was natural that a foreign observer should underrate the executive character of the British Parliament and overrate the personal authority of the monarch. Now, Montesquieu's treatment was taken by thinkers of the next generation as a sort of bible of political philosophy.
>
> "Hamilton and Madison, the two earliest exponents of the American Constitution they had done so much to create, cite it in the Federalist, much as the school men cite Aristotle, that is, as

an authority to which everybody will bow, and Madison in particular constantly refers to the expression of the three powers as the distinguishing note of a free government. * * * From their colonial and state experience, coupled with these notions of the British constitution, the men of 1787 drew three conclusions, first that the vesting of the executive and the legislative powers in different hands was a normal and natural feature of a free government; secondly, that the power of the executive was dangerous to liberty and must be kept within well defined boundaries. Thirdly, that in order to check the head of the State, it was necessary not only to define his powers and appoint him for a limited period, but also to destroy his opportunities of influencing the legislature. *Conceiving that ministers as named by and acting under the orders of the president would be his instruments rather than faithful representatives of the people, they resolved to prevent them from holding this double character, and therefore forbade any person holding office under the United States to be a member of either house.*" (Italics ours.)

At another place (Vol. I, p. 284) the same author wrote:

"Thus it was believed in 1787 that a due balance had been arrived at, the independence of Congress being secured on the one side, and the independence of the president on the other. Each power holding the other in check, the people, jealous of their hardly won liberties would be

accorded by each and safe from the encroachment of either. There was, of course, the risk that controversies as to their respective rights and powers would arise between these two deparments, but the creation of a court entitled to place an authoritative interpretation on the Constitution in which the supreme will of the people was expressed, provided a remedy available in many if not in all such cases, and a security for the faithful observance of the Constitution, which England did not, and under her present system of an omnipotent Parliament could not possess."

Mr. Bancroft in his history of the Constitution, Vol. I, p. 327, made this reference to the subject:

"The tripartite division of government into legislative, executive and judicial, enforced in theory by the illustrious Montesquieu, and practiced in the home government of every one of the American States, became a part of the Constitution of the United States, which derived their mode of instituting it from their own happy experience. It was established by the federal convention with a rigid consistence that went beyond the example of Britain, where one branch of the legislature still remains a court of appeal. Each one of the three departments proceeded from the people, and each is endowed with all the authority needed for its just activity."

The principle announced by Montesquieu to which the framers of the Constitution conformed is found in Book II, Sec. 6, of the Spirit of Laws:

"In every government," wrote Montesquieu, "there are three sorts of powers, the legislative in respect to things dependent on the law of nations, and the executive in regard to matters that depend on the civil law. By authority of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have already been enacted. By the second he makes peace or war, sends or receives embassies, establishes the public security and provides against invasion. By the third he punishes criminals or determines disputes that arise between individuals. The latter we shall call the judiciary power, and the others simply the executive power of the state. The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty it is requisite that governments be so constituted as that one man need not be afraid of another. When the legislative and executive power are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There

would be an end of everything were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting the laws, that of executing the public resolutions, and of trying the causes of individuals. Most kingdoms in Europe enjoy moderate government because the prince is invested with the two first powers and leaves the third to his subjects. In Turkey, where these three powers are united in the Sultan's person, the subjects groan under the most dreadful oppression."

Locke in his work on Civil Government (Chapter 14) used this language:

"The legislative and executive powers are in distinct hands in all moderated monarchies and well framed governments."

The proceedings of the Constitutional Convention show that it was the intention of the framers of the Constitution to distinctly divide the departments of the government according to the principle of Montesquieu:

"On Tuesday, May 29, 1878, Charles Pinckney, delegate from South Carolina, offered a draft of a Constitution, Article 1 of which reads as follows:

"The style of this government shall be the United States of America, and the government shall consist of supreme legislative, executive and judicial powers."

Madison's Debates, p. 64.

"On May 30, 1787, Edmund Randolph, delegate

from Virginia, offered a resolution, Section 3 of which is as follows:

"That a national government shall be established, consisting of a supreme legislative, executive and judiciary."

Madison's Debates, p. 73.

"On June 13, 1787, Nathaniel Gorham, of Massachusetts, submitted a report to the convention, Article 1 of which reads:

"RESOLVED, That it is the opinion of this committee that a national government ought to be established, consisting of a supreme legislative, executive and judiciary."

Madison's Debates, p. 160.

When the Constitution was before the people for adoption Mr. Madison in the 46th number of the Federalist took occasion to vindicate the Constitution in these words:

"No political truth is certainly of greater intrinsic value, or stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The enumeration of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced as a definition of tyranny. Were the federal Constitution, therefore, really attended with this enumeration of power, or with a mixture of powers which have any dangerous tendency to statutory enumeration, no further argument would be necessary to inspire universal reprobation of the system. I

persuade myself, however, that it will be made apparent to every one that that charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three departments of power should be separate and distinct. The oracle who is always consulted and cited on this subject, is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind."

This court has frequently recognized this fundamental principle of the American system. But it was never done so in more definite language than in the case of *Kilbourn* v. *Thompson,* 103 U. S. 168, a case decided in 1880. The court, speaking through Mr. Justice Miller, said:

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly

defined. It is also essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States some important exceptions. One of these is, that the President is so far made a part of the legislative power, that his assent is required to the enactment of all statutes and resolutions of Congress.

"This, however, is so only to a limited extent, for a bill may become a law notwithstanding the refusal of President to approve it, by a vote of two-thirds of each House of the Legislature.

"So, also, the Senate is made a partaker in the functions of appointing officers and making treaties, which are supposed to be properly executive, by requiring its consent to the appointment of such officers and the ratification of treaties. The Senate also exercises the judicial power of trying impeachments, and the House of preferring articles on impeachment.

"In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines in its three primary articles, the allotment of power to the executive, the legislative, and judicial department of the government. It also remains true, as a general rule, that the powers confided by the Constitution

to one of these departments cannot be exercised by another."

Whether an alien is afflicted with small-pox or leprosy, perhaps in some cases whether an alien is an epileptic, imbecile or lunatic, is not a judicial question, although cognate to such a question. The office of inspection imports a looking over in cases where ocular proof is at hand. But whether an alien is a polygamist or an anarchist, or whether, if a Chinaman, he is a citizen or one to whom the law does not apply is strictly a judicial question. The government of Russia requires no other or different power than that which must be defended in this law to deport unwelcome persons from its territory.

What do we have in the case at bar, as shown by the proceedings against this appellant? In the first place there was a warrant upon which a federal constable seized the person of Turner. So far as appears no oath was made by any one upon which the warrant issued. The whole proceeding was as summary as that of a *"lettre de catchet."* An executive secretary! A Secretary of Commerce and Labor by his own will issued a warrant, for which there does not seem to be even in this extraordinary law the slightest provision, to arrest a man who had come to this country to lecture to labor unions; and pursuant to that warrant this labor lecturer was arrested at the close of his address on "Trade Unionism and the General Strike." In brief, the Secretary of Labor caused a labor organizer to be arrested after an address upon the subject of labor and for his private opinion upon an abstract theory of government.

Next Turner was taken before a board of "Special Inquiry." The papers seized from his person by the officer who arrested him were offered in evidence. The warrant referred to was issued four days before the arrest (October 19th), so that the government had an opportunity to get evidence to sustain it before executing it. Certain of Turner's remarks were taken down at the meeting in question (October 23) and written out and offered in evidence before the board. Turner was then put upon the stand, whether by compulsion or whether he took the stand voluntarily does not appear. He was interrogated, at any rate, by a member of the board, and not by his counsel for he had none. The "trial" was secret, "apart from the public." The inquisition was not extended because Turner made no denial of his theoretical views upon government. But to show to what passes a similar examination might come, we quote from the record (1 p.):

> "Q. How long have you been in the United States?
>
> A. Is it necessary that I should answer that, commissioner?
>
> Q. The statutes contemplate that aliens shall give all information to immigration officers.
>
> A. Well, to-day is Saturday—ten days."

If the statutes contemplate that aliens are bound to furnish evidence against themselves the policy of the republic has suffered a lamentable devolution.

But again:

> Q. And you admitted previously that your arrived via Canada?

> A. No, I did not, commissioner.
>
> Q. You will deny that? A. I neither affirm or deny it."

Some question arose as to the positive identity of certain books and papers in evidence. In speaking of these Turner said: "I think they have probably got in by mistake. I have never seen them before. I think this is an error—I would not say that this book was in my pocket; of course it is the same date. I saw that number before." Now, Mr. Weldon, an inspector, and one of the judges on this occasion, abdicated his magistracy to say: "I want to say positively that I took that from Mr. Turner's overcoat pocket last night."

MR. TURNER: Of course it is only a little technicality, but I think that is the same number."

Now if this law is held valid the same course of procedure, but growing more insolent and drastic with time, will obtain in all cases where the executive department or even the constabulary at the ports see fit to adopt it. We are aware that this court in *Fong Yue Ting* v. *United States,* 149 U. S., 698, and in other cases, has held that the executive officers of the government have plenary power under the authorization of Congress to execute the exclusion laws.

But flagrant abuses and outrageous tyrannies are at hand even if the present case can by any possibility be passed over, when enlightened men will hasten to arrest the administration of this law and of still more despotic laws. And then the question will be, how can the line be drawn in the face of previous acquiescence and what shall be the distinguishing

principle? Congress cannot have power to confer the judicial office upon any department except the courts. It cannot usurp judicial functions itself nor confer upon this court its powers of legislation. This principle is fundamental and nothing more in argument is required to show that this law does confer judicial power upon an executive secretary and his clerks and appointees.

If men are to be excluded under any given law they are to be excluded according to law and under the law. If they are to be excluded for instance for having been convicted of a crime or misdemeanor the fact of such conviction is a question which only a court can determine and only men trained in the principles of evidence know how to determine. In a court the investigation of such a question is frequently attended with many nice distinctions and reasons. Whether the person supposed to have been convicted is the same person; whether in fact he was convicted of a felony or only of a misdemeanor; whether in fact instead of a conviction there was only a charge of a felony or misdemeanor are always present in such cases. Are these questions to be submitted to prosecutors, to inspectors who execute the process of their superiors? But the statute declares that conviction of a crime or misdemeanor not involving moral turpitude shall not be ground of exclusion. Is this delicate subject which enters the domain of ethics, economics, jurisprudence and political history to be committed to the constabulary of this republic? What crimes and misdemeanors involve moral turpitude and what do not? Would William Penn, if he had been convicted of "preaching and teaching", have been involved "in moral turpitude"? Are persons who are convicted of reading Herbert Spencer and exiled involved in moral turpitude? Was Jean Valjean involved in moral turpitude for stealing a loaf of bread under the dire necessity of hunger? If Turner, this appellant, had been convicted somewhere of preaching collectivism would he have been involved in moral turpitude? Can any language called law be upon its face more absurd, and in its character more pregnant with boundless despotism than this provision under consideration? But the section (2) goes further and declares that conviction for an offense purely political and not involving moral turpitude shall not exclude. All political offenses involve moral turpitude in the jurisdiction where they are punished. If they did not involve moral turpitude there they would not be political offenses. But what is a political offense as distinguished from any other offense? If a political offense involves moral turpitude in Germany, why should it be held not to involve moral turpitude in the United States? What is the criterion? When is an offense political only and when criminal only? When is a political offense tainted with moral turpitude and when is it a praiseworthy offense? Are these questions to be determined by men ignorant of law and bred to hunt men and gather evidence? Has the time come when officers of our ports can exclude those men of other countries who in every age are the martyrs of Liberty,—the Kosciuskos, the Sidneys, the Hampdens,—some of whom in an earlier day came to this country and helped to make it what it was. Can such exclusions be made by such officers deciding either that the offense was not political, or

that it was political and involved moral turpitude? If so, those provisions of the Constitution which go to the very competency of Congress and to the protection of all persons might as well be undecipherable hieroglyphics buried in the sands of the remotest desert.

The decisions of the lower federal courts to be cited on another branch of the argument show that fallen women, or those alleged to be such, are subjected to the most unwarranted conduct on the part of immigration officials. For that matter the question whether a woman is a prostitute frequently taxes the powers of the judiciary as many libel suits plainly evidence. The point is that the law gives it into the hands of the executive to exclude any person who may happen to be objectionable upon the determination of his inferiors that the person is a prostitute or otherwise within the law. That this law will never be so used is no argument. If it never will be, the power should not be granted; for it is useless to give power that will not be used. Mr. Jefferson, commenting upon the Alien and Sedition Acts, for which the Federal party went to ruin, said:

> "The same act undertaking to authorize the president to remove a person out of the United States who is under the protection of the law, on his own suspicion, without accusation, without jury, without public trial, without confrontation of the witnesses against him, without having witnesses in his favor, without defense, without counsel, is contrary to these provisions also of the Constitution, is therefore not law, but utterly void and of no force."—Kentucky Resolutions.

These resolutions have the force of sovereign approval. Mr. Jefferson was triumphantly elected president upon them. Many of their principles are repeatedly reaffirmed by this court to this day. They were written by the hand which wrote the Declaration of Independence and they never have been overthrown in the forum of reason where the verdicts of history are made up.

But the section also provides that "professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession" shall not be excluded so far as the contract labor clauses of the act are concerned. This qualification leaves the "constabulary" free to determine whether any of such persons falls under some other prohibition, as, for instance, whether he is an anarchist, or disbelieves in or is opposed to all organized government. Now it is well known that the opinion of those millions of men in this country and abroad who have rid themselves of the superstition that government is an end, vary in intensity of individualism. Some hold that government may legitimately protect life and property; others that government may only enforce the law of equal freedom; others that liberty consists in every right except the right to invade. As Mr. Huxley wrote, anarchy or the rule of one's self "is the logical outcome of that form of political theory which for the last half century and more has been known under the name of individualism." When, therefore, does a man cease to be an individualist and become an anarchist? Mr. Spencer's "Social Statics" is a statement of individualism,

or as it is sometimes said, of philosophic anarchy. Before his day Immanuel Kant, probably the greatest metaphysical intellect that the world has known, in his work on "The Philosophy of Law" had stated the universal principle of right in this language:

> "Every action is right which in itself, or in the maxim on which it proceeds, is such that it can co-exist along with the Freedom of the Will of each and all in action, according to a universal law.
>
> "If, then, my action or my condition generally can co-exist with the freedom of every other, according to a universal law, any one does me a wrong who hinders me in the performance of this action, or in the maintenance of this condition. For such a hindrance or obstruction cannot co-exist with Freedom according to universal Laws.
>
> "It follows also that it cannot be demanded as a matter of Right, that this universal Principle of all maxims shall itself be adopted as my maxim, that is, that I shall make it the *maxim* of my actions. For any one may be free, although his freedom is entirely indifferent to me, or even if I wished in my heart to infringe it, so long as I do not actually violate that freedom by *my external action*. Ethics, however, as distinguished from Jurisprudence, imposes upon me the obligation to make the fulfillment of Right a *maxim* of my conduct.
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> "The universal Law of Right may then be expressed thus: 'Act externally in such a manner that the free exercise of thy Will may be able to co-exist with the Freedom of all others, according to a universal Law.' This is undoubtedly a Law which imposes obligation upon me; but it does not at all imply and still less command that I *ought,* merely on account of this obligation, to limit my freedom to these very conditions. Reason in this connection says only that it *is* restricted thus far by its Idea, and may be likewise thus limited in fact by others; and it lays this down as a Postulate which is not capable of further proof. As the object in view is not to teach Virtue, but to explain what right *is,* thus far the Law of Right, as thus laid down, may not and should not be represented as a motive-principle of action."

Mr. Spencer in the "Principles of Ethics," Vol. II, p. 72 (D. Appleton & Co.), thus stated the rule:

> "As direct deductions from the formula of justice, the right of each man to the use of unshackled limbs, and the right to move from place to place without hindrance, are almost too obvious to need specifying. Indeed these rights, more, perhaps, that any others, are immediately recognized in thought as corollaries. Clearly, one who binds another's limbs, chains him to a post, or confines him in a dungeon, has used greater liberty of action than his captive; and no less clear is it that if by threatened punishment or otherwise he debars him from changing his locality, he commits a kindred breach of the law of equal freedom.
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> "Further, it is manifest that if, in either of these ways, a man's liberty of action is destroyed

> or diminished, not by some one other man, but by a number of other men acting jointly—if each member of a lower class thus has his powers of motion and locomotion partially cut off by the regulations which a higher class has established, each member of that higher class has transgressed the ultimate principle of equity in like manner if in a smaller degree."
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> * * * * * * * * * *

We return therefore to the question, how is this most subtle and intricate status of opinion to be determined and what possible consequence, form of detention or deportation can follow its determination that is not an invasion of liberty? Is not the determination itself a species of despotism? It is well known, as before stated, that thousands of lecturers, teachers, ministers and professional people are individualists of some sort. Shall immigration inspectors, forming themselves into boards of "Special Inquiry" be permitted to examine this philosophical subject? Shall an executive secretary pass upon the appeal from such a board; and shall the facts ascertained by these persons be foreclosed against an alien in this court or in an inferior court of the United States?

When does an individualist cease to be such and become an anarchist? What sort of a position does this country expect to occupy before the world of mind when it is known that lecturers upon anarchy or any other subject are free to pass in and out of England and France and to deliver their lectures in those countries? Under this law it is given into the hands of inspectors to say who is not an anarchist,

or who disbelieves and who does not disbelieve in organized government. That the law may never be used against any very distinguished persons proves that its administration may be partial, but not that it is constitutional or ethical. If the power exists to exclude an alien because he disbelieves in organized government, it exists to exclude an alien for any degree of disbelief in the assumed functions of a government. That degree of disbelief possible to be fixed may vary up to the point where no one might be admitted who disbelieved that the lawful province of government excluded any regulation over the lives of persons whatsoever, even to the fixing of fashions in dress. And if the ascertainment of the mind of the alien on the subject of anarchy may be committed to inspectors and boards of inquiry appointed by the executive department it can be committed on any supposed subject. If this be not usurpation and very dangerous usurpation, we do not know what could be usurpation.

The following utterances of this court elucidate the doctrine that courts must exercise the judicial functions. In the case of *Marbury* v. *Madison,* 1 Cranch, 173, Mr. Chief Justice Marshall said:

> "The constitution vests the whole judicial power of the whole United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish."

Again in *Martin* v. *Hunter's Lessee,* 1 Wheat. 330, this court in 1816, speaking through Mr. Justice Story, said:

> "If, then, it is the duty of Congress to vest the

judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdiction as to all; for the constitution has not singled out any class on which Congress are bound to act in preference to others."

In line with this decision Mr. Kent's remarks in his admirable commentaries may be quoted:

"The constitution declares that 'The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.' In this respect it is mandatory upon the legislature to establish courts of justice commensurate with the judicial power of the Union. Congress have no discretion in the case. They were bound to vest the whole judicial power in an original or appellate form, in the Court's mentioned and contemplated in the constitution, and to provide courts inferior to the supreme court, in which the judicial power unabsorbed by the supreme court, might be placed. The judicial power of the United States is, in point of origin and title, equal with the other powers of the government and is as exclusively vested in the courts created by or in pursuance of the constitution, as the legislative power is vested in Congress, or the executive power in the President." (Vol. 1, 301.)

A case which illustrated the judicial functions is that of *Andrews* v. *Hovey,* 124 U. S., 694, decided in 1887. The court said:

"Nor is this a case for the application of the doctrine, that, in cases of ambiguity, the practice adopted by an executive department of the government, in interpreting and administering a statute is to be taken as some evidence of its proper construction. The question before us, as to the validity of a patent, by reason of pre-existing acts or omissions of the inventor, of the character of those involved in the present case, is not a question of executive administration, but is properly a judicial question."

In *Ex Parte Milligan,* 4 Wallace, 2, decided in 1886, Mr. Justice Davis said for the court:

"The controlling question in the case is this: Upon the fact stated in Milligan's petition, and the exhibits filed, had the Military Commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious States, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned and, on certain criminal charges preferred against him, tried, convicted and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man?

"No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrated as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written Constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it, this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruc-

tion or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution, which says, 'That the trial of all crimes, except in case of impeachment, shall be by jury;' and in the fourth, fifth and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure; and directs that a judicial warrant shall not issue 'without proof of probable cause supported by oath or affirmation.' The fifth declares 'that no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor be deprived of life, liberty, or property without due process of law.' And the sixth guarantees the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished. It is in these words: 'In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.' The securities for personal

liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people, that these rights, highly prized, might be denied them by implication that when the original constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be imperiled unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the

great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.

* * * * * * * * * * *

"Every trial involves the exercise of judicial power; and from what source did the Military Commission that tried him (Milligan) derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it 'in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish,' and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President, because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is 'no unwritten criminal code to which resort can be had as a source of jurisdiction.'"

Do not these principles apply to the case at bar?

III.

Sections 10, 19, 21, 22, 24 and 25 are unconstitutional and void upon the additional grounds that they are repugnant to those provisions of the Constitution which declare that "No person shall

be deprived of liberty without due process of law;" that "In all criminal prosecutions the accused shall enjoy the right to a trial by an impartial jury to be informed of the nature of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, to have the assistance of counsel for his defense;" and that "No warrant shall issue but upon proper cause supported by oath or affirmation;" and that "No one in any criminal case shall be compelled to be a witness against himself."

In order to exhibit to this court the abuses which have grown up in the administration of the immigration laws, we have thought proper to refer the court to some recent decisions of the lower Federal Courts. From these decisions it is plain that many of the protections which are thrown about persons, whether aliens or citizens, by the organic law, are repeatedly disregarded by the immigrant officials. This results as well from the character of the laws under which they act as from the proneness of human nature to take advantage of power when men are clothed with authority. The act of 1903 is drawn in such a way as to leave to the executive officers, who are charged with its administration, an undue discretion and an almost boundless power in the method of carrying out its provisions. These faults are aside from the plain usurpations which the law, in so many words, has taken and delivered to the executive department of the government.

In *re Lea, et al.,* reported in the Advance Sheets of

the Federal Reporter January 28, 1904, at page 283, Judge Ballinger of the District Court of Oregon said:

> "An orderly form of proceeding before such board is prescribed, having regard to the rights of the alien, applying to land, and a right of appeal is provided for. If the authority to deport aliens found in this country belongs to the immigration officers of the government, such authority should devolve upon the board specially charged with the duty of determining the right to land. It cannot be supposed that Congress was more mindful of the right of an alien seeking to land, than of a person domiciled in the country whose deportation may be attempted. In the present case the petitioners were arrested by an officer whose residence is in Seattle, and whose word was his warrant. Immediately upon arrest the petitioners were required to take an oath and testify against themselves. Ignorant of their rights—if persons arrested for deportation can be said to have rights—with little knowledge of the English language, without opportunity to seek the advice of friends or consult an attorney, they were hurried to the Home of the Good Shepherd, where they were, until brought into court on this writ, closely guarded under an injunction to their keepers not to allow them to see or communicate with any one. In the meantime the officers making the arrest forwarded to the Commissioner of Immigration a report intended as the basis for a warrant of deportation. It was a report which, reaching the Secretary of Commerce and Labor through the channel of the Com-

missioner of Immigration should satisfy that officer that the accused were unlawfully in the country.

The accused have not seen that report. The proceeding was ex parte, summary and presumably secret. There is no presumption against the good faith of the officers. The methods employed, however, leave the person attacked at the mercy of the inspector, who is accuser, arresting officer, prosecutor, judge, jailer. By this method a citizen may be arrested and summarily committed and kept a close prisoner while the warrant for his deportation is being procured. He has no opportunity to appeal, or to petition the courts for a writ of habeas corpus. The exercise of this authority may not be restricted to aliens. *It applies to any person that the inspector decides is an alien.* But notwithstanding all this, the decisions cited by the respondent are to the effect that the political department of the government is charged with the duty not only of deciding who may come into the country, but who may remain in it, and that department may make its own rules and regulations respecting the manner in which its authority is to be exercised, and that its proceedings, of whatever character or however conducted, is due process of law."

Gautier, one of the petitioners in this case, was discharged on sustaining a demurer to the writ of *habeas corpus* and the case of Lea was retained for hearing.

On page 235 of the same Reporter Judge Ballinger further said in discharging Lea:

"From the testimony of the interpreters, it appears that an inspector named Lavin, with Mr. Petrain, an attorney by profession, who acted as interpreter, went to a house of prostitution in this city, where the petitioner was living and represented to her that Lavin was looking for some girls that had come from Seattle, and inquired of her if she knew any such girls. Incidentally she was asked when she came to Portland. Mr. Petrain's recollection is that she said she had been here about three weeks, and that in answer to another question she stated that she arrived in New York in the early part of July of this year. This is according to the recollection of the witness, who says that he will not be positive as to such statement. Later in the day the petitioner was arrested by two policemen, and taken to the city jail where her jewelry and pocket book were taken from her. On the same day she was taken from the jail to the convent of the Good Shepherd, and from the latter place she was again returned to the jail, where she remained until 7 or 8 o'clock in the evening, when she was again taken to the convent, accompanied by Lavin and Mr. Petrain. These repeated visits to the jail were obviously intended to give force to the threats made to the petitioner in the interrogation that followed. Upon her return to the convent with no one present but Lavin and Petrain she was asked to be sworn on a crucifix. She refused. She was informed that she would have to be put under oath. She finally permitted herself to be sworn, but not on the crucifix. The

examination lasted probably an hour. 'Nothing was explained to her.' She was not informed that she could call any witnesses, or could have an attorney, or that she had any rights. Her statements as interpreted were reduced to writing by Lavin. This writing she refused at first to sign. Later under pressure she signed it. She had refused to answer many of the questions asked her. She was threatened with different kinds of penalties—that she would have to remain in custody until she complied with the requests made of her to testify, and that if she did not answer correctly she would be sent to the penitentiary. The interpreter in answer to a question says 'It was a hard proceeding.' He had read of such things as having occurred in the Middle Ages. Some two or three weeks later the petitioner, still being a prisoner at the convent, was subjected to a second interrogation, with another interpreter, who testified that this investigation 'must have taken a couple of hours, probably.' The character of this proceeding and its result did not differ materially from that already had." (126 Fed. Rep., 231.)

Judge Wing of the District Court of Ohio in *U. S.* v. *Hung Chang,* recently held:

"It has been urged that under the provisions of this section the burden of proof in this proceeding is upon the person arrested to show his right to remain in the United States; that is to say, if no proof is offered, either by the United States or by the person arrested, judgment of

deportation to China must follow as a matter of course. It will be observed that the section referred to only implies in terms to 'any Chinese person or person of Chinese descent.' I hold, therefore, that the burden of proving that the person arrested is a Chinese person or person of Chinese descent is upon the United States, before any burden is cast upon the person arrested to show his right to remain in the United States. The mere fact of arrest can never be considered as proof of guilt of the person arrested, or of the truthfulness of the charge made, or any part thereof. If Congress had intended to provide for so great a departure from the immemorial usages of the Anglo-Saxon law, the act would have read that 'any person arrested under the provisions of this act * * * shall be adjudged to be unlawfully within the United States.' Such legislation would plainly be in contravention of articles 5 and 6 of the amendments to the Constitution of the United States.

Under the provisions of the section referred to, it is plain that any person within the boundaries of the United States may in fact be arrested according to the uncontrolled wish or whim of an affiant or the officer charged with the execution of the warrant, whether such person be a Chinese person or not. The act is potentially operative against every one included within the meaning of the word 'person,' as used in the organic law. I cannot attribute to the national Legislature the purpose of enacting a law the enforcement of which would result in deporting to China any

citizen of the United States without proof other than the affidavit of arrest." (Fed. Rep., 126, 400 Ad. Sheets Feb. 4, 1904.)

Judge Coxe in *ex parte Sing* (C. C.) 82 Fed. 22, said:

"The act of 1892 is concededly a most drastic and summary law. Its machinery should not be set in motion by straining the evidence so as to convict those who, because of their ignorance of our language and institutions, are peculiarly helpless and unable to protect themselves. It is one of the safe-guards of our organic law that no one should be compelled to incriminate himself, and the courts have gone to the greatest lengths in inforcing this principle by a broad and liberal interpretation. It has never been construed in a narrow or illiberal spirit, or relaxed so as to endanger civil freedom, or oppress one, no matter how lowly, whose liberty is threatened. A Chinese person is entitled to demand that the judgment of deportation against him shall be based on legal evidence."

Judge Wing has in a case very recently decided and not yet reported held that a portion of the Chinese exclusion law is unconstitutional, because the alleged Chinese can be arrested on affidavit and brought to trial before the commissioner, thus imperiling his liberty without the jury trial or other protection afforded the citizen. These cases evidence the flagrant injustices which have grown up and illustrate the opinions of the judges at circuit concerning the immigration laws in some of their more objectionable aspects.

The constitution provides that no person shall be deprived of liberty without due process of law. This inhibition upon Congress or expression of fundamental right is found in the Fifth Amendment. It is a forbidding sort of logic which attempts to prove that a document of liberty, such as the constitution, may be interpreted to mean that Congress cannot deprive any citizen of liberty without due process of law, but may deprive an alien of liberty without due process of law. If it may logically be so interpreted it is not the instrument of government for a republic; nor is the Declaration of Independence its soul of which itself is but the form and body. But we do not conceive that the subject need be dwelt upon. If Congress may impose this deprivation upon no person it is only a rhetorical transposition to say that Congress may not impose the deprivation upon any person. It is well known that the limitations upon Federal action expressed in the Fifth Amendment were embodied in the Fourteenth Amendment as to state action. The Fifth Amendment reads: "No person shall * * * be deprived of life, liberty or property without due process of law." The Fourteenth Amendment reads: "Nor shall any state deprive any person of life, liberty or property without due process of law." So that if the Fourteenth Amendment is protective of an alien against state action the Fifth Amendment is protective of an alien against Federal action.

In the case of *Wong Wing* v. *U. S.*, 163 U. S., 227, decided in 1895, this court held that portion of Section 4 of the act of Congress of May 5th, 1892, which provided for the arrest and imprisonment at hard

labor of a Chinese laborer who should fail to have the certificate required by the act and should be so adjudged by a commissioner as void because in contravention of the 5th and 6th amendments. "The term 'person,' " said the court, speaking through Mr. Justice Brewer, "used in the 5th amendment is broad enough to include any and every human being within the jurisdiction of the republic."

In *Yick Wo* v. *Hopkins,* 118 U. S., 356, decided in 1885, the opinion delivered by Mr. Justice Matthews, who spoke for the court, is as follows bearing upon the present subject:

> "The rights of the petitioners as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the Emperor of China. By the third article of the Treaty between this government and that of China, concluded November 17, 1880, 22 Stat. at L. 827, it is stipulated: 'If Chinese laborers, or Chinese of any other class, now or either permanently or temporarily residing in the territory of the United States, meet with ill-treatment at the hands of any other persons, the Government of the United States will exert all its powers to devise measures for their protection, and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty.'
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> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property without due process

> of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the Revised Statutes that 'All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."
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> "For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as

to amount to a practical denial by the State of that equal protection of the laws, which is secured to the petitioners, as to all other persons, by the broad and denying provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

What then is due process of law? If it be said that it is process according to the law of the land the sophist immediately exclaims that this law of 1903 is the law of the land. If it be said that it is a law appropriate to the circumstances he will aver that this law is appropriate to the circumstances. Due process of law is something more than either of these things. It is that process which conforms to those principles of liberty whose expressions have become clearer and clearer through Magna Charta. The Petition of Right, the Instrument of Government, the Bill of Rights up to the Declaration of Independence and the Federal Constitution. This court in 1819, in the case of *Bank of Columbia* v. *Okely,* 4 Wheat., 244, used this language respecting the Magna Charta:

"As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at

length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Again, Mr. Kent in his Commentaries, Vol. 1, p. 599, wrote:

"It may be received as a proposition, universally understood and acknowledged throughout this country, that no person can be taken or imprisoned; or disseized of his freehold or estate; or exiled or condemned; or deprived of life, liberty or property, unless by the law of the land or the judgment of his peers. The words, *by the law of the land,* as used originally in Magna Charta, in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words. *The better and larger definition of due process of law is, that it means law in its regular course of administration, through courts of justice.* (Story, Com. on the Const., Vol. III, 264, 661.)"

This court also defined due process of law in similar language in *Caldwell* v. *Texas,* 137 U. S., 691, the court speaking through Mr. Chief Justice Fuller:

"Law in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. 2 Kent, Com. 13.

> And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

Because Congress enacts that aliens shall be examined and deported according to certain rules, do not make them due process of law. Because they operate upon all aliens alike do not make them due process of law. Are they "arbitrary," are they the unrestrained exercise of governmental power? Do they violate the "established principles of private right and distributive justice?" Do they take their course "of administration through courts of Justice?" These are the questions to be answered; and each of them must be answered in the negative. This appellant was seized at the conclusion of a lecture by a federal inspector. He was searched. He was taken before a board of "Special Inquiry" composed of his jailers, his prosecutors and the witnesses against him. He was tried in secret. He was subjected to an inquisition; and informed that the laws contemplated that he should give the immigration officers whatever information they desired. If this is due process of law, any sort of an examination is due process of law. For nothing more repugnant to the right of due process of law can be conceived. It is not the sequence of the examination that makes it more or less due process of law. If the penalty of death were affixed to the entry of an anarchist into this country it would simply mean that the consequences of such entry were more draconic than they now are. It would not mean that the preceding steps of the penalty were more repugnant

to the principle of due process of law. In *Calgan* v. *Wilson,* 127 U. S., 540, the court held that "the word 'crime' in its more extended sense, comprehends every violation of public law." "It," continued the court, "is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a 'crime' within the meaning of the third article, or a 'criminal prosecution' within the meaning of the 5th amendment."

The human mind is so constituted that a right appears more absolute if its deprivation results in some horror. If the Immigration Act denounced a penalty of death upon the entry of an alien into the United States, it would require little agitation to convince the public, at least, that if such a penalty were to be affixed to such entry the alien should be entitled to "a public trial by an impartial jury, to be informed of the nature and cause of the accusation, and to be confronted with the witnesses against him, etc." Indeed, if the Federal government should ever attempt to extend this law so that a person might be deported at any time that his "disbelief in organized government" should be discovered; and also that his naturalization rights might be withdrawn, there would be sufficient force in public opinion at home and abroad to overthrow the law in the name of the very amendment to the Constitution to which we now appeal. But logically considered the present case is upon the same

footing as the suppositious case. Free governments and their constitutions are not prostrated at a blow by the onslaught of tyranny. They are attacked insidiously, first in one place then in another. One right is taken away under one pretense; and another destroyed under some other pretense. "Thraldom flaunts the banner of Freedom" when it attacks the stronghold of Liberty. Some great benefit is to be attained; life is to be protected; free government is to be conserved; the common people are to be saved from the heresies of false doctrines. These forces of reaction and despotism are ever skulking along the lines of Progress ready for any occasion that may come to pass, which will warrant an attack in the name of the very principles under which humanity is marching. So that written constitutions amount to nothing unless the people understand them and cherish the rights which they express.

If any one doubts that civilization and liberty are upon a treacherous foundation he only need to recur to the spectacle of the law of 1903. If any event, however deplorable, can furnish an excuse for the enactment of such a law as this, other excuses will not be wanting for the enactment of other laws gradually encroaching upon all constitutional right. The history of such devolutions show that each step downward finds its apology in some pretext less conspicuous, until no apology whatever is made for anything that is done; and a people debauched and stupefied by donatives and sophistry cease to require apologies of any sort. These aggressions consolidate into the triumph of "sovereign power." It matters nothing in principle whether the person affected by "administrative process" is a labor lecturer or a lecturer which the "aristocracy of intellect" places upon a more distinguished basis. No man high or low under our constitution can be dragged before a special board and cross-examined in secret touching his opinions, without the right of having witnesses in his favor, without counsel, without a presentment or indictment, and without any of those formalities which common decency has grown to regard as even the right of a slave. But it may be said that this law will never be used against any such distinguished person. Its secret spirit known to its sponsors will direct the law along its secret course. It might be a regrettable event if some man of commanding power and world-wide fame should lecture here in favor of anarchy; but it would not be wise to convene a board of "Special Inquiry" to stop him. But if it is to be used so far as possible to suppress the agitation of the labor world by men of inferior note, and not to suppress the opinion of distinguished lecturers, that is to suppress by deportation, who is to regulate this discrimination except the president who is at the head of the executive department and direct by word of mouth what is to be done in any given case? If by any possibility the government should have an administration bent upon stamping out the propagation of monarchy it could make no better show of dodging the constitution than by excluding all persons who "disbelieve" in the republican system of government and by providing for the summary deportation of dukes and royal personages and their defenders upon the decree of a board of "Special Inquiry."

Again, where did the Secretary of Labor get the

power to issue this warrant for the arrest of Turner? It may be that the Secretary has entered a rule under the general power of this statute to make regulations for the department, that he may issue his warrants for the arrest of aliens. But this record shows that the appellant for ten days had been within the sovereign territory of the state of New York. And the constitution expressly provides that "no warrant shall issue but upon probable cause supported by oath or affirmation." Has any executive on earth, except the head of a despotism, the power to issue a warrant? Warrants are issued by the judicial department under our system; and warrants issued by any other department are repugnant to all ideas of Anglo-Saxon jurisprudence independent of the constitutional provision invoked. This extraordinary writ does not run in the name of the president or of the people. It is a peremptory direction to certain inspectors to seize John Turner; and the direction proceeds from an executive secretary. The proofs upon which the warrant was issued are not given. The warrant recites "from proofs submitted to me I have become satisfied, etc." The proofs may have been telegrams, letters, newspaper reports, or the verbal report of an inspector. This warrant does not purport to have been issued upon "oath or affirmation." That the Secretary had "proofs" and that he was "satisfied" with them appear by his own recitals in the warrant. But what are "proofs" and what were the "proofs," and what is satisfactory proof are different questions. There is nothing to show that this warrant was supported by the "oath or affirmation" of any one. And

there is nothing in the law requiring any oath or affirmation in support of such a warrant.

Mr. Madison's argument in the "Virginian Resolution" upon the Alien and Sedition Acts very conclusively cover the objections on this branch of the argument to the law of 1903.

> "In the administration of preventive justice," he wrote, "the following principles have been held sacred: *that some probable ground of suspicion be exhibited before some judicial authority; that it be supported by oath or affirmation;* that the party may avoid being thrown into confinement, by finding pledges or sureties for his legal conduct sufficient in the judgment of some judicial authority; that he may have the benefit of a writ of *habeas corpus,* and thus obtain his release if wrongfully confined; and that he may at any time be discharged from his recognizance, or his confinement, and restored to his former liberty and rights, on the order of the proper judicial authority if it shall see sufficient cause.
>
> "All these principles of the only preventive justice known to American jurisprudence are violated by the Alien Act. *The ground of suspicion is to be judged of, not by any judicial authority, but by the executive magistrate alone. No oath or affirmation is required.* If the suspicion be held reasonable by the President, he may order the suspected alien to depart from the territory of the United States, without the opportunity of avoiding the sentence by finding pledges for his future good conduct. *As the President*

may limit the time of departure as he pleases, the benefit of the writ of habeas corpus may be suspended with respect to the party, although the Constitution ordains that it shall not be suspended unless when the public safety may require it, in case of rebellion or invasion, neither of which existed at the passage of the act; and the party being, under the sentence of the President, either removed from the United States, or being punished by imprisonment, or disqualification ever to become a citizen, on conviction of not obeying the order of removal, he cannot be discharged from the proceedings against him, and restored to the benefits of his former situation, although the highest judicial authority should see the most sufficient cause for it.

"But, in the last place, it can never be admitted that the removal of aliens, authorized by the act, is to be considered, not as punishment for an offense, but as a measure of precaution and prevention. *If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness, a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of blessings of personal security, and personal liberty, than he can elsewhere hope for; and where he may have nearly completed his probationary title to citizenship; if, moreover, in the execution of the sentence against him, he*

is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war and of unusual licentiousness on that element, and possibly to vindictive purposes, which his emigration itself may have provoked;—if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied. And if it be a punishment, it will remain to be inquired whether it can be constitutionally inflicted, on mere suspicion, by the single will of the executive magistrate, on persons convicted of no personal offense against the laws of the land, nor involved in any offense against the law of nations, charged on the foreign state of which they are members."

* * * * * * * * * * *

"Again, it is said that, aliens not being parties to the Constitution, the rights and privileges which it secures cannot be at all claimed by them.

"To this reasoning, also, it might be answered that, although aliens are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over them. The parties to the Constitution may have granted or retained, or modified, the power over aliens, without regard to that particular consideration.

"But a more direct reply is, that it does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. *Aliens are not more parties to*

the laws than they are parties to the Constitution; yet it will not be disputed that as they owe, on one hand a temporary obedience, they are entitled, in return, to their protection and advantage.

"If aliens have no rights under the Constitution, they might not only be banished, but even capitally punished, without a jury or the other incidents to a fair trial. But so far has a contrary principle been carried, in every part of the United States, that except on charges of treason, an alien has, besides all the common privileges, the special one of being tried by a jury, of which one-half may be also aliens.

"It is said, further, that, by the law and practice of nations, aliens may be removed, at discretion, for offenses against the law of nations; that Congress are authorized to define and punish such offenses; and that to be dangerous to the peace of society, is, in aliens, one of those offenses.

"The distinction between alien enemies and alien friends is a clear and conclusive answer to this argument. Alien enemies are under the law of nations, and liable to be punished for offenses against it. *Alien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to that law only.*

"This argument also, by referring the alien act to the power of Congress to define and punish offenses against the law of nations, yields the point that the act is of a penal, not merely of a

preventive operation. It must, in truth, be so considered. And if it be a penal act, the punishment it inflicts must be justified by some offense that deserves it."

* * * * * * * * * * *

"The Alien Act declares 'That it shall be lawful for the President to order all such aliens as he shall judge *dangerous* to the peace and safety of the United States, or shall have reasonable ground to *suspect* are concerned in any treasonable or *secret machinations* against the government thereof, to depart,' &c.

"Could a power be well given in terms less definite, less particular, and less precise? *To be dangerous to the public safety—to be suspected of secret machinations* against the government; *these can never be mistaken for legal rules or certain definitions.* They leave everything to the President, his will is the law.

"But it is not a legislative power only that is given to the President. He is to stand in the place of the judiciary also. His suspicion is the only evidence which is to convict; his order the only judgment which is to be executed.

"Thus it is the President whose will is to designate the offensive conduct; it is his will that is to ascertain the individuals on whom it is charged; and it is his will that is to cause the sentence to be executed. *It is rightly affirmed, therefore, that the act unites legislative and judicial powers to those of the executive.*

"It is affirmed that this union of power subverts the general principle of free government.

"It has become an axiom in the science of government, that a separation of the legislative, executive and judicial departments is necessary to the preservation of public liberty. Nowhere has this axiom been better understood in theory, or more carefully pursued in practice, than in the United States.

"It is affirmed that such a union of power subverts the particular organization and positive provision of the Federal Constitution.

"According to the particular organization of the Constitution, its legislative powers are vested in the Congress, its executive powers in the President, and its judicial powers in a supreme and inferior tribunal. The union of any of these powers, and still more of all three, in any one of these departments, as has been shown to be done by the Alien Act, must consequently, subvert the constitutional organization of them.

"That positive provisions, in the Constitution, securing to individuals the benefits of fair trial, are also violated by the union of powers in the Alien Act, necessarily results from the two facts, that the act relates to alien friends, and that alien friends, being under the municipal law only, are entitled to its protection.

* * * * * * * * * *

"And it must be wholly immaterial whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers."

Elliott's Debates, Vol. IV, p. 555, *et seq.*

We submit that these are words of wisdom and entitled to all consideration. No higher authority can be produced than he who was the "Father of the Constitution," and who was one of the most distinguished political thinkers of his day.

The law of 1903 is open to every objection made by Mr. Madison to the Alien and Sedition laws.

This law of 1903 is subversive of the constitutional principle that probable ground of suspicion shall be exhibited to judicial authority before a warrant issues.

It leaves the ground of suspicion in any case to be judged of by the executive and not by the judicial branch of the government.

It suspends the writ of *habeas corpus* by placing it in the power of the executive to order instant deportation with all the power of the government and all its facilities of men, money and ships in the hands of the executive to execute such deportation.

It imposes the penalty of banishment, for deportation is nothing less, without a hearing and without opportunity of defense.

It consolidates the judicial and executive branches of the government, nay the legislative as well, because the terms of the law *are* not certain or definite *and are not intended to be so.* They are intended to be vague and elusive and to leave the executive to construe the law to fit the case and the object desired to be attained.

Are the friends of this law indifferent to the course of history; or do they desire to show that what could not be done an hundred years ago can be done now?

IV.

No power whatever is delegated by The Constitution to the General Government over alien friends with reference to their admission into the United States or otherwise, or over the beliefs of citizens, denizens, sojourners or aliens, or over the freedom of speech, or of the press, whilst the Tenth Amendment to the Constitution expressly declares that 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 Constitution was "founded in jealousy and not in confidence," and this is evidenced by the resolutions passed by several of the States which acceded thereto. The States intended to bind down those whom they were about to entrust with power. Through the efforts of the jealous States the Bill of Rights and the Tenth Amendment were proposed and adopted.

Massachusetts ratified the Constitution on February 7, 1788, and submitted to the Congress that certain amendments to the Constitution should be made, as follows:

> "I. *That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several States, to be by them exercised.*
>
> "VI. *That no person* shall be tried for any

> crime by which he may incur an infamous punishment or loss of life until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval force."

And the representatives of Massachusetts in Congress were enjoined to have said amendments made.

The State of New Hampshire ratified the Constitution on the 21st day of June, 1788, and stated that it was the opinion of the convention that certain alterations and amendments in the Constitution would remove the fears and quiet the apprehensions of many of the good people of this State, and submitted that the following amendments should be made:

> "I. *That it be explicitly declared that all powers not expressly and particularly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised.*
>
> "VI. *That no person* shall be tried for any crime by which he may incur an infamous punishment or loss of life until he first be indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces.
>
> "XI. *Congress shall make no laws touching religion, or infringe the rights of conscience.*"

Virginia ratified the Constitution on the 26th of June, 1788, and in doing so expressed its understanding of the Constitution and its intention in ratifying the same in this language:

> "Do in the name and in behalf of the people of

Virginia declare and make known that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them whenever the same shall be perverted to their injury or oppression, *and that every power not granted thereby remains with them and at their will;* that therefore no right of any denomination can be canceled, abridged, restrained or modified, by the Congress, by the Senate or House of Representatives acting in any capacity, by the president or any department or officer of the United States, *except in those instances in which power is given by the Constitution for those purposes; and that among other essential rights, the liberty and conscience of the press cannot be canceled, abridged, restrained or modified by any authority of the United States.* 'With these impressions,' etc., we, the said delegates, do by these presents assent and ratify the Constitution, etc."

The State of New York ratified the Constitution on the 26th day of July, 1788, and declared among other things that:

"All powers are originally vested in and consequently derived from the people, and that government is instituted by them for their own interest, protection and security. That the people have an equal, natural and inalienable right, freely and peaceably to exercise their religion according to the dictates of conscience, and that no religious sect or society ought to be favored or established by law in reference to others. *That*

no person ought to be taken in prison or disseized of his freehold, or be exiled or deprived of his privileges, franchises, life, liberty or property but by due process of law. That except in the government of the land and naval forces, of the militia when in actual service, and in cases of impeachment, a presentment or indictment by a grand jury ought to be observed as a necessary preliminary to the trial of all crimes cognizable by the judiciary of the United States, and *such trials should be speedy and be by an impartial jury of the county where the crime is committed,* and that no person can be found guilty without the unanimous consent of such jury. * * * *That in all criminal prosecutions the accused ought to be notified of the cause and nature of his accusation, and be confronted with his accusers and the witnesses against him; to have means of producing his witnesses, and the assistance of counsel for his defense, and should not be compelled to give evidence against himself.* That people had a right peaceably to assemble. *That freedom of the press was not to be violated or restrained."*

The State of North Carolina in convention, on August 1, 1788, resolved that a declaration of rights asserting and securing from encroachment the great principles of civil and religious liberty, and the inalienable rights of the people, together with amendments to the most ambiguous and exceptionable parts of the said Constitution of government, ought to be laid before Congress, or a convention of the States that shall or may be called for the purpose of amend-

ing the said Constitution for their consideration previous to the ratification of the Constitution aforesaid on the part of the State of North Carolina.

Rhode Island ratified the Constitution on the 29th day of May, 1790, and recommended to Congress that certain amendments should be made, as follows:

"I. The United States shall guarantee to each State its sovereignty, freedom, independence, *and every power, jurisdiction and right which is not by this Constitution expressly delegated to the United States.*"

Said Rhode Island ratified the Constitution with the understanding:

"II. *That all power naturally is vested in and consequently derived from the people;* that magistrates, therefore, are their trustees and agents and at all times amenable to them.

"IV. Freedom of religion shall be assured.

"XI. *No freeman ought to be taken in person or disseized of his freehold, liberties, franchise, or outlawed or* EXILED, *or in any manner destroyed or deprived of his life, liberty or property, but by a trial by jury, or by the law of the land.*

"XII. That every freeman ought to obtain right and justice freely and without sale, completely and without denial, promptly and without delay and that all regulations contravening these rights are oppressive and unjust.

"XVI. *That the poeple have a right to freedom of speech, of writing and publishing their sentiments; that freedom of the press is one of*

the great bulwarks of liberty and ought not to be violated."

At the first session of the first Congress under the Constitution, the following resolution was adopted:

"Congress of the United States begun and held at the city of New York on Wednesday, the 4th day of March, 1789. Conventions of a number of the States having at the time of adopting their Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the government, well based in the beneficent ends of its institutions:

"RESOLVED, By the Senate and House of Representatives of the United States of America in Congress assembled, that the following amendments be submitted:

"ARTICLE III. Congress will make no law respecting the establishment of religion or prohibiting the free exercise of thought, or abridging the freedom of speech or of the press or of the right of the people peaceably to assemble and petition the government for the redress of grievances.

"ARTICLE VII. No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice

put in jeopardy for life or limb, or should be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty or property without due process of law, or shall private property be taken for public use without just compensation.

"ARTICLE XI. *Enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.*

"ARTICLE XII. *Power 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.*"

Elliott's Debates, Vol. I, p. 322, *et seq.*

It is not remarkable that the act incorporating the United States Bank and the Alien and Sedition acts provoked criticism and protest from those who insisted that the Constitution should be construed to mean what its language says. As to the bank it was known to all the constitutional lawyers of that day that on September 14th, 1787, Mr. Madison made a motion in the constitutional convention to empower Congress to grant charters of incorporation. It was objected by Mr. King that the power to incorporate companies generally would be construed to mean a power to incorporate a bank which would imperil the fate of the Constitution in Pennsylvania and New York. The question was then modified so as to permit Congress to provide for the cutting of canals. A vote was taken on the question as thus modified. Pennsylvania, Virginia and Georgia voted aye; and New Hampshire, Massachusetts, Connecticut, New Jersey,

Delaware, Maryland, North Carolina and South Carolina voted no. The whole matter fell.

Madison's Debates.

It was knowledge of these proceedings in the constitutional convention that caused Mr. Jefferson to write in his Opinion on the Constitutionality of a National Bank (see Jefferson's works (Ed. 1854), Vol. VII, pp. 555-561) that, "It is known that the very power now proposed as a *means* was rejected as an *end* by the convention which framed the Constitution."

This opinion was written in 1791. But in 1798 the Alien and Sedition acts presented to the mind of Jefferson and Madison and many others another example of encroachment upon the plain terms of the Constitution. The vigorous animadversions of Gouverneur Morris did not overstate the case.

"But, after all," wrote Morris, "what does it signify that men should have a written Constitution, containing unequivocal provisions and limitations? The legislative lion will not be entangled in the meshes of a logical net. The legislature will always make the power which it wishes to exercise, unless it be so organized as to contain within itself the sufficient check. Attempts to restrain it from outrage, by other means, will only render it more outrageous. The idea of binding legislatures by oaths is puerile. *Having sworn to exercise the powers granted, according to their true intent and meaning, they will, when they feel a desire to go further, avoid the shame, if not the guilt, of perjury, by swear-*

ing the true intent and meaning to be, according to their comprehension, that which suits their purposes."

Elliott's Debates, Vol. I, p. 507.

And so it was that Jefferson in attempting to arrest the contempt of the Constitution evinced by the Bank act and the Alien and Sedition acts incorporated in the Kentucky resolutions numerous protests based upon indisputable constructions of the organic law. Resolution IV is as follows:

> "*Resolved,* That alien friends are under the jurisdiction and protection of the laws of the State wherein they are; that no power over them has been delegated to the United States, nor prohibited to the individual States distinct from their power over citizens; and it being true as a general principle, and one of the amendments to the Constitution having also declared that '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 act of the Congress of the United States passed on the 22nd day of June, 1798, entitled 'An act concerning aliens,' which assumes power over alien friends not delegated by the Constitution, is not law but is altogether void and of no force."

Jefferson's works (Ed. 1856), Vol. IX, p. 464.

In passing upon other exclusion laws this court has hitherto reasoned their constitutionality from the

Commerce clause of the Constitution, or from the sovereign character of the United States government. This has doubtless resulted from the obvious inability to trace the regulation of immigration to any direct grant of power. We therefore divide the consideration of the power to exclude aliens into two branches, first: can the power be traced to the commerce clause of the Constitution; and second, can it be traced to the sovereign character of the government. This leads to an examination of the extent to which the commerce clause has been authoritatively interpreted by this court. It also leads to an examination of the precise nature and extent of that sovereignty which is alleged to warrant the enactment of such laws.

In *Cohens* v. *Virginia,* 6 Wheat. 398, Mr. Chief Justice Marshall used language which may well be kept in mind in testing the true worth of any given decision of a court:

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which these expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing in all other cases is seldom investigated."

And upon the same subject in the case of *Pollock*

v. *Farmers' Loan & Trust Co.,* 157 U. S. 427 (Income tax case), Mr. Chief Justice Fuller in delivering the opinion of the court, used this language:

> "Doubtless the doctrine of *stare decisis* is a salutary one, and to be adhered to on all proper occasions, but it only arises in respect of decisions directly upon the points in issue.
>
> "The language of Chief Justice Marshall in *Cohens* v. *Virginia,* 19 U. S., 6 Wheat. 264, 399, may profitably again be quoted: (Here follows the language just quoted from that case.)
>
> "So in *Carroll* v. *Carroll,* 57 U. S., 16 How. 275, 286, where a statute of the State of Maryland came under review, Mr. Justice Curtis said: 'If the construction put by the court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought in the question, then, according to the principles of the common law an opinion on such a question, is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contest belongs. And therefore this court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties.' "

As the power to exclude aliens or regulate immigrants was originally referred to the power to regulate commerce as defined by Mr. Chief Justice Marshall in *Gibbons* v. *Ogden,* 9 Wheat. 1, decided in 1824, although later decisions have founded themselves on those alleged to be authorized by the holding in *Gibbons* v. *Ogden,* it becomes necessary to analyze that case. Thus the precise question decided and the precise extent of the decision's authority can be ascertained. Now the language of the Chief Justice, which has furnished the reasoning in some of the exclusion cases, is this:

> "The counsel for appellee would limit it (commerce) to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends *navigation.* This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the *commercial* intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning *navigation,* which shall be silent on the admission of vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling or of barter."

Now the regulation of immigration is not the regulation of "traffic;" it is not the regulation of "commercial intercourse." For while the Chief Justice in

one sentence says that commerce is "intercourse," in the next he said it is "commercial intercourse," that is that the regulation of commerce is the regulation of "commercial intercourse." Taking then this definition of commerce as conclusive of the subject it does not include the subject of immigration at all.

But outside of these considerations what did the case of *Gibbons* v. *Ogden* actually decide, tested by the rule laid down in *Cohen* v. *Virginia* and *Pollock* v. *Farmers' Loan & Trust Company?* The point involved was whether an exclusive right in Ogden by virtue of a law of New York to navigate all the waters within the State, including the waters between Elizabethtown, New Jersey, and New York City, was valid, that is whether the law was constitutional. To show that the power to regulate commerce included the power to regulate navigation the Chief Justice deducted from the commerce power the constitutional exceptions to it. He held that the limits of the power to regulate commerce were described by its remaining boundaries when all exceptions thereto were taken away. And so he referred to the following provisions of the Constitution:

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

In this connection the Chief Justice said:

> "Limitations of a power furnish a strong argument in favor of the existence of that power."

In other words the prohibition upon Congress to discriminate between ports or to require vessels to enter, clear or pay duties in any port, as expressed, imported a power to regulate vessels or navigation in all particulars not prohibited in the clauses quoted or in other parts of the Constitution. The question at issue so far as it related to commerce per se was one of navigation and nothing but navigation. In fact in another part of the opinion the Chief Justice said:

> *"The questions then whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license are not and cannot be raised in this case."*

The relation of persons to commerce, or to the regulation of commerce was thus distinctly held not to be in the case. The only question decided was that the power to regulate commerce includes the power to regulate navigation, and this even turned in part upon a subsidiary point, to-wit:

> "The sole question is can a State regulate commerce with foreign nations and among the States while Congress is regulating it?"

It appeared that there was then, in 1824, a law in force passed by Congress February 18th, 1793, entitled "An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries and for regulating the same." So that the subject-matter was already under the regulation of a federal law. The Chief Justice in raising the question whether the State law could stand in face of the fed-

eral law placed himself in line with more clear-cut reasoning upon the same subject in the later case of *Wilson* v. *Black Bird Creek Marsh Co.* But first in *Gibbons* v. *Ogden* he said in delivering the court's opinion:

> "In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation. The sole question is, can a State regulate commerce with foreign nations, and among the States, while Congress is regulating it?
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> "We must first determine whether the act of laying 'duties or imposts on imports or exports' is considered in the Constitution as a branch of the taxing power, or of the power to regulate commerce. We think it very clear that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section: 'Congress shall have power to lay and collect taxes, duties, imposts, and excises;' and, before commerce is mentioned, the rule by which the exercise of this power must be governed is declared. It is, that all duties, imposts and excises shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right

> to levy taxes and imposts, and as being a new power not before conferred. The Constitution, then, considers these powers as substantive and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the States on that subject; and they might, consequently, have exercised it by levying duties on imports or exports, had the Constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the States to levy taxes, not from the questionable power to regulate commerce.
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> "The questions, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be, raised in this case. The real and sole question seems to be whether a steam machine in actual use deprives a vessel of the privileges conferred by a license."

And then in 1829 in the case of *Wilson et al.* v. *The Black Bird Creek Marsh Company,* 2 Peters, 245, the Chief Justice fully stated the position:

> "If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small

navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, we should feel not much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several States; a power which has not been so exercised as to affect the question.

"We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state or as being in conflict with any law passed on the subject."

We candidly submit that nothing more can be made out of the celebrated and often quoted case of *Gibbons* v. *Ogden* than is expressed in the foregoing analysis. Subsequent decisions of this court hereafter to be referred to distinctly limit its authority to the very subject which we contend it covered.

As the case of *Brown* v. *Maryland,* 12 Wheat. 419, decided in 1827, the decision of the court being delivered by Mr. Chief Justice Marshall, is sometimes referred to, a short review of this case will not be inappropriate. Two laws of the State of Maryland, one passed in 1819 and the other in 1822, required all importers of foreign goods by the bale or package to take out a license for which they should pay $50. The

act of 1819 imposed a fine of $100 for failing to take out such license. Brown and others were indicted for failing to take out the license required by the law. They demurred to the indictment, and the demurrer was overruled and they were fined in the City Court of Baltimore. The judgment was affirmed by the Court of Appeals of Maryland, and the case then went to the Supreme Court of the United States. It was held in this court that the laws of Maryland in question were repugnant to that clause of the Constitution which provides that "no State shall without the consent of Congress lay any imposts or duties on imports or exports." To prove that a license fee to do the business of importing is a tax upon the thing imported the Chief Justice said: "It is impossible to conceal from ourselves that this is varying the form without varying the substance. * * * All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself." Then as to the commerce clause, which was relied upon by the plaintiffs in error, the Chief Justice said: "This question was considered in the case of *Gibbons* v. *Ogden* (9 Wheat. Rep. 1), in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution." Now we have already seen what *Gibbons* v. *Ogden* actually held and what was "declared" in that case is immaterial. But it is a species of tautology to say that the commerce clause acknowledges no limitations than those prescribed by the Constitution. This is true or truistic. It amounts to saying that the commerce power is subject to the Constitution, which is true as to every power granted to Congress.

If, however, the Chief Justice meant to introduce the doctrine that the power to regulate commerce was complete except where restrained by constitutional limitations, thus, in such particular making the Constitution a limitation upon power instead of a grant of power, then he was clearly in error, and not only so but incurred his own express assurances to the people of Virginia when the Constitution was before them for adoption. In the State convention of Virginia, of which Marshall was a member, he had said upon the subject of the meaning of the "sweeping clause" (i. e., to make all laws necessary and proper) "that a power was restrained until it was given away." And so the mere power to regulate commerce does not include every power not inhibited, nor does it acknowledge no limitations except those prescribed by the Constitution. Such an interpretation is not conformable to the decisions of this court upon the commerce clause in many later cases.

The historic case of the *Mayor, etc., of the City of New York* v. *Miln,* 11 Peters 101, decided in 1837, bears upon *Gibbons* v. *Ogden,* and corrects the impression given that that case held as much as the language of the Chief Justice has been construed to import.

In the Miln case an act of the legislature of New York passed in 1824 came up for consideration concerning passengers in vessels arriving in New York and requiring the master of the vessel within twenty-four hours to report in writing concerning the names, ages and last legal settlement of every person.

The decision of the court was delivered by Mr. Justice Barbour, and among other things it was said:

> "We shall not enter into any examination of the question whether the power to regulate commerce be or be not exclusive of the States, because the opinion which we have formed renders it unnecessary: in other words, *we are of opinion that the act is not a regulation of commerce, but of police;* and that being thus considered, it was passed in the exercise of a power which rightfully belonged to the States."

Then the court in considered what was decided in the case of *Gibbons* v. *Ogden,* used this language:

> "The point decided in the first of these cases is that the acts of the legislature of New York granting to certain individuals the exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by steam for a term of years, are repugnant to the cause of the Constitution of the United States which authorized Congress to regulate commerce so far as the said acts prohibit vessels licensed according to the laws of the United States for carrying on the coasting trade, from navigating said waters by means of steam. In coming to that conclusion, this court in its reasoning, laid down several propositions, such as that the power over commerce included navigation; that it extended to the navigable waters of the States; that it extended to navigation carried on by vessels exclusively employed in transporting passengers.

Now, all this reasoning was intended to prove that a steam vessel licensed for the coasting trade was lawfully licensed by virtue of an act of Congress; and that as the exclusive right to navigate the waters of New York, granted by the law of that State, if suffered to operate, would be in collision with the right of the vessel licensed under the act of Congress to navigate the same waters; and that as when that collision occurred the law of the States must yield to that of the United States when lawfully enacted; therefore, the act of the State of New York was in that case void.

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"In that case (that is *Gibbons* v. *Ogden*) the theater on which the law operated was navigable water, over which the court say that the power to regulate commerce extended; in this, it was the territory of New York over which that State possesses an acknowledged and undisputed jurisdiction for every purpose of internal regulation: in that the subject matter on which it operated was a vessel claiming the right of navigation, a right which the court say is embraced in the power to regulate commerce; in this the subjects on which it operates are persons whose rights and duties are rightfully prescribed and controlled by the laws of the respective States within whose territorial limits they are found; in that, say the court, the act of a State came into direct collision with an act of the United States; in this no such collision exists.

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"In this case (that is *Brown* v. *State of Maryland*) it will be seen that the discussion of the court had reference to the extent of the power given to Congress to regulate commerce, and to the extent of the prohibition upon the States from imposing any duty upon imports. Now, it is difficult to perceive what analogy there can be between a case where the right of the State was inquired into, in relation to a tax imposed upon the sale of imported goods, and one where, as in this case, the inquiry is as to its right over persons within its acknowledged jurisdiction; the goods are the subject of commerce, the persons are not: the court did indeed extend the power to regulate commerce, so as to protect the goods imported from a State tax after they were landed, and were yet in bulk, but why? Because they were the subjects of commerce, and because, as the power to regulate commerce under which the importation was made implied a right to sell, that right was complete without paying the State for a second right to sell, whilst the bales or packages were in their original form. But how can this apply to persons? They are not the subject of commerce; and, not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to Congress to regulate commerce, and the prohibition to the States from imposing a duty on imported goods.

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"From this it appears that whilst a State is acting within the legitimate scope of its power as

to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by Congress acting under a different power; subject only, say the court, to this limitation, that in the event of collision, the law of the State must yield to the law of Congress. The court must be understood, of course, as meaning that the law of Congress is passed upon a subject within the sphere of its power.

"Even then, if the section of the act in question could be considered as partaking of the nature of a commercial regulation, the principle here laid down would save it from condemnation, if no such collision exist."

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In referring to the Act of Congress of 1819, the court said:

"The object of this clause, in all probability, was to enable the government of the United States to form an accurate estimate of the increase of population by immigration; but whatsoever may have been its purpose, it is obvious that these laws only affect, through the power over navigation, the passengers whilst on their voyage, and until they shall have landed. After that, and when they have ceased to have any connection with the ship, and when, therefore, they have ceased to be passengers, we are satisfied that acts of Congress, applying to them as such, and only professing to legislate in relation to them as such,

have then performed their office, and can, with no propriety of language, be said, to come into conflict with the law of a State whose operation only begins when that of the laws of Congress ends; whose operation is not even on the same subject, because, although the person on whom it operates is the same, yet having ceased to be a passenger, he no longer stands in the only relation in which the laws of Congress either professed or intended to act upon him. * * * Therefore, if the State law were to be considered as partaking of the nature of a commercial regulation, it would stand the tests of the most rigid scrutiny, if tried by the standard laid down in the reasoning of the court, quoted from the case of *Gibbons* v. *Ogden*. 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 bv 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 authority of a State is complete, unqualified and exclusive."

Again in the License Cases, 5 How. 504, decided in 1847, *Gibbons* v. *Ogden* was analyzed by this court. Certain laws of Massachusetts required that no person should be a retailer of or seller of wine, brandy, rum or other spirituous liquors in a less quantity than 28 gallons and that delivered and carried away all at one time unless he were first licensed as a retailer of wine and spirits by the county authorities wherein the business was undertaken to be carried on. Another law of Rhode Island forbade the sale of certain spirits in a less quantity than ten gallons, although Fletcher, the party indicted, had bought the liquor from an importer who had imported it from France. Another law of New Hampshire imposed similar restrictions, although in the New Hampshire case Pierce, the party indicted, sold a barrel of American gin purchased in Boston and carried coastwise to Piscataqua Bridge and there sold in the same barrel. There were three of these cases which were argued together and decided under the title of the "License Cases." The court held that the State laws were not inconsistent with any provision of the Constitution.

Mr. Chief Justice Taney in passing on the question involved spoke as follows:

"First: to *Gibbons* v. *Ogden,* because this is the case usually relied on to prove the exclusive power of Congress and the prohibition to the

States. It is true that one or two passages in that opinion, taken by themselves, and detached from the context, would seem to countenance this doctrine; and, indeed, it has always appeared to me that this controversy has mainly arisen out of that case, and that this doctrine of the exclusive power of Congress, in the sense in which it is now contended for, is comparatively a modern one, and was never seriously put forward in any case until after the decision of *Gibbons* v. *Ogden,* although it has been abundantly discussed since. Still, it seems to me to be clear, upon a careful examination of that case, that the expressions referred to do not warrant the inference drawn from them, and were not used in the sense imputed to them; and that the opinion in that case, when taken altogether, and with reference to the subject matter before the court, establishes the doctrine that a State may in the execution of its powers of internal police, make regulations of foreign commerce; and that such regulations are valid, unless they come into collision with a law of Congress. Upon examining that opinion, it will be seen that the court, when it uses the expressions which are supposed to countenance the doctrine of exclusive power in Congress, is commenting upon the argument of counsel in favor of equal power on this subject in the States and the general government, where neither party is bound to yield to the other; and is drawing the distinction between cases of concurrent powers and those in which the supreme or paramount power was granted to Congress. It therefore very

justly speaks of the States as exercising their own powers in laying taxes for State purposes, although the same thing is taxed by Congress; and as exercising the powers granted to Congress when they make regulations of commerce. In the first place, the State power is concurrent with that of the general government—is equal to it, and is not bound to yield. In the second it is subordinate and subject to the superior and controlling power conferred upon Congress. And it is solely with reference to this distinction, and in the midst of this argument upon it, that the court uses the expressions which are supposed to maintain an absolute prohibition to the States. But it certainly did not mean to press the doctrine to that extent. For it does not decide the case on that ground (although it would have been abundantly sufficient, if the court had entertained the opinion imputed to it), but, after disposing of the argument which had been offered in favor of concurrent powers, it proceeds immediately, in a very full and elaborate argument, to show that there was a conflict between the law of New York and the act of Congress, and explicitly puts its decision upon that ground. Now, the whole of this part of the opinion would have been unnecessary and out of place, if the State law was of itself a violation of the Constitution of the United States, and therefore utterly null and void whether it did or did not come in conflict with the law of Congress.

"Moreover, the court distinctly admits, on pages 205, 206, that a State may, in the execu-

tion of its police and health laws, make regulations of commerce, but which Congress may control. It is very clear that so far as these regulations are merely internal, and do not operate on foreign commerce, or commerce among the States, they are altogether independent of the power of the general government, and cannot be controlled by it. The power of control, therefore, which the court speaks of, presupposes that they are regulations of foreign commerce or commerce among the States. And if a State, with a view to its police or health, may make valid regulations of commerce which yet fall within the controlling power of the general government, it follows that the State is not absolutely prohibited from making regulations of foreign commerce within its own territorial limits, provided they do not come in conflict with the laws of Congress.

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"It may be well, however, to remark that in analogous cases, where, by the Constitution of the United States, power over a particular subject is conferred on Congress without any prohibition to the States, the same rule of construction has prevailed. Thus, in the case of *Houston* v. *Moore* (5 Wheat. 1), it was held that the grant of power to the federal government to provide for organizing, arming and discipling the militia, did not preclude the States from legislating on the same subject, providing the law of the State was not repugnant to the law of Congress. And every State in the Union has continually legislated on the subject, and I am not aware that the validity

of these laws has ever been disputed, unless they came in conflict with the law of Congress.

"The same doctrine was held in the case of *Sturges* v. *Crowninshield* (4 Wheat. 196), under the clause in the Constitution which gives to Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States."

All of the justices agreed in holding the laws in question constitutional; but Justices McLean, Catron, Daniel and Woodbury filed separate opinions. Mr. Justice McLean said that *Gibbons* v. *Ogden* decided that Congress was invested with power over commerce complete in itself and acknowledges no limitations except those prescribed by the Constitution. Mr. Justice Catron said that all that belonged to the commerce power, as distinguished from the police power, belonged to Congress and referred to *Gibbons* v. *Ogden, Brown* v. *Maryland* and *New York* v. *Miln.* Mr. Justice Daniel said that the doctrine of *Brown* v. *Maryland* had been gratuitously brought into the case and in speaking upon the commerce clause declared that "The commerce here spoken of is that traffic between the people of the United States and foreign nations, by which articles are procured by purchase or barter from abroad, or by which the like subjects of traffic are transmitted from the United States to foreign countries, etc." Mr. Justice Woodbury in considering the commerce clause invoked declared that "There is nothing in its nature, in several respects, to render it more exclusive than the other grants, but on the contrary much in its nature to permit and require the concurrent and auxiliary action

of the States." Mr. Justice Grier in his opinion and upon the point of the right of the States to prohibit the sales and consumption of an article believed to be pernicious in its effects declared "I do not consider the question of the exclusiveness of the power of Congress to regulate commerce as necessarily connected with the decision of this point." So that we infer from their silence that Justices Wayne, McKinley and Nelson concurred in all particulars with the Chief Justice. While it conclusively appears that the opinion of Mr. Justice Daniel, Woodbury and Grier are practically, by express language, or by holding the point of those cases not involved, with Mr. Chief Justice Taney in his references to *Gibbons* v. *Ogden* and *Brown* v. *Maryland.*

The case of *Gibbons* v. *Ogden* as an authority bearing upon the exclusive power in Congress to regulate commerce with foreign nations, and the definition of commerce as including traffic and intercourse so as to permit Congress to pass exclusion acts under the Commerce clause, grow more indistinct in the cases decided by this court after the Passenger Cases. We find that the reasoning in some cases rests upon the mere assertion that Congress has power to pass exclusion acts under the Commerce clause. Then, that succeeding cases refer to these assertions. Until finally the principle seems to be lost in a declaration that the United States are sovereign, that they are a nation, and that as a sovereign government and as a nation they have power to exclude aliens from their shores for a good reason or for a bad reason.

In the Passenger Cases, decided in 1849, there came

before the court for consideration certain statutes of the States of New York and Massachusetts, imposing taxes upon alien passengers arriving in the ports of those States. The Passenger Cases consisted of the case of *Smith* v. *Turner,* Health Commissioner of the Port of New York, and *Norris* v. *The City of Boston.* There was no opinion of the court as a court. The report of the case consists merely of the opinion of the judges. The opinion filed by Mr. Justice McLean, so far as it held that the laws in question were unconstitutional and void was also concurred in by Mr. Justice Catron, Mr. Justice McKinley and Mr. Justice Grier. Scattered through the individual opinions of the various judges are a variety of references to different principles urged against the constitutionality of the laws then in question. For instance, Mr. Justice McLean, who delivered an opinion in the case of *Smith* v. *Turner,* held, referring to *Gibbons* v. *Ogden,* and *Brown* v. *Maryland,* that Congress has exclusive power to regulate commerce with foreign nations; that commerce is not only an exchange of commodities but includes navigation and intercourse and the regulation of vessels used in transporting men. Mr. Chief Justice Taney dissented from the holding that the laws were unconstitutional, and held that the case of *Mayor of New York* v. *Miln,* already referred to, was controlling and decisive of one of the points raised. Mr. Justice Woodbury, Mr. Justice Daniel and Mr. Justice Nelson also dissented.

In the case of *Henderson* v. *Mayor,* 92 U. S., page 259, decided in 1875, a bill was filed to enjoin the Commissioner of Immigration from executing a New York law requiring the owners of vessels to pay three

hundred dollars for each passenger landed, who intended to pass through New York to other States. It was claimed that the law was repugnant to the clause of the Constitution, which empowers Congress to regulate commerce with foreign nations and among the several States. And also that it was contrary to that clause of the Constitution, which provides no State shall lay any impost. The decision of the court is predicated upon the definition of commerce, as given in *Gibbons* v. *Ogden.* The court used this language:

> "Whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may be justly said to be of such a nature as to require exclusive legislation by Congress." (This must mean, of course, whatever subjects are committed to Congress for regulation.)

The power here referred to was the power to regulate commerce. But it is perceived that the doctrine here announced merges into the doctrine that the power to regulate immigration is deduced from the sovereign character of the general government. Because, if Congress has the exclusive control over the regulation of commerce, and if the regulation of immigration is included in the regulation of commerce, it is immaterial whether the regulation of immigration is in its nature national, or in its nature local. The court proceeded to say in this case, that it was not required to consider at what time after his arrival the passenger himself passes from the sole protection of the Constitution and becomes subject to the juris-

diction of the State. Because the tax began to run when the passenger took passage in a foreign port, and because also the portion of the statute under consideration by the court related to the ship owner. It is barely possible that the court had in mind the language of Mr. Justice Grier in the Passenger Cases already referred to, and where he said:

> "It therefore follows that passengers can never be subject to State laws until they become a portion of the population of the State temporarily or permanently."

This language of Mr. Justice Grier plainly recognizes the rule that an immigrant becomes a portion of the population of the State and subject to its laws and jurisdiction at some time.

In 1875, the case of *Chy Lung* v. *Freeman,* 92 U. S., page 275, was decided. The case related to a statute of California, which was passed with the obvious purpose of keeping out of the territory of that State persons who should come from foreign countries, who were lunatics, idiots, criminals or prostitutes. The act was held unconstitutional, because, as the court said:

> "The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belong to Congress."

The power in Congress to regulate such immigration was predicated upon the commerce clause of the Constitution. As to this case the power in Congress to regulate commerce does not preclude, according to many later decisions of this court, the exercise of the

power to regulate commerce by the States. We conceive that State laws regulating immigration cannot, under the most authoritative decisions of this court, be invalidated simply upon the ground that Congress has power to regulate commerce. The proposition must either be, that Congress has exclusive power to regulate commerce, or else Congress must already have exercised its power with reference to the particular subject of commerce. Upon this proposition the case of *Black Bird Creek Marsh Company* v. *Wilson,* already referred to and decided by Mr. Chief Justice Marshall, is in point, and we desire to submit the following authorities upon the same subject.

In the case of *Holmes* v. *Jennison* et al., 14 Peters 538, the opinion of Mr. Justice Barbour contains this language:

> "The second class of constitutional provisions, as to which this question of repugnancy may arise, consists of those powers granted to the federal government, which the States previously possessed; where there is nothing in the terms of the grant which imports exclusion, and where there is no express prohibition upon the States.
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> "As to this class of powers, the great constitutional problem to be solved is, whether any of them can be construed as being exclusive. If they can, then the necessary consequence is that the States cannot exercise them, whether the federal government shall or shall not think proper to execute them. If, on the contrary, they are not exclusive but concurrent, then the States may rightfully exercise them; and no question of

repugnancy can ever rise whilst the power remains dormant and unexecuted by the federal government. Such a question can only occur when the actual exercise of such a power by the States comes into direct conflict with the actual exercise of the same power by the federal government. This characteristic of concurrent powers is illustrated by the familiar example of the power of taxation. Thus, although the power of laying and collecting taxes is specifically granted to Congress, yet the States, as we all know are in the habitual exercise of the same power over the same people, and the same objects of taxation and at the same time, as the federal government; except when the States are restrained by an express prohibition from acting upon particular objects; that is, from laying any imposts or duties on imports or exports, beyond what may be absolutely necessary for executing their inspection laws. And but for that prohibition I doubt not but that the States would have had as much power to lay imposts or duties on imports or exports as to impose a tax on any other subject of taxation.

"I hold the following proposition to be maintainable: That wherever a power, such as the States originally possessed, has been granted to the federal government, and the terms of the grant do not import exclusion, and there is no express prohibition upon the States, and the power granted to the federal government is dormant and unexecuted; there the States still retain power to act upon the subject. And I place

this upon the ground that in such a case the question of repugnancy cannot occur, until the power is executed by the federal government. It is not repugnant to the Constitution, because there is not in that instrument either an express prohibition, nor that which is implied by necessary construction arising from words of exclusion. There is, therefore, nothing in the Constitution itself, operating by itself, as it does in cases of express prohibition or terms of exclusion, to which the exercise of such a power by the States is repugnant, or with which it is utterly incompatible. It is not repugnant to any law passed or treaty made by the United States, because my proposition in terms assumes that no such law has been passed or treaty made."

In the case of *Ex parte McNeil,* 13 Wall. 236, decided in 1871, the opinion of Mr. Justice Swayne in passing upon the pilot laws of New York said:

"But, conceding that this provision is a regulation of commerce and within the power of Congress upon that subject, it by no means follows that it involves the constitutional conflict insisted upon by the counsel for the petitioner. In the complex system of polity which prevails in this country the powers of government may be divided into four classes:

"Those which belong exclusively to the States.

"Those which belong exclusively to the National Government.

"Those which may be exercised concurrently and independently by both.

"Those which may be exercised by the States but only until Congress shall see fit to act upon the subject. The authority of the State then retires and lies in abeyance until the occasion for its exercise shall recur."

In *Osborne* v. *Mayor, etc., of Mobile,* 83 U. S. 483, decided in 1872, Mr. Chief Justice Chase said:

"It is to be observed that Congress has never undertaken to exercise this power in any manner inconsistent with the municipal ordinance under consideration, and there are several cases in which the court has asserted the right of the State to legislate in the absence of legislation by Congress, upon subjects over which the Constitution has clothed that body with legislative authority. *License Cases,* 5 How. 504; *Wilson* v. *Black Bird C. M. Co.,* 2 Pet. 245; *Cooley* v. *Board of Wardens,* 12 How. 315."

In *Missouri K. & T. R. Co.* v. *Haber,* 169 U. S. 627, decided in 1897, the opinion of Mr. Justice Harlan contains this language:

"Although the power of Congress to regulate commerce among the States, and the power of the States to regulate their purely domestic affairs, are distinct powers, which, in their application, may at times bear upon the same subject, no collision that would disturb the harmony of the National and State governments, or produce any conflict between the two governments in the exercise of their respective powers, need occur, unless the National government, acting within

the limits of its constitutional authority, takes under its immediate control and exclusive supervision the entire subject to which the State legislation may refer."

In the case of *Robertson* v. *Baldwin,* 165 U. S. 273, there was presented for decision the validity of an act of Congress conferring upon State officers the power to arrest deserting seamen and to deliver them on board their vessel. Mr. Justice Harlan in dissenting used this language:

"Can the decision of the court be sustained under the clause of the Constitution granting power to Congress to regulate commerce with foreign nations and among the several States? That power cannot be exerted except with regard to other provisions of the Constitution, particularly those embodying the fundamental guaranties of life, liberty and property. While Congress may enact regulations for the conduct of commerce with foreign nations and among the States, and may, perhaps, prescribe punishment for the violation of such regulations, it may not, in so doing, ignore other clauses of the Constitution. For instance, a regulation of commerce cannot be sustained, which, in disregard of the express injunction of the Constitution, imposes a cruel and unusual punishment for its violation, or compels a person to testify in a criminal case against himself, or authorizes him to be put twice in jeopardy of life or limb, or denies to the accused the privilege of being confronted with the witnesses against him, or of being informed

of the nature and cause of the accusation against him. And it is equally clear that no regulation of commerce established by Congress can stand if its necessary operation be either to establish slavery or to create a condition of involuntary servitude forbidden by the Constitution."

And so it may be said, in passing, that if the power to regulate commerce is to be construed as acknowledging no limitation except those expressed in the Constitution and that this is to mean that the regulation may be coupled with any power, or such power as is given in the Act of 1903, the provisions of the Constitution relating to the protection of life, liberty and property, to jury trial and to all the accompaniments of a judicial trial as known in our system and developed by the awful struggles of the past, amount to nothing. Upon what principle is the power to regulate commerce held to be paramount to the securities of liberty mentioned in the Constitution? Why is one portion of the Constitution more binding than another?

But as bearing upon the vicious characteristics of the present exclusion law, the language of Mr. Justice Miller, who delivered the opinion of the court in the case of *Chy Lung* v. *Freeman,* is most pertinent: Evil administration of the law is equally such whether resorted to by the State or by the general government.

"Individual foreigners, however distinguished at home for their social, their literary or their political character, are helpless in the presence of this potent commissioner. Such a person may

offer to furnish any amount of surety on his own bond, or deposit any sum of money; but the law of California takes no note of him. It is the master, owner or consignee of the vessel alone whose bond can be accepted; and so a silly, an obstinate, or a wicked commissioner may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend.

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"The patriot, seeking our shores after an unsuccessful struggle against despotism in Europe or Asia, may be kept out, because there his resistance has been judged a crime. The woman whose error has been repaired by a marriage and numerous children, and whose loving husband brings her with his wealth to his new home, may be told she must pay a round sum before she can land, because it is alleged she was debauched by her husband before marriage. Whether a young woman's manners are such as to justify the commissioner in calling her lewd may be made to depend on the sum she will pay for the privilege of landing in San Francisco."

But is such administration of the law and such practice any less reprehensible because done by the general government instead of by a State government?

Again in the case of *The People of the State of New York* v. *Compagne Generale Trans-Atlantique,* 107 U. S., page 383, decided in 1882, there came before the consideration of this court certain

inspection laws, which had been passed by the State of New York. The law in question which had been passed May 31, 1881, imposed a tax on every passenger from a foreign country landing in the port of New York, who should not be a citizen of the United States, and held the vessel, which brought such person, liable for the tax. The court went on to say in answer to the point made by counsel for the law, that the tax was an exercise of the inspection power of the State, that no inspection law, from the time of the formation of the Constitution, has included anything but personal property as a subject of its operation. "What is inspection?" asked the court. "Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test. When testimony or evidence is to be taken and examined it is not inspection in any sense whatever." Then, as regards the other points made in the case, the court used the following language:

> "This act empowers and directs the commissioners of immigration 'to inspect the persons and effects of all persons arriving by vessel at the Port of New York from any foreign country, as far as may be necessary, to ascertain who among them are habitual criminals, or pauper lunatics, idiots or imbeciles, or deaf, dumb, blind, infirm, or orphan persons, without means or capacity to support themselves and subject to become a public charge, and whether their persons or effects are affected with any infectious or contagious

disease, and whether their effects contain any criminal implements or contrivances.'

* * * * * * * * * * *

"We feel quite safe in saying, that neither at the time of the formation of the Constitution nor since has any inspection law included anything but personal property as a subject of its operation. Nor has it ever been held that the words, imports and exports, are used in that instrument as applicable to free human beings by any competent judicial authority. We know of nothing which can be exported from one country or imported into another that is not in some sense property; property in regard to which some one is owner, and is either the importer or the exporter.

"This cannot apply to a free man. Of him it is never said he imports himself, or his wife or his children.

"The language of Section 9, Article 1, of the Constitution which is relied on by counsel, does not establish a different construction:

" 'The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.'

"There has never been any doubt that this clause had exclusive reference to persons of the African race. The two words 'migration' and 'importation' refer to the different conditions of

this race as regards freedom and slavery. When the free black man came here he migrated; when the slave came he was imported; the latter was property and was imported by his owner as other property, and a duty could be imposed on him as an import. We conclude that free human beings are not imports or exports within the meaning of the Constitution.

"In addition to what is said above, it is apparent that the object of these New York enactments goes far beyond any correct view of the purpose of an inspectoin law. The commissioners are 'To inspect all persons arriving from any foreign country, to ascertain who among them are habitual criminals or paupers, idiots or imbeciles * * * or orphan persons without means or capacity to support themselves and subject to become a public charge.'

"It may safely be said that these are matters incapable of being satisfactorily ascertained by inspection.

"What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test. When testimony or evidence is to be taken and examined, it is not inspection in any sense whatever."

In the case of *Eyde* v. *Robertson,* 112 U. S., page 580, decided in 1884, the validity of the act of Congress passed August 3rd, 1882, Vol. 22 Statutes at Large, page 214, entitled "An Act to Regulate Immigration," came before this court for consideration. This case was considered with some others, and is

known as the Head Money cases. A suit was brought by Eyde to recover from Robertson, the collector of the port of New York, a certain sum of money, which had been paid to him on account of the landing of the plaintiff in that port as a passenger from a foreign port, Eyde not being a citizen of the United States. The court referred to the Passenger cases, *Henderson* v. *The Mayor, Chy Lung* v. *Freeman,* and *The People of New York* v. *Compagne Generale Trans-Atlantique,* and added, that those cases held that Congress has power to regulate commerce with foreign nations.

"It cannot be said," said the Court, "that these cases do not govern the present, though there was not then before us any act of Congress whose validity was in question, for the decisions rest upon the ground that the state statutes were void only because Congress and not the states were authorized by the Constitution to pass them, and for the reason that Congress could enact such laws, and for that reason alone were the acts of the state held void. It was therefore, of the essence of the decision which held the state statutes invalid that a similar statute by Congress would be valid."

So that, out of the invalidation of state statutes upon this subject, upon the ground that Congress has power to regulate commerce with foreign nations, although there were no federal statutes upon the subject at the same time and in the face of other decisions of the Court going to the point that the regulation of commerce may be concurrent with the states, grew the decision in the Head Money cases. The lineage

of the Head Money cases may be traced through those decisions which invalidated state stautes, and these cases which invalidated state statutes may be traced to *Gibbons* v. *Ogden,* and yet as before seen, the case of *Gibbons* v. *Ogden* in its most extensive definition of commerce does not include the regulation of immigration, nor is there anything in *Gibbons* v. *Ogden* to show that in the absence of a federal statute a state statute cannot exist, which does regulate immigration.

Exclusion decisions based upon the doctrine of sovereignty: The *Chinese Exclusion Case,* 130 U. S., 581; *Ekin* v. *U. S.,* 651; *Fong Yue Ting* v. *U. S.,* 149 U. S., 698, and *Lees* v. *U. S.,* 150 U. S., 474, we regard as resting upon palpable fallacies. In *Ekin* v. *U. S.* the court held the regulation of commerce "includes the bringing of persons into the ports of the United States." Now it would seem that this is the very thing to be proven. It might be said with equal force that the subject of immigration comes under some other power. But whether it does or not, rests in proof, or deduction by a fair train of reasoning from the granted power. We candidly submit that no clearer example of a *petitio principii* can be given than to assume that Congress may regulate immigration because it may regulate commerce and that the regulation of commerce includes the regulation of immigration. The argument ends where it began and proceeds not a step beyond its starting point.

The other cases just noted predicate the regulation of immigration upon a different basis. Thus in the Chinese Exclusion Cases it was held that the United

States have jurisdiction over their own territory. True, but to what extent? Then it was said, that if aliens could not be excluded the government would be to that extent subject to the control of another power. But what of that, if Congress has no power over immigration, which is the very thing to be determined? Then it was said that the United States are a nation. But what sort of a nation? Can anything be predicated of the United States as a nation which may be predicated of Russia as a nation? If not, does the mere predication that the United States are a nation warrant the deduction that they may exclude aliens. Then it was said that the power to expel is an attribute of a sovereignty. But sovereignty is a term of varying significance. Sovereignty may be plenary or limited; it may inhere in its whole extent in a legislative body; or a legislative body may have mere sovereign powers delegated by the sovereign power. So it was said in *Ekin* v. *U. S.* that every sovereign nation has the power inhering in sovereignty to exclude aliens. In *Fong Yue Ting* v. *U. S.* it was said that every nation has the right to refuse admission to foreigners, and in *Lees* v. *U. S.* it was said that the power of Congress to exclude aliens is ample. As the doctrine of sovereignty in reference to the subject of exclusion is nowhere more fully stated than in the case of *Fong Yue Ting* v. *U. S.,* we desire to quote from the opinion of the Court and the opinions of the justices who dissented as preparatory to the concluding part of the argument on this branch of the case.

Mr. Justice Gray, who delivered the opinion of the Court, said:

"The right to exclude or to expel all aliens, or any class of aliens, absolutely, or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare, the question now before the court is whether the manner in which Congress has exercised this right in sections 6 and 7 of the Act of 1892 is consistent with the Constitution. * * * The Constitution has granted to Congress the power to regulate commerce with foreign nations including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization, to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy and to make rules for the government and regulation of the land and naval forces; and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof. And the several states are expressly forbidden to enter into any treaty, alliance or confederation; to grant letters of marque and reprisal; to enter into any agreement or compact with another State, or with a foreign power; or to engage in war,

unless actually invaded, or in such imminent danger as will not admit of delay."

Mr. Justice Brewer, in dissenting said:

"I rest my dissent on three propositions: First, that the persons against whom the penalties of section 6 of the Act of 1892 are directed are persons lawfully residing within the United States; secondly, that as such they are within the protection of the Constitution, and secured by its guarantees against oppression and wrong; and, third, that section 6 deprives them of liberty and imposes punishment without due process of law, and in disregard of constitutional guaranties, especially those found in the 4th, 5th, 6th and 8th articles of the Amendments. * * *

"Now, the power to remove resident aliens is, confessedly, not expressed. Even if it be among the powers implied, yet still it can be exercised only in subordination to the limitations and restrictions imposed by the constitution. In the case of *Monongahela Nav. Co.* v. *United States,* 149 U. S., p. 463, it was said: 'But like the other powers granted to Congress by the constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce; but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th Amendment, and can take only on payment

of just compensation.' And if that be true of the powers expressly granted, it must as certainly be true of those that are only granted by implication.

"When the first ten Amendments were presented for adoption, they were preceded by a preamble stating that the conventions of many states had at the time of their adopting the constitution expressed a desire, 'in order to prevent misconception or abuse of its powers, the further declaratory and restrictive clauses should be added.' It is worthy of notice that in them the word 'citizen' is not found. In some of them the descriptive word is 'people,' but in the 5th it is broader and the word is 'person', and in the 6th it is the 'accused', while in the 3rd, 7th and 8th there is no limitation as to the beneficiaries suggested by any descriptive word.

"In the case of *Yick Wo* v. *Hopkins,* 118 U. S., 356, it was said: 'The 14th Amendment of the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.' " * * *

"If the use of the word 'person' in the 14th Amendment protects all individuals lawfully

within the State, the use of the same word 'person' in the 5th must be equally comprehensive, and secures to all persons lawfully within the territory of the United States the protection named therein; and a like conclusion must follow as to the 6th." * * *

"Deportation is punishment. It involves first an arrest, a deprival of liberty; and, second, a removal from home, from family, from business, from property. In 1. Rapalje & Lawrence's Law Dictionary, p. 109, 'Banishment' is thus defined: 'A punishment by forced exile, either for years or for life; inflicted principally upon political offenders, "transportation" being the word used to express a similar punishment of ordinary criminals.' In 4 Blackstone, 377, it is said: 'Some punishments consist in exile or banishment, by abjuration of the realm, or transportation.' In Vattel we find that 'banishment is only applied to condemnation in due course of law.' 1 Vattel's Law of Nations, Section 288, note.

"But it needs no citation of authorities to support the proposition that deportation is punishment. Everyone knows that to be forcibly taken away from home and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that oftentimes most severe and cruel. Apt and just are the words of one of the framers of this Constitution, President Madison, when he says (4 Elliot, Deb. 555): 'If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness—a

country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind; where he enjoys under the laws a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for; if, moreover, in the execution of the sentence against him, he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war and of unusual licentiousness on that element, and possibly to vindictive purposes, which his immigration itself may have provoked—if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.'

"But punishment implies a trial: 'No person shall be deprived of life, liberty or property without due process of law.' Due process requires that a man be heard before he is condemned, and both heard and condemned in the due and orderly procedure of a trial as recognized by the common law from time immemorial. It was said in this court in *Hagar* v. *Reclamation Dist. No.* 108, 111 U. S., 701: 'Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard.' * * *

"Again, it is absolutely within the discretion of the collector to give or refuse a certificate to

one who applies therefor. Nowhere is it provided what evidence shall be furnished to the collector, and nowhere is it made mandatory upon him to grant a certificate on the production of such evidence. It cannot be due process of law to impose punishment on any person for failing to have that in his possession, the possession of which he can obtain only at the arbitrary and unregulated discretion of any official. It will not do to say that the presumption is that the official will act reasonably and not arbitrarily. When the right to liberty and residence is involved, some other protection than the mere discretion of any official is required. Well was it said by Mr. Justice Matthews in the case of *Yick Wo* v. *Hopkins,* 118 U. S., 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' "

Mr. Chief Justice Fuller in dissenting, used this language:

"I entertain no doubt that the provisions of 5th and 14th Amendments, which forbid that any person shall be deprived of life, liberty or property, without due process of law, are, in the language of Mr. Justice Matthews, already quoted by my brother Brewer, 'universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color

or of nationality,' and although in *Yick Wo* v. *Hopkins,* 118 U. S., 366, only the validity of a municipal ordinance was involved, the rule laid down as much applies to Congress under the 5th Amendment as to the States under the 14th. The right to remain in the United States in the enjoyment of all the rights, privileges, immunities, and exemptions accorded to the citizens and subjects of the most favored nation, is a valuable right, and certainly a right which cannot be taken away without taking away the liberty of its possessor. This cannot be done by mere legislation."

The sovereignty invoked as warranting the enactment of exclusion laws differs in no degree from that sovereignty which was alleged to inhere in Queen Elizabeth by the Court lawyers of her day. Concerning this Mr. Hallam in his work, The Constitutional History of England, wrote:

"There was, unfortunately, a notion very prevalent in the cabinet of Elizabeth, though it was not quite so broadly, or at least so frequently promulgated as in the following reigns, that besides the common prerogatives of the English crown, which were admitted to have legal bounds, there was a kind of paramount sovereignty which they denominated her absolute power, incident, as they pretended, to the abstract nature of sovereignty, and arising out of the primary office of preserving the State from destruction. This seemed analogous to the dictatorial power which might be said to reside in the Roman senate, since it could confer it upon an individual. And we

all must in fact admit that self-preservation is the first necessity of commonwealths as well as persons, which may justify, in Montesquieu's poetical language, the veiling of the statutes of liberty. Thus martial law is proclaimed during an invasion, and houses are destroyed in expectation of a seige, but few governments *are to be trusted with this insidious plea of necessity which more often means their own security than that of the people;* nor do I conceive that the ministers of Elizabeth restrained this pretended power even in theory to such cases of overbearing exigency. It was the misfortune of the 16th century to see kingly power strained to the highest pitch in the two principal European monarchies. Charles V. and Philip II. had crushed and trampled the ancient liberty of Castile and Arragon. Francis I. and his successors, who found the work nearly done to their hands, had inflicted every practical oppression on their subjects. These examples could not be without their effect on governments so unceasingly attentive to all that passed on the stage of Europe: nor was this effect confined to the court of Elizabeth. *A king of England in the presence of absolute sovereigns, or perhaps of their ambassadors, must always feel some degree of that humiliation with which a young man in check of a prudent father regards the careless prodigality of the rich heirs with whom he associates."*

Is not this last sentence in line with certain declarations heard in these days that the United States are sovereign as other nations are sovereign? Do they

not proceed from the same source of humiliation? But in this case it is false humiliation and ignores the principles of liberty which prompted the limitations upon Congressional power.

But let us plant our feet upon authoritative definitions of a nation and of sovereignty and then consider where it resides under our system and where it devolved after the revolution and to what extent its powers were conferred upon the general government.

> "A nation or a state is, as has been said at the beginning of this work, a body politic, or a society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength.
>
> From the very design that induces a number of men to form a society which has its common interests, and which is to act in concert, it is necessary that there should be established a PUBLIC AUTHORITY, to order and direct what is to be done by each in relation to the end of the association. This political authority is the *sovereignty;* and he or they who are invested with it are the SOVEREIGN. (10.)
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> * * * * * * * * * *
>
> If the body of the nation *keep in its own hands* the empire, or the right to command, it is a POPULAR government, a DEMOCRACY; if it intrust it to a *certain number of citizens,* to a senate, it establishes an ARISTOCRATIC republic; finally, if it confide the government to a *single person,* the state becomes a monarchy. Vattel's Law of Nations, Cap. 1, p. 65.

"According to the fundamental principles of both federal and state constitutions, the government, the supreme power or *jura summi imperii,* resides in the people, and it follows that it is the right of the people to make laws. But as the exercise of that right by the people at large would be equally inconvenient and impracticable, the constitution reposes the exercise of that power in a body of representatives of the people, but at the same time imposes upon them such restrictions as are deemed important for the general welfare or for the protection of individual rights. Whenever this body of representatives exceed the limits prescribed to their action by the fundamental law from which their whole authority is derived, or whenever they exercise their powers in a manner which the people, by the constitution have not thought proper to allow, their action is not only censurable, but in point of law is void, and must not only be so declared by the courts where the point arises in litigation, but may be disregarded and disobeyed by any citizen. From this it will appear how broad is the difference between the constitution of Britain and those of the American states; the courts of the former country not venturing to declare that there are any legal limits to the legislative authority, except such as rest in the legislative will and discretion; while in America a considerable portion of the time of the courts is occupied with a discussion of questions respecting the constitutional limitations upon the power of the several departments of the government. See 1

Tucker's Blackstone, appendix A; Cooley's Const. Lim. cc. 1 and 7."

Cooley's Blackstone, Vol. 1, p. 49. (Footnote.)

In the case of the *Bank of Augusta* v. *Earle,* 13 Peters' Reports, p. 58, argued and determined in 1839, Mr. Webster used this language:

"In respect to this law of comity, it is said States are not Nations. They have no National sovereignty. A sort of residium of sovereignty is all that remains of them. National sovereignty it is said is conferred on this government, and part of the municipal sovereignty. The rest of the municipal sovereignty belongs to the States. Notwithstanding the respect which I entertain for the learned Judge who presided in that court, I cannot follow in the train of his argument. I can make no diagram such as this of the partition of National character between the state and general governments. I cannot map it out and say, so far is national and so far municipal, and here is the exact line where the one begins and the other ends. We have no second La Place and we never shall have, with his *mechanique politique,* able to define and describe the orbit of each sphere in our political system with such exact mathematical precision. There is no such thing as arranging these governments of ours by the laws of gravitation, so that they will be sure to go on forever without impinging. These institutions are practical, admirable, glorious, blessed creations. Still, they were, when created, experimental institutions, and if the convention

which framed the constitution of the United States had set down in it certain general definitions of power, such as had been alleged in the argument of this case, and stopped there, I verily believe, that in the course of the fifty years which have since elapsed, this government would never have gone into operation.

"Suppose that this constitution had said in terms, after the language of the court below, All national sovereignty shall belong to the United States, all municipal sovereignty to the several states. I will say that however clear, however distinct, such a definition may appear to those who use it, the employment of it in the constitution could only have led to utter confusion and uncertainty. I am not prepared to say that the states had no national sovereignty. The laws of some of the states, Maryland and Virginia, for instance, provide punishment for treason. The power which is exercised is certainly not municipal. Virginia has a law of alienage which is a power exercised against a foreign nation. Does not the question necessarily arise when power is exercised concerning an alien enemy, enemy to whom? The law of escheat which exists in also the exercise of a great sovereign power.

"The term sovereignty does not occur in the constitution at all. The constitution treats the states as states, and the United States as the United States; and by a careful enumeration declares all the powers that are granted to the United States, and all the rest are reserved to the States. If we pursue to the extreme point

the powers granted and the powers reserved, the powers of the general and state government will be found then to be impinging and not conflicting. Our hope is that the prudence and patriotism of the states and the wisdom of this government will prevent that catastrophe. For myself I will pursue the advice of the court in Deveaux's case; I will avoid nice metaphysical subtleties and all useless theories; I will keep my feet out of the traps of general definitions; I will keep things as they are, and go no further to inquire what they might be if they were not what they are. The states of this Union as states are subject to all the voluntary and customary laws of nations."

The court speaking through Mr. Chief Justice Taney in deciding this case used this language:

"But until this is done upon what grounds could this court refuse to administer the law of international comity between these states? They are sovereign states, and the history of the past and the events which are daily occurring offer the strongest evidence that they have adopted towards each other the laws of comity to their fullest extent."

In the Massachusetts convention which passed upon the Federal Constitution, Samuel Adams used this language:

"Your excellency's first proposition is that it be explicitly declared that all powers not expressly delegated to congress are reserved to the

several states to be by them exercised. This appears to my mind to be a summary of a bill of rights which gentlemen are anxious to obtain. It removes a doubt which many have entertained respecting the matter, and gives an assurance that if any law made by the federal government shall be extended beyond the power granted by the proposed constitution, and inconsistent with the constitution of this state, it will be an error, and adjudged by courts of law to be void. It is consonant with the second article in the present confederation that 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. I have long considered the watchfulness of the people over the conduct of their rulers the strongest guard against the encroachments of power, and I hope the people of this country will always be thus watchful."

Elliott's debates, Vol. 2, p. 131.

Whatever may be thought of Mr. Stephens' views on other subjects, no constitutional thinker has more clearly and conclusively discussed this subtle question of sovereignty. Not only that, but his doctrines are in line with the decisions of this court. He wrote:

"The whole subject has narrowed down to this: where in this country resides that power and authority that can rightfully make and unmake constitutions? In all confederated republics, ac-

cording to Montesquieu, Vattel and Burlamaqui, it remains with the sovereign states when confederated. Is our confederated republic an exception to this rule? If so, how does it appear? Is there anything in its history anterior to the present compact of union that shows it to be an exception? Certainly not; for the sovereignty of each state was expressly retained in the first articles of union. Is there, then, anything in the present compact itself that shows that it was surrendered by them in fact? If so, where is the clause bearing that import? None can be found. Again, if it was thereby surrendered, to whom did it pass? Did it pass to all the people of the United States? Of course not, for not one particle of power of any sort, much less sovereignty, is delegated in the constitution to the people of the United States. All powers therein delegated are to the states in their sovereign character under the designation of the United States.

"Is it then surrendered to the United States jointly? Certainly not, for one of the main objects in forming the compact, as before stated, and as clearly appears from the instrument itself, was to perpetuate separate state existence. The guaranty to this effect from the very words used implies their sovereignty. There can be no such thing as a perfect state without sovereignty. It certainly is not parted with by any express terms in that instrument. If it be surrendered thereby, it must be by implication only, but how can it be implied from any words or phrases in that instrument? If carried by implication, it must be on

the strange assumption that it is an incident only of some one or all of those specific and specially enumerated powers expressly delegated. This cannot be, as that would be making the incident greater than the object, the shadow more solid than the substance. For sovereignty is the highest and greatest of all political powers. It is itself the source as well as the embodiment of all political powers both great and small. All proceed and emanate from it. All the great powers specifically and expressly delegated in the constitution, such as the power to declare war and make peace, to raise and support armies, to tax and lay excise duties, are themselves but the incident of sovereignty. If this great embodiment of all powers was parted with, why were any minor specifications made? Why any enumeration? Was not such specifications or enumeration both useless and absurd? The bare fact that all powers parted with by states are delegated only, as all admit, necessarily implies that the greater power delegating still continued to exist."

Constitutional View of the War, Vol. 1. pp. 487, 488 and 489.

Again, in another place he wrote:

"The paramount authority in this country, sovereignty, that to which allegiance is due, is with the people somewhere. There is no sovereignty either in the general government or the state's governments. These are permitted to exercise certain civil powers so long only as it shall suit

the sovereign will that they shall do so, and no longer. Sovereignty itself, from which emanates all political power, I repeat, resides with the people somewhere. And with what people? Why, of necessity, it appears to me, with the same people who delegated, whatever those powers the general government has ever been entrusted with."

Constitutional View of the War, Vol. 1, pp. 40 and 41.

We insist next that sovereignty devolved upon the states after the revolution.

In *Chisholm* v. *Georgia,* 2 Dallas, 470, decided in 1793, Mr. Chief Justice Jay said:

"The revolution or rather the Declaration of Independence, found the people already united for general purposes, and at the same time providing for their more domestic concerns by state conventions, and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed not to the people of the colony or states within whose limits they were situated, but to the whole people; on whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the revolution, combined with local convenience and considerations; the people nevertheless continued to consider themselves, in a national point of view, as one people; and they continued without interruption to manage their national concerns accordingly; afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the states, the basis of a general government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity established the present constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plentitude of it, they declared with becoming dignity, 'We the people of the United States, do ordain and establish this constitution.' Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty establishing a constitution by which it was their will, that the state governments should be bound, and to which the state constitutions should be made to conform. Every state constitution is a compact made by and between the citizens of a state to govern themselves in a certain manner; and the constitution of the United States is likewise a compact made by the people of the United States to govern themselves as to general objects, in a certain manner. By this great compact however, many prerogatives were transferred to the national government, such as those of making war and peace, contracting alliances, coining money, etc., etc."

In *Sturges* v. *Crowninshield,* 4 Wheat., 193, decided

in 1819, Mr. Chief Justice Marshall, who delivered the opinion of the court, said:

> "When the American people created a national legislature, with certain enumerative powers, it was neither necessary nor proper to define the powers retained by the states. *These powers proceed, not from the people of America, but from the people of the several states; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.* In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been, that the mere *grant of a power to Congress did not imply a prohibition on the States to exercise the same power.*"

In *Trustees of Dartmouth College* v. *Woodward,* 4 Wheat., 651, decided in 1819, Mr. Chief Justice Marshall, who delivered the opinion of the court, said:

> "By the revolution, the duties, as well as the powers, of Government devolved on the People of New Hampshire. It is admitted, that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department."

In *State of Rhode Island* v. *The State of Massachusetts,* 12 Peters, p. 720, decided in 1838, Mr. Justice Baldwin, who delivered the opinion of the court, said:

> "Before we can proceed in this cause, we must,

> therefore, inquire whether we can hear and determine the matters in controversy between the parties, who are two States of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the Federal Government, and foreign to each other for all but Federal purposes. So they have been considered by this court through a long series of years and cases to the present term, during which, in the case of *The Bank of the United States* v. *Daniels,* this court has declared this to be a fundamental principle of the Constitution, and so we shall consider it in deciding on the present motion. (2 Peters, 590, 591.)
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> "Those States in their highest sovereign capacity, in the convention of the People thereof, on whom by the revolution the prerogative of the crown, and the transcendent power of parliament devolved, in a plenitude unimpaired by any act and controllable by no authority (6 Wheat., 651; 8 Wheat., 584, 588), adopted the Constitution by which they respectively made to the United States a grant of judicial power over controversies between two or more states."

In *Martin, et al.,* v. *The Lessee of Waddell,* 16 Peters, 410, decided in 1842, Mr. Chief Justice Taney, who delivered the opinion of the court, said:

> "For when the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to

the rights since surrendered by the Constitution to the general government."

In *Martin* v. *Hunter's Lessee,* 1 Wheat., pp. 325, 326, decided in 1816, Mr. Justice Story, who delivered the opinion of the court, said:

> "On the other hand, it is perfectly clear that the sovereign powers vested in the State Governments, by their respective constitutions, remain unaltered and unimpaired, except so far as they were granted to the government of the United States.
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> "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. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonable, restricted or enlarged."

In *Fontain* v. *Ravenel,* 58 U. S., 369, decided in 1854, Mr. Chief Justice Taney, in concurring in the opinion of the court, said:

> "These prerogative powers which belong to the sovereign as *parens patriae* remain with the

> States. They may legalize charitable bequests within their own respective dominions, to the extent to which the law upon that subject has been carried in England; and they may require any tribunal of the State, which they think proper to select for that purpose, to establish such charities, and to carry them into execution. But State laws will not authorize the courts of the United States to exercise any power that is now in its nature judicial; nor can they confer on them the prerogative powers over minors, idiots, and lunatics, or charities, which the English Chancellor possesses."

But then what is the character of the general government with reference to sovereignty?

In *Marbury* v. *Madison,* 1 Cranch, 176, decided in 1803, Mr. Chief Justice Marshall, who delivered the opinion of the court, said:

> "The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a

proposition too plain to be contested that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

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"Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution and see only the law.

"This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure."

In *McCulloch* v. *The State of Maryland, et al.*, 4 Wheat., 405, decided in 1818, Mr. Chief Justice Marshall, who delivered the opinion of the court, said:

"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. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."

In *Wayman, et al.*, v. *Southard, et al.*, 10 Wheat., 43, decided in 1825, Mr. Chief Justice Marshall in delivering the opinion of the court again said:

"Congress, at the introduction of the present government, was placed in a peculiar situation. A judicial system was to be prepared not for a *consolidated people* but for distinct societies, already possessing distinct systems, and accustomed to laws, which, though originating in the same great principles, had been variously modified."

In *Gilman* v. *Philadelphia*, 70 U. S., 713, decided in 1865, Mr. Justice Swayne in delivering the opinion of the court said:

"The National Government possesses no powers but such as have been delegated to it. The States have all but such as they have surrendered. The power to authorize the building of bridges is not to be found in the Federal Constitution. It has not been taken from the States. It must reside somewhere. They had it before the Constitution was adopted, and they have it still. 'When the Revolution took place the people of each state became themselves sovereign; and in

that character hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the General Government.' *Martin* v. *Waddell,* 16 Pet., 410."

In *Pacific Insurance Company* v. *Soule,* 7 Wallace, 342, decided in 1868, Mr. Justice Swayne, speaking for the court, said:

"The National Government, though supreme within its own sphere, is one of limited jurisdiction and specific functions. It has no faculties but such as the Constitution has given it, either expressly or incidentally by necessary intendment. Whenever any act done under its authority is challenged, the proper sanction must be found in its charter, or the act is *ultra vires* and void."

In *Buffington* v. *Day,* 11 Wallace, 113, decided in 1870, Mr. Justice Nelson, speaking for the court, said:

"It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the state governments by their respective constitutions, remained unaltered and unimpaired except so far as they were granted to the Government of the United States. That the intention of the framers of the constitution in this respect might not be misundersood, this rule of interpretation, is expressly declared, in the 10th article of the amendments, namely: 'The powers not delegated to the United States are reserved to the States resepctively, or to the people.' The Government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

"The General Government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the States within the limits of their powers not granted, or, in the language of the 10th Amendment, 'reserved' are as independent of the General Government as that Government within its sphere is independent of the States."

In *United States* v. *Cruikshank,* 92 U. S., 542, decided in 1875, Mr. Chief Justice Waite, speaking for the court, said:

"The Government of the United States is one of delegated powers only. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the Constitution or laws of the United States, except such as the Government as the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States."

In *United States* v. *Harris,* 106 U. S., 629, decided

in 1882, Mr. Justice Woods, speaking for the court, said:

"We pass to the consideration of the merits of the case. Proper respect for a co-ordinate branch of the Government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an Act in question is clearly demonstrated. While conceding this, it must, nevertheless, be stated that the Government of the United States is one of delegated, limited and enumerated powers. *Martin* v. *Hunter,* I Wheat., 304; *McCulloch* v. *Maryland,* 4 Wheat, 316; *Gibbons* v. *Ogden,* 9 Wheat., 1. Therefore, every valid Act of Congress must find in the Constitution some warrant for its passage. This is apparent by reference to the following provisions of the Constitution: section 1, of the 1st article, declares that all legislative powers granted by the Constitution shall be vested in the Congress of the United States. Section 8, of the same article, enumerates the powers granted to the Congress, and concludes the enumeration with the grant of power. 'To make all laws which shall be necessary and proper to carry into execution the foregoing powers and all other powers vested in the Constitution in the Government of the United States or in any department or officer thereof.' Article X, of the Amendments to the Constitution declares that, 'The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respecively or to the people.'

"Mr. Justice Story, in his Commentaries on the Constitution, says:

" 'Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it.' Section 1243, referring to Virginia Reports and Resolution January, 1800, pp. 33, 34; President Monroe's Exposition and Message of May 4, 1822, p. 47; 1 Tuck. Bl. Com. App., 287, 288; 5 Marsh. Wash. App., n. 3; 1 Hamilton's Works, 117, 121."

In *Yick Wo* v. *Hopkins,* 118 U. S., 356, decided in 1885, Mr. Justice Matthews, speaking for the court, said:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, *while sovereign powers are delegated to the agencies of government, sovereignty itself re-*

mains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power."

In *Robertson* v. *Baldwin,* 165 U. S., 296, decided in 1896, Mr. Justice Harlan in a dissenting opinion said:

"Nor, I submit, is any light thrown upon the present question by the history of legislation in Great Britain about seamen. The powers of the British Parliament furnish no test for the powers that may be exercised by the Congress of the United States. Referring to the difficulties confronting the Convention of 1787, which framed the present Constitution of the United States, and to the profound differences between the instrument framed by it and what is called the British Constitution, Mr. Bryce, an English writer of high authority, says in his admirable work on the American Commonwealth: 'The British parliament has always been, was then, and remains now a sovereign and constituent assembly. It can make and unmake any and every law, change the form of government or the succession to the Crown, interfere with the course of justice, extinguish the most sacred private rights of the citizen. Between it and the people at large there is no legal distinction, because the whole plenitude of the people's rights and powers reside in it, just as if the whole nation were present within the chamber where it sits. In point of legal theory it is the nation, being the historical successor of the Folk Moot of our Teutonic forefathers. Both practically and legally, it is to-

day the only and the efficient depository of the authority of the nation, and is therefore, within the sphere of law, irresponsible and omnipotent.' Vol. 1, p. 32. No such powers have been given to or can be exercised by any legislative body organized under the American system. Absolute, arbitrary power exists nowhere in this free land. The authority for the exercise of power by the Congress of the United States must be found in the Constitution. Whatever it does in excess of the powers granted to it, or in violation of the injunctions of the supreme law of the land, is a nullity, and may be so treated by every person."

The argument then that the United States may exclude aliens because of their sovereign power, or because they are a nation, or because they have the powers of sovereign nations, is manifestly unsound. If sovereignty inheres in the people of the states; if the people of the states acting through the states granted to a general government certain incidents of sovereignty, it remains to be proven that the power to exclude aliens falls within the compass of some grant of sovereign power or agency. If the argument be reduced to a syllogism the fallacy may be easily detected by any one at all familiar with the subject. Suppose it be said:

All sovereign nations may exclude aliens. The United States are a sovereign nation. Therefore they may exclude aliens. This is a plain "fallacy of equivocation." For the term "sovereign nation" is used in two distinct senses. In the major premise it is used in the sense of a nation which in its executive or its legislative branch possesses the whole sovereign

power. In the minor premise the term can only refer to the United States as possessing those sovereign powers which have been granted to them by the organic law. In other words, as already seen, from the decisions of this court and other authorities, the United States possess limited sovereignty; or the sovereign power, the people, have only granted limited powers of sovereignty. Therefore while the above syllogism is formally correct it is materially fallacious, for the reason noted. These are what Bentham called "question begging epithets" which perpetually insist upon the sovereignty of the United States as warranting some particular law or policy.

> "At the head of these (fallacies of confusion) stands that multitudinous body of fallacious reasonings in which the source of error is the ambiguity of the term when something which is true of a word be used in a particular sense, is reasoned on as if it were true in another sense. * * * It occurs in ratiocination in two ways; when the middle term is ambiguous, or when one of the terms of the syllogism is taken in one sense in the premises and in another sense in the conclusion."

Mills Logic, Chap. VII.

So it was said by some of the earlier constitutional thinkers that if the constitution were a grant of sovereignty why did the constitution so carefully enumerate mere incidents of sovereignty as being in the grant? Why was Congress specifically given power to coin money, declare war, pass naturalization laws, regulate commerce, and do many other things which

are the mere incidents of sovereign power, if the sovereign power itself were completely parted with by the constitution? It seems an act of supererogation to argue this question. Especially in view of the decisions just cited on the limited character of the general government. Yet what is meant when apart from the attempt to place the regulation of immigration under the commerce clause, it is asserted that this may be done by virtue of the sovereign power of the government, and by virtue of its power as a nation? Before then the commerce clause, or the argument of the sovereign character of the general government shall be used to abridge the freedom of speech and of the press, to interfere with the exercise of religion, to deny jury trial, and to transfer judicial power of appalling magnitude to the executive department, and in brief to strike down every canon of constitutional and historical liberty, a remembrance of what we are as a nation and a recurrence to fundamental principles may arrest the fatal act. How clear in history is the lineage of greatness! Those who put themselves on the side of liberty, some times though in a very humble way, have received the lasting benedictions of mankind. Those who put themselves on the side of expediency, on the side of power and glory, on the side of political mysticism may be remembered but not revered. They may find apologists, but neither friends nor adherents. The course of this world is toward the realization of perfect liberty. No conceivable catastrophe can destroy its march. For as long as men love life they will love all things that make life desirable. The press may be censored, but the ingenuity of mind will overleap the restrictions.

Public meetings may be dispersed, but their objects will find effect in some other way afterwards, if not through public meetings themselves. Whatever makes for the realization of man's betterment, speech, writing, agitation, petition will be resorted to in spite of all restrictions. Mankind lived through the middle ages. The world survived the despotism of Philip II., Louis XIV., Charles V. and James II. Yet nevertheless shall this republic plant itself in the way of progress? Shall it return to the tactics of those days? Has this country grown so arrogant in its power, so little in its greatness that it refuses men the right to speak, that it denies the principles of liberty? Rather we should say that anarchists are free to come to these shores and exploit their doctrines if they will; but the beneficient example of our system shall convince them that free government is preferable to anarchy.

No danger exists to this country from without. No danger exists to it from the agitation or even of the acts of Jacobites within it of whatever persuasion they may be. Wherever violence is resorted to by any one the proper authorities will not fail to do their duty. It is a poor compliment to the state government and entirely unmerited for the federal government directly or indirectly to assume to administer the criminal law. The danger which now confronts the people of this country is the aggression of government. The menace to the United States is the disregard of the fundamental law. For when free institutions are destroyed nothing of liberty remains. The preservation of this republic as a republic is the noblest mission that any man can have in this day.

We respectfully insist that for the foregoing rea-

sons the law of March 3rd, 1903, should be held unconstitutional and that this appellant should be discharged from custody and relieved from the order of deportation. Respectfully submitted.

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